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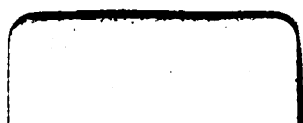
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CASES

1143

DECIDED IN

THE COURT OF SESSION,
COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM AUGUST 3, 1893, TO AUGUST 25, 1894.

REPORTED BY

MIDDLETON RETTIE, H. J. E. FRASER, JOHN DAVID SYM,
C. C. MACONOCHIE, AND G. L. MACFARLANE,
ESQUIRES, ADVOCATES.

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COURT OF SESSION
DURING THE PERIOD OF THESE REPORTS.

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Lord KINNEAR.

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MORRIS, SHAND, BOWEN, and RUSSELL OF KILLOWEN.

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ERRATA.

- P. 48 (H. L.), line 2 of rubric, for "*cap. cccxi.*," read "*cap. ccl.*"
P. 234, line 28 from foot, for "*adequate*," read "*inadequate*."
P. 262, line 7, for "*his*," read "*her*."
P. 752, line 21 from foot, for "*November*," read "*February*."
P. 1018, line 15, insert "*Vary Campbell*" as senior counsel for defender.

CASES

DECIDED IN

THE HOUSE OF LORDS.

1893-94.

JAMES MUIRHEAD (Pursuer), Appellant.—*Sol.-Gen. Asher—George Watt.* **No. 1.**
 FORTH AND NORTH SEA STEAMBOAT MUTUAL INSURANCE ASSOCIATION
 (Defenders), Respondents.—*Lord-Adv. Balfour—Salvesen.*

Nov. 17, 1893.
 Muirhead v.
 Forth and
 North Sea
 Steamboat
 Mutual Insur-
 ance Associa-
 tion.

Marine insurance—Mutual insurance—Conditions in policy—Company—“Articles of Association” imported into policy—Invalid addition to articles printed on policy.—A mutual insurance company incorporated under the Companies Acts was authorised by its articles of association to make alterations in its articles of association, by special resolution passed in accordance with the provisions of the Companies Acts. The company resolved to alter one of the articles of association by adding to it “that it shall be a condition of insurance that the assured shall keep one-fifth (of the ship) uninsured.” The provisions of the Companies Acts were not complied with, but the articles as altered were registered in terms of the Companies Acts, and were printed on the back of each policy as rules of the insurance. The policy bore *in gremio* that the “articles of association shall be deemed and considered part of this policy.”

In a question between a policy-holder and the company, *held* (aff. judgment of First Division) that the articles of association referred to in the policy must be held to be the registered articles, and that the altered article was a valid condition of the insurance.

Marine insurance—Policy—Declared value.—A shipowner insured a steamer with a mutual insurance company. The policy provided that the vessel, “for so much as concerns the assured by agreement between the assured and the company in this policy,” should be valued at £3750.

In a question between the assured and the company as to whether the assured had violated a condition of the policy, which required him to keep one-fifth of the value of the steamer uninsured, *held* (aff. judgment of First Division) that the value of the vessel must be taken to be the value declared in the policy.

(In the Court of Session, Feb. 21, 1893, 20 R. 442.)

The pursuer appealed.

Ld. Chancellor
 (Herschell).
 Lord Watson.
 Lord Ash-
 bourne.
 Lord Shand.
 Lord Bowen.

LORD CHANCELLOR.—This is an appeal from an interlocutor of the Inner House affirming an interlocutor of the Lord Ordinary assoilzieing the defenders from the conclusions of the summons in an action brought to recover the sum of £1000 upon a policy of insurance. There is no question about the loss of the vessel insured, but the question arose whether, according to the terms and conditions of the policy, the assured was entitled to recover. Reliance was placed by the defenders upon an article which it was said contained a condition which was broken by the assured, and which, therefore, disentitled him to recover, the condition being that the assured should keep one-fifth of the value of the vessel uninsured.

No. 1. It appeared that before the action was brought a discussion had taken place with regard to an insurance with another company, the Sunderland Insurance Company. This policy was a policy for £1000 upon a vessel valued at £3750. In the Sunderland policy as at first effected the vessel was also valued at £3750 and there was an insurance of £3000. The attention of the assured was called to the fact that this constituted an over-insurance, inasmuch as the two insurances together exceeded the limit up to which it was alleged the assured was entitled to insure as between the present respondents and himself. On the face of the correspondence there is shewn no contest by the appellant that there had been this over-insurance; and when the action was brought, the point really argued by the present appellant was, not that there had not been this excess, but that, according to the true construction of the article on which reliance was placed by the company, all that he was bound to do was to abstain from insuring with them for more than four-fifths of the value of the vessel, and that it was quite immaterial what insurances he might have with other companies. That, and that alone, so far as I understand it, was the contest between the parties at the time when the action was brought.

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ance Associa-
tion.

Now, dealing with that matter first, it appears to me to be scarcely capable of argument that the contention of the appellant could be sustained. The article provides that "the sum insured on any one steamer shall not exceed £1000, or such other sum as the directors may think prudent, but in no case to exceed four-fifths of the value of such steamer including trawl gear; and it shall be a condition of this insurance that the assured shall keep one-fifth uninsured." It seems to me to be impossible to put any other construction upon those words than this, that he shall be his own insurer to the extent of one-fifth, so as to secure due attention and care on his part, and that it had not reference only to the transaction between himself and this company. That disposes of the question which was really in dispute when this action was launched.

But it was discovered in the course of the proceedings that, as was alleged, there had been certain irregularities in the manner in which this article had become one of the articles of association of the company, and it was contended, therefore, that it was in no way binding upon the assured, and that his policy was to be regarded as free altogether from this condition. An amendment of the pleadings was allowed to raise that point.

The policy no doubt provides that payment shall be made to the company in respect of this insurance according to the articles of association of the company, and that the conditions contained in the said articles of association shall be deemed and considered part of this policy. The argument on the part of the appellant is that the term "the articles of association" in the policy means those articles of association which have been validly brought into existence according to the provisions under which the company was constituted and which regulate its proceedings, that is to say, under the original articles of association; and that no added article which has not been validly added according to the provisions of the original articles can be an article of association, and that, therefore, not being an article of association, it is not one of the conditions incorporated in this policy. That is the argument on the part of the appellant.

The foundation of fact for that argument is that the 66th article of association provides that "the company may from time to time, by special resolution passed in accordance with the provisions of the Companies Acts, 1862 and 1867, or any subsisting statutory modification thereof, alter and make new provisions in

lieu of or in addition to any of the regulations of the association contained in these articles." The Companies Act requires certain meetings to be held at a certain interval; and it is said that, although the company purported to alter its original articles of association by making the article upon which reliance is placed by the respondents, the statutory conditions were not complied with, and that it therefore never really did become an article of association of this company. Now, it is not in dispute that, so far as the matter of fact is concerned, that is established. The requirements of the Companies Act were not complied with, and this new article of association was not made in accordance with those requirements, and therefore was not in that sense a valid article. The original article 67, which was altered by the new one, enabled the company to insure only to one-half of the value of the vessel; but it contained, on the other hand, no condition such as I have read, that the assured should keep one-fifth uninsured. The contention, therefore, on behalf of the appellant is this,—“Article 67 is the only article which can apply to my insurance; the insurance was within the powers and provisions of that article, and that article does not contain a condition which is obnoxious to my claim, and therefore my case stands.”

If by the words “articles of association” in the policy of insurance are to be understood articles of association which have been in accordance with the regulations of the company validly constituted, I think the appellant makes out his case. But I am unable to come to the conclusion that this is the true construction of the policy. If it were, it certainly would lead to some very strange results. It cannot be doubted that, although articles might not have been validly made according to the constitution of the company, yet nevertheless a person dealing with that company, on the faith that these were amongst the articles, would be entitled as against the company to treat them as binding. That is a well-established doctrine, wherever an article which has not, by reason of some defect in procedure, been validly constituted is one which it was competent for the company to make. The assured, therefore, might have insisted upon binding the assurer to the provisions of an article which *de facto* had existed and had been registered, whatever defects there might be in it *de jure*; and, on the other hand, it is contended that, if there is any stipulation favourable to the company in any of those articles which, though *de facto* amongst the registered articles, have not become articles, if I may say so, *de jure*, the assured may refuse to be bound by those provisions, and fall back upon the position that the articles which are inserted in the policy are those articles only which have been lawfully and properly made. Now that certainly would be a result in which one would be indisposed to acquiesce, unless one were compelled by the ordinary rules of construction so to construe this policy. I think one is not so compelled. The policy may well be, and ought as a business document to be, construed in this way—that by “the articles of association of the company,” both parties must have intended those articles, which had in fact been registered, and were the registered articles of the company, whatever defects there might have been in the procedure according to the regulations by which the company was bound. I am of opinion, therefore, that this article, upon which the contest turns, was an “article of association of the company” within the meaning of the policy.

But then it is said (and this, I think, is something of an afterthought) that the condition was not broken, inasmuch as the vessel was insured altogether for only £4000, and she was really worth £5000; and, therefore, she was only

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insured for four-fifths of her value, and one-fifth was at the risk of the assured. I am not at all sure that that, as matter of proof, is open to the appellant ; but it is unnecessary to consider that, because it is clear that, as between the parties to this action, the value of the vessel must be taken as £3750 ; and if she was insured for more than four-fifths of £3750, it appears to me that this condition was broken.

But another point was raised, for the first time, I believe, in this House. It was said that the vessel was insured with the Sunderland Company under a policy similar in its terms to this, and that inasmuch as upon the true construction of this policy and the Sunderland policy no more could have been recovered by the assured than four-fifths of £3750, therefore the condition was not broken, because the assured had kept the vessel uninsured to the extent of one-fifth. I do not think that that point is open to the appellant. No proof was led ; and having regard to the manner in which the questions have been raised, and to the correspondence which passed between the parties, I am of opinion that it is not open to the appellant now to take such a point. But I may add that, even if it were, it does not seem to me necessary to dwell upon it, for the appellant really could not make good any such claim. By agreement before this loss took place, the valuation in the Sunderland policy was raised to £5000. Supposing, therefore, that the appellant were to have recovered £1000 upon this policy, and to have sued the Sunderland Company for £3000, I am quite unable to see what answer the Sunderland Company would have had upon their policy to that claim for £3000 ; and, inasmuch as the appellant could lawfully have recovered £4000, I am equally at a loss to see how it could be said that he had kept, as between himself and the respondent company, one-fifth uninsured.

For these reasons I move your Lordships that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.—I also am of opinion that according to the right construction of this contract the articles of association referred to in the policy must be taken to be those articles which had been duly registered, and under which the company was trading at the date of the contract. I am not prepared to hold that in a question with a person in the position of this appellant these articles were in any sense invalid ; because there was no defect of power on the part of the company to make those regulations which are contained in article 67 for the guidance of the directors in conducting the business of the company. On account of an irregularity in the passing of the resolution, the article might be open to exception at the instance of members of the company in a question with their directors ; but in a question between the company and those who *bona fide* traded with it through its directors, these articles were valid in this sense, that the directors could bind the company, and the company could take no exception to a contract made by them on the ground that there had been an irregularity in the manner in which the resolutions were passed.

Now, it is idle to suggest that when the directors are contracting, any distinction is to be drawn between the validity of a stipulation which is not to the advantage of the company and the validity of a stipulation which is obviously for its advantage. All that can be suggested is that the members of the company are much less likely to challenge it in the one case than in the other ; but the question as between validity and invalidity arising from an

irregularity is, to my mind, purely a domestic matter ; it is a matter which concerns the company and its directors, and not one which concerns the company dealing with *bona fide* third parties outside. No. 1.

Nov. 17, 1893.
Muirhead v.

In this case the declaration of the policy is that a certain provision in these articles of association shall, so far as regards this insurance, be as binding upon the assured as upon the person or persons effecting the insurance. The persons who effected it had power to pass it ; it was binding upon them to its full extent even when effect was given to those stipulations which were irregularly entered in the articles of association. There was no defect of power on the part of the appellant ; and why two parties, the one having authority from the company and the other transacting for his own hand and on his own behoof, should not be able to make a contract effectually binding in terms upon both of them, I am unable to understand. Forth and North Sea Steamboat Mutual Insurance Association.

With regard to the last point, which it was sought to raise here for the first time, I am of opinion that it would be *peccati exempli* to allow an appellant who has conducted his case in both Courts below upon the footing that the legal effect of a particular document was admitted, to traverse in this House the construction which has been put upon the document all along, even though he does not produce it at the bar ; for the Sunderland policy, upon which so much has been said, is not in process.

LORD ASHBOURNE.—I concur. I think the appellant has no case.

LORD SHAND.—I am of the same opinion. The circumstances in which the question has arisen are these : In the first place, the alteration on the articles of association which is said to be ineffectual, and which, if challenged timeously by a member of this company, might have been held to be ineffectual because of the failure to observe the requirement of the Companies Act with regard to notice, was registered upwards of five years before this policy was entered into. In addition to that, on the back of the policy the detail of the altered article is given, and the attention of the insurer is drawn to it by a printed note on the front of the policy, "See the other side." It is clear that the company for a period of five years have carried on their business in conformity with the provisions of the altered article by making their policies conform to it. Under these circumstances, I am of opinion with your Lordships that in construing the policy the meaning of the words "according to the articles of association of the company," is the articles of association as those articles have been registered and acted upon by the company, and I think that this consideration is very much strengthened by what has been observed by my noble and learned friend opposite (Lord Watson), that the provision in the policy goes on to say, "and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance."

LORD BOWEN.—I have nothing to add to what has already fallen from those of your Lordships who have spoken.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

TRAILL & HOWELL—R. & R. DENHOLM, S.S.C.—A. BEVERIDGE—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.

No. 2.

THE LORD ADVOCATE (Pursuer), Appellant.—*Lord-Adv. Balfour—Sol.-Gen. Sir John Rigby—Patten-MacDougall.*Mar. 6, 1894.
Lord Advocate
v. Bogie.WILLIAM BOGIE AND OTHERS (Methven's Executors) (Defenders),
Respondents.—*Sir H. James—Lorimer—Thomas Shaw—James S. Henderson.*

*Revenue—Double duties—Legatees identified by reference to will of another testator—Power of disposal—Stamp-Duties, &c., Act, 1845 (8 and 9 Vict. cap. 76), sec. 4.—Stamp-Duties Act, 1860 (23 Vict. cap. 15), sec. 4.—*By section 4 of the Stamp-Duties Act, 1845 (8 and 9 Vict. cap. 76), it is enacted that "every gift by any will . . . of any person which . . . shall be payable . . . out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of . . . shall be deemed a legacy. . . ."

By section 4 of the Stamp-Duties Act, 1860 (23 Vict. cap. 15), it is enacted that the stamp-duties payable by law upon inventories are to be levied and paid "in respect of all the personal or moveable estate and effects which any person hereafter dying shall have disposed of by will under any authority enabling such person to dispose of the same as he or she shall think fit. . . ."

A bequeathed one-third of the residue of her estate to B, and failing him to his executors and representatives. B predeceased A, leaving a will, under which he appointed executors.

In addition to the inventory and legacy-duties payable by A's executors the Crown claimed inventory and legacy-duties from B's executors on one-third of A's residue on the ground that it had been disposed of by B's will.

Held (aff. judgment of First Division) that B's executors were not liable for the duties claimed, as B had no power to dispose of, and had not disposed of, any part of A's estate.

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Ash-
bourne.
Lord Morris.

(IN the Court of Session, Feb. 28, 1893, 20 R. 429.)

The Lord Advocate appealed.

LORD CHANCELLOR.—The question raised in the present case is whether inventory-duty and legacy-duty are to be paid in respect of a certain part of the estate of Miss Scott which passed to the executors of Mr Robert Methven.

Robert Methven died leaving a trust-disposition and settlement. By his trust-disposition and settlement the defenders were his trustees and executors, and became entitled to his heritable and moveable estate. Miss Scott, who had made a trust-disposition in the lifetime of Robert Methven, by that disposition provided with regard to the free residue of her whole moveable estate and effects in these terms: "I leave and bequeath the same to the said Robert Methven, Robert Russell, and James Russell equally between and amongst them share and share alike for their own use and behoof, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees." Of course, there is no question that inventory-duty must be paid upon the third of the residue which is now in question passing under Miss Scott's will; and there is no question that legacy-duty must be paid in respect of the disposition to which I have just called your Lordships' attention. The question is whether a second duty is payable.

Miss Scott survived Robert Methven, and therefore the gift to him personally never took effect. At the time from which her will must be regarded as speaking Robert Methven was dead. His estate had passed under this trust-disposition to his executors and was then ascertained. It has been held¹ and it is not now in dispute, that the effect of Miss Scott's trust-disposition was not to

vest in the executors of Robert Methven, the defenders, and the respondents here, a beneficial interest in the property left by Miss Scott, namely, one-third of her residue; that what they took they took as executors, and that they were bound to deal with this third of the residue in precisely the same way as they had to deal with the estate which had passed to them under Robert Methven's will.

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Under these circumstances, it is contended on behalf of the Crown, who are the appellants at your Lordships' bar, that inventory-duty is payable in respect of the moneys which thus came to the executors of Robert Methven as part of Robert Methven's estate, and that legacy-duty is payable by the beneficiaries under Robert Methven's will, who of course will take, by virtue of this disposition of Miss Scott's, the money which so passes to the executors of Methven.

It may be that under circumstances such as I have detailed it would be neither unreasonable nor unjust that this second duty, as it is called, should become payable; but with that your Lordships have not to deal. It can only be payable if it falls within the taxing provisions which have been enacted by the Legislature with reference to inventories and legacies.

The Stamp-Duties Act of 1815 defines as the estate liable to inventory-duty or probate-duty "the personal estate and effects of any person deceased." Now the contention on behalf of the appellants is that the effect of Miss Scott's disposition coupled with Methven's was to make this third of the residue of Miss Scott's estate part of the personal estate and effects of Robert Methven. Of course it had never belonged to Robert Methven; at the time of his death it could in no sense be said to be his or any part of his estate. The contention is that the effect of Miss Scott's disposition is to add it to his personal estate, and to make it as much a part of his personal estate as if it had belonged to him in his lifetime. The only question which your Lordships have to consider is whether it has been in that sense so completely made a part of his personal estate that within the words of the Stamp-Duties Act, which I have read, it must be regarded as part of "the personal estate and effects of the deceased."

The will of Miss Scott, as I have said, must be taken as speaking from the time of her death; and the case appears to me to be precisely the same as if she in her lifetime had given the money to the executors of Methven to be used by them as executors in the same way as the other money which came to them as executors; I cannot think that there is any difference because she made this disposition by will, and in her will had made Robert Methven himself a beneficiary in case he had survived her. One must look at the state of things at the time from which the will speaks.

Now, I think that the effect of her disposition was so to vest this money in the persons who were to administer Robert Methven's estate, that they would have to administer it precisely as if it were part of Robert Methven's estate. I will go so far as to assume that, so far as it was possible for her to do so, she made it a part of his personal estate. But admitting all that, it does not follow that the legal effect of what she did was to make it for the purposes of this statute that which it really was not, a part of "the personal estate of the deceased," which *prima facie* means the personal estate which has been his. For many purposes it would no doubt be regarded in precisely the same way. The learned Lord Advocate said that the question was whether it was impossible for her to make it so. It seems to me, however, that the question rather is

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whether what she has done necessarily has the effect of making it a part of the personal estate of the deceased within the meaning of the statute. If it has, of course the duty follows ; but I cannot think that this is the result. It appears to me that the effect cannot be said to be more than this ; it is to be held by the same persons and administered in the same way and dealt with altogether as if it were part of the personal estate ; but I do not think that makes it, or could make it, part of the personal estate within the meaning of this statute. And, my Lords, it seems to me difficult to resist that conclusion when it was admitted (or perhaps I should hardly say admitted) by the Lord Advocate, that if different words having precisely the same effect had been used by Miss Scott a duty would not have been payable ; he admitted that if she had described in different words what is said to be the legal effect of her disposition as to the persons to administer, the mode of administration and the persons who were to benefit, it would have been difficult to contend that it would then have become a part of the personal estate. It seems to me that the only difference which can be suggested would have been that in the one case the duty would have been payable, and in the other it would not, although precisely the same legal result had been brought about by the use of different words.

I think this view of the case is strongly confirmed by the statutes to which attention has been called. So far as I am aware, the first statute which made an inventory obligatory is the 48 Geo. III. cap. 149, sec. 38, which provides in respect of any person dying after the 10th of October 1808, having personal or moveable estate or effects in Scotland, that before they are dealt with there shall be "a full and true inventory" on oath, containing a statement "of all the personal or moveable estate and effects of the deceased already recovered or known to be existing." Of course, that would have been satisfied in this case by an inventory made out shortly after Robert Methven's death and before Miss Scott's death, upon obtaining confirmation. The statute proceeds to deal with cases, which of course would frequently occur, in which, although a full statement was made of all the estate and effects of the deceased then known, it should be afterwards discovered that there was some property forming part of that estate which had not been known at the time when the inventory was made.

Then the statute proceeds in these terms,—“If at any subsequent period a discovery shall be made of any other effects belonging to the deceased, an additional inventory of the same shall be in like manner exhibited” ; and there are very considerable penalties imposed if that is not done. The statute therefore appears to contemplate that all that is required to supplement an honest statement of the property of the deceased in the first instance, is a further statement of any property subsequently discovered “belonging to the deceased.” Now, my Lords, whatever may be the case with regard to the expression “personal estate and effects of the deceased,” which can conceivably be regarded as an entity that may be added to, it seems to me impossible to contend that the words “belonging to the deceased” could have any application to a property which never belonged to him, and which was, as is suggested, added to his personal estate after his death. Those words occurring in the later part of the section appear to me to be very cogent in the interpretation of the earlier words of the section, which indicate the nature of the property that is to be included in the inventory, and strongly support the view that it would not include that which a person other than the deceased took steps to make and intended to

make, so far as could be done, a part of the personal estate and effects of the deceased. No. 2.

In the subsequent Act, the Act of 1881, which provides also for the payment of further probate duty, it is enacted in section 32 that "if at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate," then "the person acting in the administration of such estate and effects shall within six months after the discovery deliver a further affidavit." There, again, the test is made "the personal estate and effects of the deceased at the time of the grant of probate"; and that provision would clearly be inapplicable to the case where, after the grant of probate, owing to the dispositions of the will of another person, money or property was, in the way suggested, added to the personal estate, because of course it would not come within the words "were at the time of the grant of probate of greater value than the value mentioned in the certificate."

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For these reasons I think that the taxing clauses do not apply to the portion of Miss Scott's estate which came to the executors of Mr Methven; and all the illustrations which have been put, and all the questions which have been asked, really seem to me to depend upon the answer to that question. If, within the Act, it has become part of the personal estate and effects, then no doubt probate would be required to make title to it. If it has not so become part of the estate, then probate would not be required to make title. When once that question is answered all the other questions seem to be answered fully and without difficulty.

I will not detain your Lordships more than a moment upon the suggestion that if it is not within the words of the statutes I have quoted it is within the words of the Stamp-Duties Act of 1860. It seems to me impossible to say that it was any part of "personal or moveable estate and effects which" a person "shall have disposed of by will under any authority enabling such person to dispose of" as he thought fit.

The only question remaining is whether the beneficial interest can be regarded as subject to the payment of legacy-duty by the beneficiaries. That depends upon the construction of the Stamp-Duties Act of 1845, which defines as a legacy liable to duty "every gift by any will or testamentary instrument of any person which by virtue of such will or testamentary instrument is or shall be payable or shall have effect or be satisfied out of the personal or moveable estate or effects of such person or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of." It seems to me impossible to say that any moneys which may be received, by virtue of the dispositions which have been under consideration, by the persons who are named as beneficiaries in Mr Methven's will, who in consequence of Miss Scott's disposition would take certain further benefits, are received as gifts by Mr Methven's will which, by virtue of that will, are payable out of any personal estate of his or any "personal estate" which he had "power to dispose of."

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—I am also of opinion that the judgment appealed from ought to be affirmed. I do not wish to suggest that Miss Scott could not have made such a testamentary disposition in favour of the beneficiaries under the will of

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Robert Methven as would have entitled the Crown to claim payment of duty. She unquestionably could have directed the trustees of Methven, whom she made her executors, to pay these duties to the Crown; and that direction would have been imperative. I do not think it is necessary to speculate how far she could have accomplished the object of making the Crown entitled to these duties by indicating that her bequest was to be in the same position under these statutes as if it had in point of fact belonged to the nephew who predeceased her. I am satisfied that no such thing was either done or attempted here. Miss Scott created, according to my view, a new trust in the persons of Methven's executors, the purpose of the trust being, not that the fund which she committed to them should become part and parcel of the deceased's estate, but that it was to be administered by the trustees as a separate estate, in the same manner and subject to the same conditions as if it had originally been the property of Methven himself.

LORD ASHBOURNE.—I entirely concur. The claim of the Crown is practically for the recovery of a double duty; and for the reasons stated by the Lord Chancellor I think their case has entirely failed.

LORD MORRIS concurred.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

SIR W. H. MELVILL, Solicitor for England of the Board of Inland Revenue—
P. H. J. HAMILTON GRIERSON, Solicitor for Scotland of the Board of Inland Revenue—
D. E. CHANDLER—WILLIAM BLACK, S.S.C.

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EDINBURGH UNITED BREWERIES, LIMITED, AND OTHERS (Pursuers),
Appellants.—*Sol.-Gen. Sir J. Rigby—Asher, Q.C.—Thomas Shaw.*
JAMES A. MOLLESON AND ANOTHER (Defenders), Respondents.—
Lord-Adv. Balfour—Ure.

Sale—Resale for enhanced price—Subvendee—Reduction—Title to sue reduction of original contract.—An arrangement was made for the sale of a brewery by A to B at the price of £20,500 fixed on the basis of profits for the last two years as shewn by the books. The books were examined by an accountant employed by B, and the sale was completed. B sold the brewery to C for £28,500, which was fixed without reference to profits, and A, at B's request, conveyed the brewery to C. It was afterwards discovered that A's books contained false entries, largely increasing the apparent profits, which had been made by his clerk without his knowledge.

C in his own name and as B's assignee, and B, raised an action against A for reduction of the contract between A and B, and of the conveyance by A to C, C offering restitution *in integrum*.

Held, in aff. judgment of the First Division, which assolizied A, (1) that as C was not privy to the contract between A and B, he had no title to reduce it; (2) that as B had no interest in the subjects after the conveyance by A to C, he had no title to reduce the said contract.

Sale—Agreement to sell business on condition of buyer being satisfied as to profits after examination of the books.—An agreement for the sale of a brewery business at a certain price set out that the arrangement proceeded upon the basis that the profits during the two preceding years amounted to a certain sum upon an average, and that "in the event of it being ascertained that this is not the fact the arrangement shall be at an end"; and further bore, that B, the purchaser, "with the view of verifying the amount of the profits for the said two years, shall immediately, upon delivery hereof, be entitled to have the books," &c., connected with the business, examined by an accountant.

The balance-sheets and books were examined by accountants employed by the buyer, and thereafter the contract of sale was completed. No. 3.

The buyer thereafter agreed to assign his rights as purchaser to a company, and at his request the original seller conveyed the brewery to the company. Mar. 9, 1894.
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The company, a year afterwards, discovered that a number of the entries in the books submitted to the accountants were false, and had been fraudulently made by the clerk in charge of the books, without the knowledge of the seller, with the result of shewing a much larger profit than was actually made.

In an action brought by the company as B's assignee, and with his concurrence, against the original seller for reduction of the sale to B, on the ground that it had now been ascertained that the amount of the profits set forth as the basis of the price were not the true profits, and that in terms of the contract the sale fell to be reduced, *held* that the condition as to the amount of profits lapsed on the completion of the sale.

(In the Court of Session, March 17, 1893, 20 R. 581.)

The pursuers appealed.

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Ash-
bourne.
Lord Mac-
naghten.
Lord Morris.

LORD CHANCELLOR.—This is an appeal from an interlocutor of the First Division of the Inner-House affirming an interlocutor of the Lord Ordinary. The action is of a somewhat peculiar character. The pursuers are the Edinburgh United Breweries Company and Mr Dunn; the defender is Mr Molleson. Mr Molleson, who was the trustee of a brewery belonging to Mr Nicolson, on the 11th November 1889, entered into a contract with Mr Dunn for the sale to him of the Palace Brewery and the business and stocks connected with it. The purchase was to take place as from the 15th of November 1889, at the price of £20,500. The purchase-money was to be paid by the 31st of December, at which date a conveyance was to be executed either to Mr Dunn or to any company to which he might assign his interest, it being no doubt in contemplation at that time that a company would be formed for the purpose of carrying on this and other businesses. That was a matter in which Mr Molleson had no concern or interest, except that he agreed to make the conveyance either to Mr Dunn or to such nominee of his. The 10th clause of the agreement is the one upon which the appellants place their reliance.

Before reading the terms of that clause, however, I will state to your Lordships what subsequently took place. Mr Dunn, on the 14th of December, entered into an agreement with the United Breweries Company, the pursuers, by which he agreed to sell them this brewery and several other breweries. To some of the terms of that agreement I shall have presently to call your Lordships' attention, but the price to be paid by the United Breweries Company to Mr Dunn, who it appears was really acting for the Contract Corporation, was the sum of £28,500, being £8000 more than the price which was to be paid by Mr Dunn to Mr Molleson. On the 31st of December a conveyance was executed by Mr Molleson, at the instance of Mr Dunn, by which Molleson, in implement of his contract of the 11th of November, conveyed to the United Breweries Company the Palace Brewery and all the other subjects of the contract of the 11th of November, so that a profit was made upon the transaction by Mr Dunn, or the Contract Corporation (it matters not which), of £8000. Mr Dunn at that date ceased to have any interest in the Palace Brewery or in the contract entered into with Mr Molleson.

The tenth clause of the original agreement provided that "the arrangement herein set out proceeds upon the basis that the net profits from said brewery and wine businesses amounted during each of the two years ending 31st of December 1887 and 31st December 1888 to £3750 or thereabouts upon an

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average." It further provided that, "in the event of its being ascertained that this is not the fact, this arrangement shall be at an end, and the second party" (that is Mr Molleson) "shall be bound to repay the said sum of £3700," which was the deposit to be paid upon the execution of the agreement. "The first party" (that is Mr Dunn), "with the view of verifying the amount of the profits for said two years, shall immediately upon delivery thereof be entitled to have the books, accounts, and vouchers connected with said businesses examined by an accountant named by him." In accordance with the provisions of that clause all the books of Mr Molleson connected with the brewery were placed before accountants selected by Mr Dunn, and were examined by them as fully as it appeared to them to be necessary to examine them. They reported that the books shewed a profit of somewhat less than the sum named,—that is to say, a profit of £3300 instead of £3750; but there was a discussion as to whether they had arrived at the profits upon the true basis. I do not think that, for the present purpose, the difference between £3300 and £3750 is material. I will take it for the purposes of my judgment that the books shewed, according to the report of the accountants, the profit stated, namely, £3750. It was discovered, something more than a year after the conveyance to the Brewery Company, that the books had in fact been improperly dealt with by a clerk in the employ of Mr Molleson—that he had altered some of the items in the books with the view of making the profits appear greater than they really were. I assume, for the purpose of the opinion which I am about to express, that, although all the books, vouchers, and accounts were in the hands of the accountants, and they could, if they had examined them, from the materials in their possession have found out the frauds which had been committed, yet the examination contemplated by the parties to the contract was such that the frauds would not in ordinary course have been discovered.

Under these circumstances the United Breweries Company and Dunn come as pursuers, claiming a reduction of the disposition entered into between Molleson and the Breweries Company and Molleson and Dunn, and insist that they are entitled to have those agreements and dispositions reduced. Their case is put by the learned counsel for the appellants in two ways. First, it is said that under the contract between Dunn and Molleson profits were made the basis of that contract; that the contract itself provided that if it were ascertained at any time that those profits had not been made the contract should be at an end; that all the rights of Dunn under the contract were passed by him to the United Breweries Company, and that therefore the United Breweries Company are entitled as a matter of contract to say that the transaction not having been carried out in accordance with that which is declared to be its basis, and the United Breweries Company and Dunn having been misled into believing that the books were what in fact they were not, the United Breweries Company can themselves maintain this action of reduction in right of the transfer to them by Dunn of his rights.

My Lords, that depends of course upon the construction of the 10th clause of the contract. I will assume that whilst the matter was *in fieri*, until the 31st of December, when the conveyance was executed, the United Breweries Company, under their contract with Dunn, could have taken advantage of this stipulation in Dunn's contract with Molleson and have insisted that the arrangement was at an end. But the question is, what is their position in that respect

after the disposition of the 31st of December, by which the brewery was conveyed to and vested in the Breweries Company, the total purchase-money being paid by Dunn to Molleson. Now, my Lords, it appears to me that the very terms of the 10th article of the contract shew that it is only providing as a matter of contract between the parties for what is to take place between the making of this contract and the disposition in implement of it. It is true that there is no limitation in terms of the time during which this 10th clause is to operate, but it appears to me that that time is necessarily ascertained by the terms of the clause,—“In the event of its being ascertained that this is not the fact” (that is, that such profits are not made), “this arrangement shall be at an end, and the second party shall be bound to repay the said sum of £3700.” That is the sum which would be payable prior to the execution of the conveyance; it was “this arrangement,” this contract, which was to be at an end, and it was this sum which was to be repaid.

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Now, it seems to me that that shews as plainly as anything can, that the contract did not provide for the insertion in the disposition of any clause making that disposition void if the profits were ascertained to be less than was stated; but what both of the parties contemplated was, that the time given down to the 31st of December would be sufficient for ascertaining whether the alleged or suggested profits had been made, and within that time no doubt the arrangement would have come to an end in accordance with clause 10, if it had been ascertained that the alleged profit had not been made. But when this disposition was executed the contract ceased to be *in fieri*, and the rights of the parties fell to be ascertained from the terms of the disposition. It is not at all infrequent for an agreement to contain stipulations which find no place in the subsequent disposition, but the rights of the parties must be ascertained by the disposition executed in implement of the contract and not by the contract which contemplates that implement. When once the disposition is executed, it seems to me that, as a general rule (of course I am not saying there may not be exceptions), the rights under the contract come to an end. In this case I think that the very terms of article 10 are inconsistent with the continuance of it, or, at all events, that it is inapplicable to the period after the disposition has been executed. It appears to me, therefore, that, assuming that all the rights, including this right, under clause 10, were passed by Dunn to the United Breweries Company by his agreement with them of the 14th of December, yet after the execution of the conveyance of the 31st of December it ceased to be possible for them to rest upon this 10th clause as making that transaction void, and of course that transaction is the one which they seek to set aside. No doubt, if there had been any fraud, if there had been misrepresentation, it would have been open to Dunn, notwithstanding the execution of the conveyance, to set aside the conveyance and to put an end to the transaction altogether. That is not for a moment disputed, and, in truth, the stress which has been laid upon this 10th clause and the allegation that it contains a contractual right which was passed on to the Breweries Company and which still exists, have resulted from the difficulty in which the appellants felt themselves by reason of the circumstance that it is not Dunn who is now seeking to set aside the contract, but that it is the United Breweries Company, in truth, who are now the owners of the subject of it.

Therefore, in my opinion, the first ground upon which the appellants rested their case fails in point of fact; on the true construction of this 10th clause

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there is nothing upon which they can now rest as a contractual right created by it.

But then it is said that Dunn was led to take this disposition instead of asserting any right which he might have under the 10th clause, by reason of misrepresentation on the part of Molleson—that the books which were examined by the accountants must be taken to have been represented by Molleson as proper and genuine books, and that inasmuch as they were not so, Dunn would be entitled as against Molleson to rescind or obtain reduction of the conveyance. My Lords, I will for the present purpose assume that to have been the case; but the question is, Can there now be reduction in this suit at the instance of the present pursuers under the circumstances which exist? Dunn, in point of fact, parted with the property, and the conveyance was made at his instance to other people in pursuance of a contract of sale by him to them at a profit. Would Dunn then be in a position, having parted with the property and having parted with it at a profit, to come into Court and say,—“I am entitled to claim that this contract shall be reduced”? It is said that he has that right, because although he has parted with the property, the persons who are the present owners of the property, and who took from him, are brought also into Court as co-pursuers, so that the two together, at all events, could restore the subject-matter to Molleson. Does that give them a title to sue?

Now, even if it be admitted that if where a person who has purchased through a misrepresentation has resold, those representations have been repeated by him to the persons to whom he has resold, in such a manner as that they could impeach the transaction as against him, in that case, even without an actual reduction of the resale, the transaction might be reduced as against the original seller—even admitting that, it appears to me that no such case is really made here, either upon the pleadings, or, as far as I can see, upon the facts. The learned Judge, Lord McLaren, states more than once in his judgment that it was admitted that the contract of Dunn with the company was neither impeachable nor impeached; but whether that was admitted or not it seems clear, when one looks at the pleadings, that no such case was set up. It is quite true that in the 8th condescendence it is stated that “the information obtained from the sellers by Mr Dunn, with reference to the assets and past profits of the said business, was communicated to the pursuers, the Edinburgh United Breweries, Limited.” But the 9th condescendence, up to which that leads, sets up this case, that Mr Molleson “either knew, or ought to have known, that the” balance-sheets “were false and were fraudulently concocted, in order to shew said excessive profits. Whilst in that position he handed the said false balance-sheets to the pursuers” (that is, the United Breweries Company and Dunn) “for the purpose of getting them to enter into the contract in question” (the contract in question appears from the context to mean the one of the 11th of November 1889) “on the basis of the profits thereby shewn. Mr Molleson thereby induced the pursuers, by false and fraudulent representations, to enter into the said contract.” Now, it is obvious that the case there set up is that, the transaction of the 11th of November, though nominally Dunn’s, was really not only that of Dunn, but that of Dunn and the United Breweries Company. Of that there is not only no proof, but it is completely disproved; but that is the case set up upon the pleadings, and it is nowhere alleged that Dunn entered into the contract with the United Breweries Company under such circumstances, and with such representations, that as against him they are entitled to set aside the con-

tract and claim reduction. For aught that appears upon these pleadings Dunn may be quite prepared, as between him and them, to stand by the contract, although he may be willing to assist them in restoring the brewery to Mr Molleson, and getting back the £20,500. It is not alleged anywhere that his contract with them is impeachable; no circumstances are shewn raising any such case.

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And, my Lords, when we come to the evidence which was read to us by the Solicitor-General yesterday, we know very little of what the transaction was as between Dunn and the company; but I certainly do not think it can be said to have been made out in any way that this contract could have been impeached as between Dunn and the company. It is said that the representations which were made by Molleson to Dunn were passed on by him to the company. Now, I think that that mode of stating the facts involves a fallacy. It may be that representations made to one are passed on, as it is said, by him to another; but they do not become, and are not necessarily, the same representations as were made to the person who originally received them.

It is said (and on that the whole case rests) that Molleson must be taken to have represented to Dunn that the books handed to him for inspection were genuine and properly kept books; but it is impossible to say that there is any evidence of any representation made by Dunn to the company which can be treated as a representation that the books tendered by Molleson were in fact genuine. It is rational enough to hold that, as against Molleson, that is the effect of his handing over the books; but when Dunn informs those to whom he is selling, as he obviously did by shewing them the contract, that the books to be examined by the accountants are the books handed over by Molleson, and when he hands to them the result of the accountants' inspection of those books, the utmost representation which he can be taken to have made is this,—Here is the report of the accountants whom I have employed as to what is shewn by the books which Molleson handed over to those accountants as the books of the business. Beyond that, it seems to me to be impossible to say that any representation was made by Dunn to the United Breweries Company. Therefore, it appears to me that in the present case there is really no foundation laid for impeaching this contract as between Dunn and the United Breweries Company, even if (upon which I express no opinion) it would have been enough to shew that the contract was impeachable, and if it would not have been necessary, before such a proceeding as this was instituted, to have had it impeached and put an end to. I express no opinion upon that; but at all events I think that the foundation is altogether wanting unless the case can be brought up to that point.

I ought perhaps to add one other observation in connection with what I have just said, namely, that I must certainly not be taken as assenting to the view, or as expressing any opinion upon it, that if a person who has been induced by misrepresentation to buy a property has parted with that property, and if he can get back that property in any way so as to put himself in a position to restore it, he is then always in a position to claim reduction of the contract into which he was led by misrepresentation.

For these reasons, I move that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—Although I have come to the same conclusion as regards the

No. 3.

Mar. 9, 1894.
Edinburgh
United
Breweries,
Limited, v.
Molleson.

result with the learned Judges of the First Division, I am not in a position to give an unqualified assent to all that has been expressed in the judgment of Lord M'Laren, who delivered the opinion of the Court; and that for two reasons; in the first place, because I have not heard argument or made up my mind upon many points discussed in his judgment which it is unnecessary to advert to now; and also because upon those points on which we have heard argument, I am not prepared to concur with all that fell from Lord M'Laren.

It appears to me to be very necessary to keep in view the position of the three parties who appear upon the scene in this appeal, Mr Molleson, Mr Dunn, and the company. The contract sought to be set aside, which was implemented by a conveyance to the company, was a contract to which Mr Molleson and Mr Dunn were the only parties. There was no privity between Molleson and the company, and in conveying to them Molleson simply fulfilled the obligation, which he had undertaken to Dunn, to make a conveyance to his nominee. The deed of conveyance is the only contract between Mr Molleson and the company. By the ordinary rule of law, the moment a conveyance is accepted as in implement of the obligations of a contract, the original contract is at an end, and the conveyance constitutes the only contract between the parties.

In this appeal two grounds are urged for the rescission of the original contract by Mr Dunn and also by the company, because they sue together, and if either has shewn a good title for rescinding the contract upon restitution the appellants must prevail. Now, what is the position of Mr Dunn? He made a remunerative sale, and he has no interest in the brewery, which was the subject of these dealings; and if he made a valid contract of sale to the company to be followed by a conveyance in virtue of his contract with Mr Molleson, it humbly appears to me that his title to challenge this transaction with the respondent came to an end the moment the conveyance was completed.

I do not concur with some observations of Lord M'Laren to the effect that although the contract between him and the company might not be reducible, Dunn might by some arrangement with the Company be enabled to bring an action for rescission upon tendering restitution. It may be that if the contract had been thrown back upon his hands by the company, and was reducible at their instance in a question with him, he would have been remanded to his original position and have been entitled to any remedy which he could have pursued before he parted with the brewery; but unless the sale by him to the company was reducible by them upon legal grounds, it appears to me that Mr Dunn could not have rehabilitated himself so as to revive in his favour a remedy against the seller to him. I am assuming for the purposes of this case that Mr Molleson did make representations which would have entitled Mr Dunn, so long as he retained the brewery, to the remedy of rescission. Upon that point I, of course, desire to express no opinion, because, although the Court below has dealt with and expressed an opinion upon the point, I certainly do not feel inclined to concur upon a matter which obviously presents questions of delicacy and difficulty without having heard a full argument.

Therefore, it appears to me that Mr Dunn as a pursuer is out of the case; he had no title in his own right, and I do not see how his concurrence can in the least degree aid the title of the company.

That title is rested upon two different grounds; one of them is the supposed transmission to them of a conventional stipulation which gives them a right to

rescind the contract; the other is a ground dehors the contract, which rests apparently upon the transmission by Dunn to the company, in his dealings with the company itself, of the representations made to him by Mr Molleson. As to the first, the conventional ground, I can only say that there does not appear to me to exist any right of rescission which could be conveyed to the company by Dunn. The agreement conveys from Mr Dunn to the company all his rights under the contract, and one of these rights is said to be contained in article 10 of the contract. The terms of that article have been fully explained by my noble and learned friend, the Lord Chancellor, and in my opinion they do not amount to a condition, resolute of the contract when concluded by payment of the price and disposition of the property. They apply merely to the interval of time which the parties apprehended would elapse between the making of the antecedent contract and the conveyance which was to follow in execution of it, and they expired by efflux of time.

The next ground pleaded assumes that this contract of sale by Dunn to the company was reducible at the instance of the latter, because the representations made by Mr Molleson to Mr Dunn were transmitted, and handed on by Mr Dunn to the company. In the first place, my Lords, there is no record for that. It is perfectly obvious that before the First Division at least, whether the counsel meant it or not, they must have expressed themselves in terms which led the Court to understand that Mr Dunn was holding by his £8000 under his contract with the company. Whether that impression was right or not it is not for me to say; the question is not brought before us. But I think it right to add that although the record was supplemented in argument by a verbal condescendence by the Solicitor-General, nothing that he said was calculated to suggest that any relevant case could be made by the appellants for setting aside the agreement with Mr Dunn.

LORD ASHBOURNE.—I entirely concur, and think the contentions of the appellants wholly untenable.

LORD MACNAGHTEN and LORD MORRIS concurred.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

NICHOLSON, GRAHAM, & GRAHAM—PHILIP, LAING, & Co., S.S.C.—FAITHFUL & OWEN—DAVIDSON & SYME, W.S.

WILSON, SONS, & COMPANY (The "Otto"), Appellants.—*Sir Walter Phillimore, Q.C.—Aspinall.*

JAMES CURRIE AND OTHERS (The "Thorsa"), Respondents.—*Sir R. Webster, Q.C.—Salvesen.*

No. 4.

Mar. 18, 1894.
Wilson, Sons,
& Co. v.
Currie.

Ship—Collision—Regulations for preventing collisions at sea under Order of Council, 11th August 1884, articles 15, 18, 19, and 21.—The steamships "Thorsa" and "Otto" were approaching each other end-on, or nearly so, in daylight in the Sound. When they were a mile apart the "Thorsa" signalled in manner provided by the 19th article of the Regulations for preventing collisions at sea of 1884,* that she was (in terms of article 15 of these Regulations

* The regulations for preventing collisions at sea under Order of Council, 11th August 1884, provided as follows:—(Article 15) "If two ships under steam are meeting end-on, or nearly end-on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other." (Article 18) "Every steamship when approaching another ship,

No. 4.

Mar. 13, 1894.
Wilson, Sons,
& Co. v.
Currie.

The "Thorsa." about to alter her course to starboard to pass the "Otto" on the port side, and at the same time she put her helm to port, and brought her head a point, or nearly a point, to starboard. The "Otto" heard, but disregarded the signal, and kept her course. When the ships were within half a mile, the "Thorsa" repeated the signal, and again ported her helm. The "Otto" immediately there-
after starboarded her helm, bringing her head to port, and shaped a course

across the bows of the "Thorsa." The "Thorsa" immediately stopped and reversed her engines, but a collision took place, and the "Otto" sank.

In cross actions by the owners of the vessels, the owners of the "Otto," while admitting that their vessel had been in fault, maintained that the "Thorsa" had also been in fault, in respect that she did not stop and reverse her engines when the risk of collision first became apparent.

Held (aff. judgment of Second Division) that no fault was attributable to the "Thorsa," in respect (1) that it was proved that at her second porting the "Thorsa" had done enough to determine the risk of collision if the "Otto" had kept her course; and (2) that she had complied with article 18, as she had stopped and reversed as soon as it became apparent that it was "necessary" so to do, i.e., when the "Otto" changed her course so as to cross the bows of the "Thorsa."

Ld. Chancellor
(Herschell).
Lord Watson.
Ld. Halsbury.
Lord Ash-
bourne.
Lord Mac-
naghten.
Lord Morris.

(IN the Court of Session, June 23, 1893, 20 R. 876.)

The respondents appealed.

LORD CHANCELLOR.—This is an appeal from an interlocutor of the Second Division of the Court of Session. The Lord Ordinary found that both the "Otto" and the "Thorsa" were to blame for a collision by which the "Otto" was sunk. The Inner-House, reversing this judgment, held that the "Otto" alone was to blame, and that the "Thorsa" was not to blame. No attempt has been made to impeach the finding of the Court below with regard to the "Otto," and indeed any such attempt would have been useless, because it is perfectly clear that the "Otto" was very seriously to blame.

The vessels were proceeding upon, generally speaking, opposite courses, the one up and the other down. The "Otto" had left her pilot at Elsinore and was proceeding towards the Lappegrund lightship. Shortly before the time with which your Lordships have to deal a vessel called the "James Malam," which was coming in the same direction as the "Otto" and had passed her, also passed the "Thorsa." Those two vessels passed starboard to starboard. After a manœuvre by the "Thorsa" had been executed for the purpose of passing clear of the "James Malam," the view taken by the Lord Ordinary and by the Inner-House is that the two vessels, the "Thorsa" and the "Otto," were end-on, or nearly end-on. The "Thorsa" blew one blast, in order to indicate to the "Otto" that she was going to the starboard. She ported her helm in accordance with the indication which she had given by her whistle; and there seems to be no question that the sound of her whistle was heard on board the "Otto." There is some doubt as to whether the "Otto" at that time had ceased starboarding (she undoubtedly had been starboarding) and was keeping a steady course, or whether she was altering her course. It is not

so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary." (Article 19) "In taking any course authorised or required by these regulations a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz., one short blast to mean 'I am directing my course to starboard.'" (Article 21) "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of each ship."

necessary to determine that question. According to the account of the master of the "Otto," she was keeping a steady course. No. 4.

The "Thorsa," observing that the "Otto" was coming towards her and was not executing the corresponding manœuvre which the master of the "Thorsa" had been led to expect she would execute, blew the whistle again, and again ported. Almost immediately afterwards the "Otto" hard-a-starboarded, coming across the "Thorsa." It is not disputed that as soon as that manœuvre was observed the master of the "Thorsa" directed that her engines should be stopped and reversed, and that his order was obeyed; and no complaint is made of the conduct of the master of the "Thorsa" in not stopping and reversing earlier than he did after the hard-a-starboarding manœuvre was observed. But it is said (and this is the only case now made against the "Thorsa") that she ought to have stopped and reversed at an earlier period; that when, at some time between the first whistle and the second, the master of the "Thorsa" saw that the "Otto" was not so manœuvring as to bring her port side to port side, it ought to have been seen then that there was a risk of collision, and that accordingly then the master of the "Thorsa" ought to have stopped and reversed.

Mar. 13, 1894.
Wilson, Sons,
& Co. v.
Currie.

The "Thorsa."

Now, it is by no means clear upon the evidence that, supposing the two vessels had kept their courses after the first whistle, and that last manœuvre, the hard-a-starboarding of the "Otto," had never taken place, the two vessels under those circumstances would not have passed each other without collision, or danger. That they would have done so is stated by the master of the "Thorsa." Sir Walter Phillimore, on behalf of the appellants, suggests that they would have passed very close to one another, that it would have been a very fine thing, and that it would have been doubtful whether they would have passed clear. But it appears to me that the case of the "Thorsa" does not rest, and ought not to be rested, solely upon the question thus put. The master of the "Thorsa" a second time gave a signal to the "Otto" that he was intending to go to the starboard. Now, it is not denied that the vessels were able to see one another. They were manœuvring with the knowledge, as far as vessels ever can have it, of what was going on in the meantime; and if the story of the "Thorsa," which has been practically accepted by the Court below, is anything like correct, namely, that the two vessels, supposing their courses had not been changed, would have passed clear, although it might have been a near thing, it is obvious that under these circumstances, if the "Otto" had taken the step she ought, instead of starboarding when she got that second signal, there would have been no collision whatsoever.

Now, under the circumstances which existed, it appears to me that the master of the "Thorsa" was justified in giving that second signal before taking any other step, and that he was justified in porting after giving that second signal to see whether the master of the "Otto" would not manœuvre in the manner in which proper navigation demanded that he should. Considering that it is by no means clear that the two vessels would not have passed each other with perfect safety if they had kept their courses, the master of the "Thorsa" was not bound to stop and reverse, but had a right to see whether the master of the "Otto" was going to manœuvre as he ought to have done. As soon as he saw that the "Otto" had starboarded, he stopped and reversed. It appears to me certain that in this case the rule which has been relied upon by the learned counsel for the appellants has not been violated by the "Thorsa,"

No. 4. and that she is consequently not to blame. I certainly do not desire to countenance the idea that a vessel is entitled to run the matter very fine and to go on until the last moment before stopping and reversing; but in the present case it seems to me that the master of the "Thorsa," knowing the facts which existed, and in the circumstances which had been observed by him, acted as reasonably as a seaman could, and did not fail in his duty in any way whatsoever.

Mar. 13, 1894.
Wilson, Sons,
& Co. v.
Currie.

The "Thorsa."

For these reasons I move that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—Was the master of the "Thorsa" when he ported a second time justified in assuming that the action of his helm would be sufficient to determine the risk of collision with the "Otto" without the necessity of stopping and reversing? The decision of this appeal one way or another depends, in my opinion, upon the answer to be given to that question. I have no difficulty in answering the question in the same way as the learned Judges of the Second Division have practically done. I do not think the master of the "Thorsa" was bound to assume that the "Otto," though she had disregarded his first would pay no attention to his second signal, and would not keep out of the way by going to the starboard. Upon the evidence, which on that point is all one way, I see little reason to doubt that had the "Otto," after the second signal from the "Thorsa," kept on her course, the vessels would have passed clear of each other. The collision was, in my opinion, entirely due to the unseamanlike navigation of the "Otto"; and I am therefore of opinion that the judgment appealed from ought to be affirmed.

LORD HALSBURY.—I am of the same opinion. There are two vessels practically on opposite courses, both intending to pass the lightship at about the same point; and the only blame that can be properly attributed to the "Thorsa" is that she did not stop and reverse in time to prevent the collision. That of course is a question which must always depend upon the circumstances of the particular case, and I am not helped by any canon which has been laid down beyond this, that people must behave reasonably with respect to the course they are pursuing when they come into proximity to each other, which may be the result of the course they are following. Looking at what the "Thorsa" did, it appears to me that she acted reasonably throughout. There was no reason why she should not keep on the course she was pursuing; and when she gave a signal which was not attended to, and gave a second signal, I think she might calculate that a seaman using ordinary care would attend to it. The time, of course, becomes very material. So far as I can form a judgment of the time that elapsed, when at last it was apparent to the master of the "Thorsa" that the master of the "Otto" was going to manoeuvre as he ought not to have done, the former did what he ought to have done—he stopped and reversed; but it was too late to prevent the collision, which I think was caused by the persistent conduct of the master of the "Otto" throughout.

LORD ASHBOURNE, LORD MACNAGHTEN, and LORD MORRIS concurred.

JUDGMENT appealed from affirmed, and appeal dismissed, with costs.

PRITCHARD & SONS—J. & T. W. HEARFIELDS & LAMBERT, Hull—THOMAS COOPER & Co.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.

HAMLIN & COMPANY, Defenders (Appellants).—*Sir Henry James, Q.C.*— No. 5.

Murray, Q.C.—Ruegg.

THE TALISKER DISTILLERY, Pursuers (Respondents).—

Lord-Adv. Balfour—Danckwerts.

May 10, 1894.
Hamlyn & Co.
v. Talisker
Distillery.

Contract—Construction—Foreign—Arbitration—Locus solutionis.—Where a personal contract is entered into between persons residing in different countries where different systems of law prevail, the intention of the parties as expressed or implied in the contract will determine the system by which the whole or any part of the contract is to be interpreted and governed.

A mutual contract between an English and a Scots firm to be implemented in Scotland was signed in London and contained this clause:—"Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way."

The Scots firm, after using arrestments in Scotland against the English firm to found jurisdiction, raised an action against them for breach of contract.

The defenders pleaded that the action was excluded by the clause of reference.

The First Division held (1) that the validity and effect of the contract fell to be determined by the law of Scotland, the *locus solutionis*; (2) that the arbitration clause could not be regarded as a separate contract, the *locus solutionis* of which was in England; and (3) that the reference to unnamed arbiters was by the law of Scotland invalid.

In an appeal held (in *rev.* the judgment) (1) that the arbitration clause fell to be construed and governed by the law of England, as its terms shewed that that was the intention of the parties; (2) that by the law of England it was valid; and (3) that there was no principle of public policy to prevent the Courts of Scotland from giving it effect.

(In the Court of Session 30th November 1893, reported in the present vol. p. 204.)

By memorandum of agreement, dated 27th January 1892, between Roderick Kemp & Company, of Talisker Distillery, Carbost, Skye (now represented by "The Talisker Distillery"), and Hamlyn & Company, merchants, London, Roderick Kemp & Company agreed to sell and Hamlyn & Company agreed to buy all grains made by Kemp & Company at a certain price, and further, to supply and erect at the distillery a patent grain drying machine, which Kemp & Company agreed to keep in proper working order, "supplying all steam and labour, &c. necessary for properly drying the grains for the said Hamlyn & Company, and will bag up in the said Hamlyn & Company's sacks and deliver the grains f.o.b. Carbost, to their order." The contract was to be in force for ten years from the date of the erection of the machine.

The agreement contained the following clause,—“Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way.”

The memorandum of agreement was signed by the parties in London.

In March 1893 the Talisker Distillery, after having arrested *ad fund.* some sacks belonging to Hamlyn & Company, raised an action against them concluding for declarator that the defenders were bound to purchase all grains made by the pursuers for ten years from 27th October 1892, and for payment of £3000 for breach of contract, in respect that the defenders had failed to provide a proper drying machine, and that they now sought to repudiate the agreement to purchase the grains made by the pursuers.

The defenders pleaded, *inter alia*;—The action is excluded by the clause of reference in the said memorandum of agreement.

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Ash-
bourne.
Lord Mac-
naghten.
Lord Morris.
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The Lord Ordinary (Kyllachy) repelled this plea, and allowed a proof. On 30th November 1893 the First Division (*diss.* Lord Kinnear, the Lord President absent) adhered to his interlocutor. The defenders appealed.

LORD CHANCELLOR.—On the 27th of January 1892 an agreement was entered into between Roderick Kemp & Co. of the Talisker Distillery, Carbost, Isle of Skye, and Hamlyn & Co. of London, under which Hamlyn & Co. were to supply to the distillery a patent drying machine which was to be worked by the distillery company, who were to bag up and deliver to Hamlyn & Co. dried grain free on board at Carbost to their order or otherwise as required. The agreement concludes with a clause in the following terms:—"Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." This agreement was made between the parties in England.

Shortly after the contract was entered into Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp & Co., and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had "no jurisdiction," and that "the action is excluded by the clause of reference in the memorandum of agreement." These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by Lord Adam and Lord M'Laren, in the Inner-House, Lord Kinnear dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents.

It is not in controversy that the arbitration clause is, according to the law of England, a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the Court below is thus expressed by Lord Adam: "So far as I see, nothing required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *lex loci solutionis*, that is, by the law of Scotland."

It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the *lex loci solutionis*. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

The learned Judges in the Court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, where different systems of law pre-

vail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.

Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

But then it is said that the Scotch Court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted, the Courts in Scotland cannot be bound to enforce a contract which is against the policy of their law. I should be prepared to admit that an agreement which was opposed to a fundamental principle of the law of Scotland founded on considerations of public policy could not be relied upon and insisted upon in the Courts of Scotland; and if, according to the law of Scotland, the Courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which was urged by the respondents. But that is not the case. The Courts in Scotland recognise the right of the

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parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the Courts in Scotland would have recognised and given effect to and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy the rule can be said to rest that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced.

It is not necessary to inquire into the history of the distinction which has arisen in the Courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is sufficient to say that when once it is admitted, as it must be, that the Courts of Scotland do enforce and give effect to an arbitration clause, and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that if this arbitration clause is to be interpreted according to the law of England, and is therefore a valid arbitration clause, there is no reason why the Courts in Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland.

But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the *forum* being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the Courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where the merits fall to be determined in the Scotch Courts, insist, by virtue of an agreement, that those Courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the Courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch Courts would have to be followed; but the preliminary question has to be determined, whether, by virtue of a valid clause of arbitration, the proper course is for the Courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the *forum* in which the action is pending seems to me entirely to fail. For these reasons I move that the judgment appealed from be reversed.

The question then arises, what course should be taken in the present case, whether the action should be stayed until the arbitration is completed, or whether the House should make an order remitting the cause to be determined pursuant to the arbitration clause. I am quite satisfied, upon that part of the case, with the suggestion which will be made by my noble and learned friend who will follow me (Lord Watson), and I think that there is really no difficulty in the manner in which he proposes to give effect to the contract between the parties.

LORD WATSON.—This action was brought in the Court of Session by a

Scotch distiller, who died during its dependence, and is now represented by the respondents, against the appellant firm, who are merchants in London, concluding for damages in respect of their breach of a mercantile contract. For the purposes of this appeal, it is sufficient to say that the contract which was made in England, but fell to be mutually performed in Scotland, contains this provision:—"Should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange, or their umpire, in the usual way."

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In defence the appellants pleaded,—“(1) No jurisdiction; (2) The action is excluded by the clause of reference.” Both pleas were exclusively founded upon the agreement to refer. They were repelled by the Lord Ordinary (Kyllachy), and, in the First Division, by Lords Adam and M'Laren, Lord Kinnear dissenting. The learned Judges of the majority were of opinion, with the Lord Ordinary, that, inasmuch as Scotland was admittedly the *locus solutionis* the whole stipulations of the contract, including the clause of reference, must be governed by Scotch law. In that view, the agreement to refer, being to arbiters unnamed, was plainly invalid; and their Lordships accordingly sent the case to proof before the Lord Ordinary.

With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases like the present, they do not correctly represent the rights of a defender who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company*,¹ where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating the rule of procedure, which was in force long before its date.

The first question in this appeal is, whether the law of England or the law of Scotland applies to the interpretation of the clause of reference. If the law of Scotland must prevail, the judgments appealed from are unimpeachable. If, on the other hand, the contract must be governed by English law, the clause of reference is obligatory according to that law, and in that event the further question arises, whether the Courts of Scotland ought to give the same effect to it as if it had been a binding Scotch covenant.

Upon the first of these questions I have been unable to arrive at the same conclusion with the Courts below. When two parties living under different systems of law enter into a personal contract, which of the systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary

¹ 10 Macph. 892, 44 Scot. Jur. 503.

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and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties, and amongst these considerations, the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one *forum* and the place of performance in another. In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles. And to my mind their selection from the membership of a commercial body in London of a conventional tribunal which is to act "in the usual way," or, in other words, in the manner which is customary in London, indicates, not less conclusively, that in agreeing to such an arbitration they were contracting with reference to the law of England.

Upon the assumption that the contract must be read in the light of English law, the respondents maintained that, in so far as concerns the agreement to refer, that law is inadmissible. They argued that the agreement relates, not to the substance of the contract, but to the remedy which the parties were to pursue; and that according to a well-known principle of general law, all questions touching the remedy must be decided according to the rules of the *forum* in which the remedy is sought. They also contended that the Court of Session were not bound to recognise any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions is, in my opinion, well founded.

It has never, so far as I am aware, been seriously disputed that, whatever may be the domicile of a contract, any Court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. *Don v. Lippman*,¹ which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules noticed by Lord Brougham in his elaborate judgment as belonging to that class refer to the action of the Court in investigating the merits of a suit in which jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the Court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*. Without clear authority, I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case, either of them

¹ 2 Sh. and M'L. 682.

could avoid the reference by bringing an action before a Scotch Court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested.

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The second reason advanced by the respondents for denying effect to the reference would have been more plausible if it had been the law of Scotland that no private agreement could exclude, to any extent, the jurisdiction of the ordinary tribunals. I am not disposed to hold that Scotch Courts are bound to give effect to every stipulation in a foreign contract, unless it is shewn to be *contra bonos mores*, in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy, that her Courts would be justified in declining to recognise them. But the law of Scotland has, from the earliest times, permitted private parties to exclude the merits of any dispute between them from the consideration of the Court by simply naming their arbiter. The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest upon any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely trenched upon by the legislation of the last fifty years, both in general and in local and personal Acts, that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted, with directions to sist procedure *in hoc statu*, in order that the matters in dispute may be settled by arbitration in terms of the contract. Such an order will leave the parties at liberty, in the course of the reference, to avail themselves of the provisions of the Arbitration Act, 1889, and will enable the Court of Session, in the event of any lapse of the reference, to dispose of the merits of the case.

LORD ASHBOURNE.—I concur.

The substantial question to be determined is whether the law of Scotland or the law of England is to be applied to the interpretation of the arbitration clause in question. One of the parties was a Scotch distiller, and the parties on the other side were merchants in London. The contract was made in England, and was (apart from the arbitration clause) to be performed in Scotland. That clause, set out in the case, is of the highest importance. There is no absolute rule of law as to the way in which the intention of the parties to a contract with reference to the law of a particular place is to be ascertained. Were it not for the arbitration clause, I should assent to the conclusion that the parties contracted solely with a view to the application of the law of Scotland. Having regard, however, to the terms of that clause, I am led to the conclusion that the parties intended that it should be interpreted by the rules of the law of England alone. A contract which provided that disputes "should be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," distinctly introduces a reference to well-known laws regulating such arbitrations, and those must be the laws of England. This interpretation gives due and full effect to every portion of the contract; whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It

No. 5. is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause, rather than of mutilating or destroying one of the most important provisions.

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LORD MACNAGHTEN and LORD MORRIS concurred.

LORD SHAND.—I am also of opinion that the appeal in this case should be sustained, and the judgment complained of reversed for the reasons which have already been so fully stated, and which it would serve no good purpose to repeat. From the terms in which the clause of reference is expressed in a contract, to which, it must be observed, a firm of merchants in London, and carrying on business there, is one of the parties, I think it is to be inferred to be *pari contractus* that the agreement which it contained for the settlement of disputes which might arise out of the contract was to be interpreted and governed by the law of England; and I am further of opinion that there are no such considerations of public policy at the basis of the rule of Scottish law in reference to the necessity of arbiters being named in order to create a binding obligation to refer, as can warrant the Courts in Scotland, in an action brought there, in refusing to give effect to the law and practice as to arbitrations in England. In accordance with the ordinary practice in Scotland, I think that procedure in the present action should be stayed to allow the arbitration to be proceeded with in England, as provided by the contract.

ORDERED and adjudged that the said interlocutors of the 6th of July 1893 and the 30th of November 1893, complained of in the said appeal, be reversed: Further ordered, that the cause be, and the same is hereby, remitted to the First Division of the Court of Session in Scotland with directions to sist procedure *in hoc statu*, in order that the matters in dispute may be settled by arbitration in terms of the contract constituted by a "memorandum of agreement between Messrs Roderick Kemp & Company," &c. The respondents were further ordered to pay to the appellants their expenses in the Court of Session from the date of the Lord Ordinary's interlocutor, and the expenses in the appeal.

RANGER, BURTON, & FROST—FINLAY & WILSON, S.S.C.—R. S. TAYLOR, SON, & HUMBERT—ALEX. MUSTARD, S.S.C.

No. 6. GRAHAM MACFARLANE AND OTHERS (Dunlop's Trustees) (Defenders),
Appellants.—*Sir R. Webster, Q.C.—H. Johnston—Pitman.*

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THE LORD ADVOCATE (Pursuer), Respondent.—*Lord-Adv. Balfour—Sol.-Gen. Shaw—Patten MacDougall.*

Revenue—Legacy-duty—36 Geo. III. c. 52, secs. 12 and 19—Moveable estate directed to be invested in lands to be entailed—"Estate of inheritance."—Section 19 of the Act 36 Geo. III. c. 52, enacts,—“That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate” [the duty being payable under sec. 12, “as if the annual produce thereof had been given by way of annuity”] “unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied.”

Then follows this proviso,—“Provided, nevertheless, that in case before the

same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.”

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Testamentary trustees were directed, during the period of six years next after the testator's death, to realise the residue of the trust-estate and to purchase land, and at the end of the six years to entail the same on A and a series of heirs. At the end of the six years A, whose right then vested, presented a petition for disentail, and having by private arrangement obtained the consents of the next three heirs on payment of compensation for their respective interests, as ascertained by an extrajudicial valuation, he obtained a decree ordaining the trustees to convey to him in fee-simple the moneys held by them for investment in land.

The Crown thereupon claimed from the trustees legacy-duty upon the money in their hands at the end of the six years for investment in land, under the 19th section of the Act 36 Geo. III. c. 52, on the ground that A had right to the whole thereof, and had, in the sense of that section, “become entitled to an estate of inheritance in possession in the real estate to be purchased therewith.” The trustees maintained that the duty fell to be charged only on the succession which had opened to A under the will, and that as he was merely the first of a series of beneficiaries in succession, the duty should be charged on his life interest as an annuity, the proceedings by which he had acquired a right in fee-simple being transactions *inter vivos* which did not affect his succession.

Held (in *aff.* judgment of First Division) (1) that the words “shall become entitled to an estate of inheritance in possession in real estate” fell to be construed as meaning shall become entitled, if real estate is purchased, to an estate of inheritance in possession; (2) that under the entail directed to be executed A, as institute, would have had an estate of inheritance in possession; and therefore (3) that under the will, and apart from the disentail proceedings, A was liable in duty on the whole sum in terms of the proviso in section 19.

Opinions that if A had been originally liable to duty on his life interest only, he would have become liable under sec. 12 to duty on the whole money on his acquiring an absolute interest by the disentail proceedings.

Held further (*aff.* judgment of First Division) that money expended in building a mansion-house was not money expended in the purchase of real estate.

(In the Court of Session, Feb. 6, 1892, 19 R. 461, and Jan. 12, 1894, reported in the present volume, p. 348.)

Graham Macfarlane and others (Dunlop's Trustees) appealed against the judgment of 6th February 1892 and against the judgment of 12th January 1894, in so far as it disallowed the claim for exemption for the £12,000 expended in building a mansion-house.

The Crown did not appeal.

At delivering judgment,—

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Ash-
bourne.
Lord Mac-
naghten.
Lord Morris.
Lord Shand.
Lord Russell
of Killowen.

LORD CHANCELLOR.—The question raised by this appeal is whether the Crown is entitled to legacy-duty upon the residue of the estate of the testator, who died in the year 1883, having made a trust-disposition by which the income of his estate or part of it was to be accumulated for a period of six years, and then to be laid out in the purchase of land by the trustees, the land purchased being settled as soon as convenient after the expiry of the six years by the trustees executing a deed or deeds of strict entail of the lands purchased, “to and in favour of William Hamilton Dunlop and the heirs-male of his body lawfully begotten according to their seniority,” whom failing the heirs-female of his body

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lawfully begotten, whom failing to his brother Hamilton Dunlop and the heirs male and female of his body lawfully begotten, with an ultimate provision, failing those heirs, to the testator's own nearest heirs and assignees whomsoever.

The moneys forming part of the residue, the duty upon which is now claimed, had not at the time in question been applied in the purchase of land; they were still in the hands of the trustees. A residuary account was sent in by the trustees, and William Hamilton Dunlop, who would have been interested under the deed of entail if executed, took proceedings, as he was entitled to do under the Acts which enable a disentail to be effected, by which the interests of the three next heirs were to be ascertained and valued, and, subject to those interests so valued, he became entitled to the residue without the money being expended upon the purchase of land, and settled in the manner provided by the trust-disposition. There is no dispute that it was perfectly competent to William Hamilton Dunlop to take this course—that it was one which the law sanctioned, and that the effect of his having taken it was that which I have described.

The Crown claims the duty upon the whole of this residue, under the provisions of the 36th of Geo. III. c. 52, or the provisions which have been substituted for it, but which do not materially alter those enactments. The statute in the first instance imposes legacy-duty upon all legacies above a certain amount and upon all residue or share of residue which may pass to a beneficiary under a will. In the 12th clause, upon which reliance is placed by the appellants, it is provided,—“That the duty payable on . . . residue or part of residue of any personal estate” (it applies to legacies also, but as this is a case of residue, it is not necessary to refer to that part) “given to or for the benefit of or so that the same shall be enjoyed by different persons in succession who shall be chargeable with the duties hereby imposed at one and the same rate shall be charged upon and paid out of the residue or part of residue so given as in the case of a legacy to one person.” So that even where successive interests are created by the trust-disposition, if the persons entitled to those successive interests are of the same degree of consanguinity so that the duty would be payable at the same rate, the duty is to be paid out of the residue just as if there had been a bequest to one person alone.

The next part of the section deals with the case where a legacy or residue or part of residue is “given to or for the benefit of or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty so that one rate of duty cannot be immediately charged thereon.” It was to meet that particular case that a departure was permitted from that which is the principle of the Act clearly indicated by the 2d section and the earlier part of the 12th section, that where there was a bequest of residue the duty should *prima facie* be paid out of that residue on the whole sum which would pass from the trustees to the beneficiary, before distribution. In the case where different rates of duty would become chargeable there was of course a difficulty in providing for that course being adopted; and therefore where persons under such a settlement became entitled for life only or to a temporary interest, they were to be “chargeable with the duty” “in the same manner as if the annual produce had been given by way of annuity.” But the section concludes by providing that “all and every person and persons who shall become absolutely entitled to any such legacy or residue or part of residue so to be enjoyed in

succession shall when and as such person or persons respectively shall receive the same or begin to enjoy the benefit thereof be chargeable with and pay the duty for the same or such part thereof as shall be so received or of which the benefit shall be so enjoyed in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed." So that the scheme of the section was that where you could only charge in succession you were to do so ; but in that case whenever any person or persons became entitled to an absolute interest, then the duty was to be paid upon the whole sum.

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That is followed by section 19, which deals with the class of cases which this House has now to consider. It enacts,—“That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate.” That is the leading idea of the section. Then it continues,—“Unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued.” The word “unless” with which that provision commences is certainly not very happily chosen, because the enactment first being that the sum of money to be applied in the purchase of real estate shall be charged with the same duty as personal estate, the word “unless” would seem the proper mode of introducing some exception ; but the words which follow “unless” do not introduce any exception at all ; on the contrary, they provide that where the property is to be enjoyed by different persons in succession, the duty is to be paid in the same manner as if it had not been directed to be applied in the purchase of real estate. That refers to the cases dealt with by section 12.

Then the section proceeds to say,—“but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied : Provided nevertheless that in case before the same or some part thereof shall be actually so applied any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.”

It is not disputed that if the case is within the proviso which I have just read, the appeal must fail and the judgment of the Court below must be affirmed. The question is whether the residue had been actually applied in the purchase of land before the person “became entitled to an estate of inheritance in possession in the real estate to be purchased therewith.” At the time when this dispute arose the money had not been applied to the purchase of land at all, but remained as money in the hands of the trustees. It is obvious that the words “in case any person or persons shall become entitled to an estate of inheritance in possession in the real estate” cannot be literally applied, because no person can become entitled to an estate of inheritance in possession in real estate which is to be purchased in the future. It is obvious that the words need construction, and that their meaning must be, in case a person will become

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entitled if real estate is purchased, or as and when real estate is purchased, to an estate of inheritance in possession therein.

Now, was Mr William Hamilton Dunlop in the present case in that position? Supposing the land had been purchased, could he have claimed a conveyance to himself which would have vested in him an estate of inheritance in possession? Now, the land which was to be purchased was to be conveyed and settled to and in favour of William Hamilton Dunlop, and the heirs-male of his body lawfully begotten, with other provisions to which I have already called attention. Was the estate which undoubtedly would have been vested in him if the land had been so settled an estate of inheritance in possession? The words "an estate of inheritance" are, I understand, not words of art in the law of Scotland. One has to consider their meaning, therefore, without reference to any technical rule. Is a person who is instituted heir of entail the owner of or possessed of an estate of inheritance? My Lords, as far as I understand the law of Scotland, the heir of entail is the owner of the land. That land will descend to the heirs under the entail, and the limitations upon his ownership are fetters introduced for securing that the land shall descend to the heir. Under those circumstances it certainly appears to me that when one once arrives at what the position of an heir of entail is, there is no difficulty in coming to the conclusion that a person enjoying such rights and having such a title and such ownership does possess an estate of inheritance. Indeed, it seems to me difficult to define an estate of inheritance better than as an estate which does not terminate with the life of the possessor, but which passes to his heirs. It is quite clear that a tenant in tail in England according to the English law is possessed of an estate of inheritance; and it is equally clear that the position of an heir of entail in Scotland and that of a tenant in tail in England do not, for any practical purposes in view of the question of their possessing an estate of inheritance, differ in quality the one from the other. I do not of course mean to say that the rights of a tenant in tail in England and of an heir of entail in Scotland are precisely the same; they are not; but in considering whether it should be said of the one as of the other that he possesses an estate of inheritance, it seems to me that every reason which makes that language appropriate in the one case makes it appropriate in the other. For myself, therefore, I own it seems to me that, quite apart from the disentailing proceedings effected by Mr William Hamilton Dunlop, his case comes within the proviso, and that the intention of the proviso was to meet such a case, and that where a person under a trust-disposition would have taken such an estate if the land had been purchased as Mr Dunlop would have taken in the present case, he should be treated for the purposes of the legacy-duty as the absolute owner just as much as if the bequest had been made to him absolutely.

That really is sufficient to dispose of the present case. But even if that view were not well founded, I should not be satisfied by the arguments of the learned counsel for the appellants that they would be entitled to judgment. The effect of the statutes in reference to disentailing is to enable the first heir of entail to have the interest or expectancies of the three next heirs, in circumstances such as the present, valued, and to insist that, instead of the entail continuing and instead of the land being purchased and settled in the manner prescribed, they according to their several interests shall have paid over to them or be entitled to enjoy the money which was destined by the testator to be laid out in land. Where such a disentail has taken place it is obvious that all succession or idea

of succession is at an end. The money in the hands of the trustees is no longer to be settled; there is no longer to be a succession of interests, or any land to be purchased; there will be an absolute title to have that money handed over free of restriction. How under those circumstances ought it to be dealt with for the purposes of legacy-duty? My Lords, it is not necessary to express any opinion upon that after the view which I have invited your Lordships to take upon the effect of the proviso; but I own it seems to me that there is no difficulty in such a case in applying the language of the 12th section of the Act or, if that be inappropriate, even of the 2d section of the Act, which is the charging section. If it is not a case of succession at all, then the 2d section applies. The 12th section only comes in where successive interests have been created and have to be dealt with. Of course, if section 2 applies, or that which is now substituted for it, there is an end of the case. If section 12 applies, then under the earlier part of the section the case does not differ. The whole argument has been based upon the suggestion that the case is one of successive interests within the second part of section 12, and that therefore all that Mr William Hamilton Dunlop ought to do is to pay upon the basis of his having a life interest. But, my Lords, all those successions, whatever they were, which were intended to be created by the testamentary disposition were created subject to the law relating to entail; they were created subject to a statutory power of sweeping them away, and the result of their being swept away, is that there are now no successive interests which can be charged, but that there are absolute interests, and absolute interests only, in the money. I certainly have no difficulty in applying to those circumstances the language at the end of section 12, which provides that although there were to be successive interests, yet whenever the successive interests come to an end, and there is an absolute title in some person or persons, then the duty shall be paid in the manner provided at the end of that section. It is not, however, necessary to come absolutely to any determination upon that point, because the case is really concluded against the appellants by the view which I first presented to your Lordships.

Your Lordships in the course of the argument indicated somewhat clearly that the other point taken by the appellants was wholly untenable, the question being whether money which was expended in building a house upon land can be treated as coming under the words "purchase of real estate." It seems to me that notwithstanding the argument used for the purpose of shewing that the result is the same as if the land with the house on it had been purchased, and that it is hard that the incidence of the tax should be different, it must be remembered that in construing a taxing statute such as this your Lordships have to be guided by the words used, and it would be doing them violence almost amounting to an outrage if the words were held to cover such a case as that under consideration.

I therefore move that the interlocutors appealed from be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—Whatever view be taken of this case, whether it be regarded as one in which nothing ought to be looked at except the terms of the trust-deed of the late Mr Dunlop, or whether it be assumed that the fact of the disentail with all its consequences ought to be taken into account, the result to the appellant appears to me to be precisely the same.

With regard to the first of these views, I entertain the opinion that according

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to Scotch law the expression "estate of inheritance" occurring in the proviso to the 19th section of the Act of 36 Geo. III. ought to be construed as including the right and interest of a Scotch heir of entail in possession. The words are not technical, but they appear to me very aptly to describe that right and interest. A Scotch heir of entail in possession is vested with the full fee of the land. He is the only person who can have the slightest pretence to the position of owner; and the sole object of the restrictions, imposed upon him as taillied fiar, is to protect and strengthen the right of inheritance which is created by the deed of entail, and to make the estate descend in succession to those heirs who are called by the terms of the destination.

But, my Lords, this is a taxing statute, applicable equally to real estate in Scotland and in England; and, following the principles which were laid down by the noble and learned Lords who decided *Lord Saltoun v. Her Majesty's Advocate-General*,¹ it is clear that if the interest of an heir of entail can by any fair interpretation be brought within the words "estate of inheritance," it ought to be so brought. I need hardly repeat that in England the interest of a tenant in tail, which bears, I will not say a close, but a fair analogy to the interest of an heir of entail in Scotland, would clearly fall within the sweep of the Act. According to that view Mr Dunlop, before he presented the petition of disentail, was within the predicament of the proviso, and was liable to be assessed simply as if he had been a legatee. I have had some difficulty in making up my mind whether that is the right ground upon which to rest the decision of this case, or whether the alternative view which has been presented is the right one. If the disentail is to be taken into account that must be upon the footing that the Legislature has by the provisions of the Entail Acts altered and modified the meaning and effect of such a direction to invest and entail as occurs in the settlement of the late Mr Dunlop. In that view, the result of entail legislation, beginning in 1848 and terminating in the year 1882, has been to prescribe that a direction in these terms shall, in the circumstances which have occurred in the present case, not operate according to its precise terms, but as an absolute bequest to the institute of entail and to certain other of the heirs. It seems to me to be very immaterial whether the case falls under the proviso or condition in the end of section 12 of the statute or under the general taxing words of the Act as a direct bequest of residue to these persons.

I have only to say in addition that the Court of Session appear to have erred in assuming that if the last view be the correct one the case would be within the proviso at the end of section 19. I do not think that that is so; I think the proviso at the end of section 19 is confined to the case where the money is not to be paid over but is to be invested by the trustees, and land is to be conveyed to the beneficiaries indicated in the deed. I am bound to say, however, that the error has been mainly, if not wholly induced, by the form in which the Crown chose to present its case for the consideration of the Court.

LORD ASHBOURNE concurred.

LORD MACNAGHTEN.—I agree. Putting aside the disentailing proceedings and the rights flowing therefrom, I think this case clearly falls under section 19 of the 36th of George III. I think the words in the proviso at the end of that section, though not framed in the technical language of the Scotch law, describe the

¹ H. L., July 7, 1860, 3 Macq. 659, 32 Scot. Jur. 641, Paters. Ap. 970.

actual position of William Hamilton Dunlop, as institute of the entail created under the testator's trust-disposition, as aptly and as accurately as they would describe the position of a tenant in tail in possession in England.

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LORD MORRIS concurred.

LORD SHAND.—I also concur, and I am of opinion with your Lordships that this decision should be affirmed upon the grounds stated by my noble and learned friend the Lord Chancellor and my noble and learned friend opposite (Lord Watson). I desire to add, however, that I am not satisfied that the judgment of the learned Judges in the Court of Session, rested as it is upon the proviso in section 19, is not sound and sufficient for the decision of the case.

LORD RUSSELL OF KILLOWEN concurred.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

GRAHAMER, CURREY, & SPENS—J. & F. ANDERSON, W.S.—Sir W. H. MELVILL, Solicitor of Inland Revenue for England—P. J. H. GRIERSON, Solicitor of Inland Revenue for Scotland.

JOHN ANDREW HAMILTON (Defender), Appellant.—*Moulton, Q.C.*—*C. K. Mackenzie.*

No. 7.

DAVID RITCHIE AND ANOTHER (Watson's Trustees) (Pursuers), Respondents.—*Murray, Q.C.*—*Butcher.*

June 4, 1894.
Hamilton v.
Ritchie.

Succession—Vesting—Substitution.—A testator by holograph settlement left the liferent of his whole estates, heritable and moveable, to his widow. He then disposed of the fee of his estates, and, *inter alia*, provided, "I leave to my nephew J. F. W. my estate of B, but I wish it expressly understood that in the event of my said nephew dying without leaving any lawful heir-male of his body, then and in that event my said lands of B are to revert back to my nephew J. H."

J. F. W. survived the testator, but predeceased the testator's widow unmarried, and was survived by J. H. J. F. W. left a general trust-disposition and settlement of his whole estate, heritable and moveable.

In a question between J. F. W.'s trustees and J. H., *held (aff. judgment of the Second Division)* that the fee of the lands of B vested in J. F. W. at the testator's death, with a simple substitution in favour of J. H., in the event of J. F. W. dying without leaving an heir-male of his body, and that the substitution had been evacuated by J. F. W.'s general disposition.

(In the Court of Session, Jan. 31, 1894, reported in the present volume p. 451.)

The defender appealed.

Lord Watson.
Lord Ash-
bourne.
Lord Mac-
naghten.

LORD WATSON.—This appeal raises a question upon the construction of a clause in the settlement of the late Mr Walter Whyte of Bankhead. The general scheme of that instrument is that Mr Whyte, upon his death, which occurred in 1873, gave the liferent of his entire estate, heritable and moveable, to Mrs Margaret Pollok or Whyte, his spouse, who survived him. The interest of the widow was burdened by an annuity of £300 in favour of Mrs Hamilton, one of the testator's sisters. After that bequest he provides that on the death of his wife the annuity to Mrs Hamilton is to cease, and that in lieu of that annuity she is to take a liferent of two properties which are destined, one to her son John, the appellant in this case, and the other to her son James

Lord Morris.
Lord Shand.
Lord Russell
of Killowen.

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Hamilton in fee. I do not think it has been seriously disputed that the fee which is destined to the two Hamiltons vested in them *a morte testatoris*.

Then follows the clause which we have to construe. That, again, is followed by a direction that at the death of his widow his moveable estate shall be equally divided between the families of his two sisters, Mrs Watson and Mrs Hamilton.

The clause which has given rise to the present litigation is in these terms,—
“I also leave to my nephew James Francis Watson, presently residing at Ardmore House, in the parish of Cardross, Dumbartonshire, my estate of Bankhead, situated in the parish of Rutherglen and county of Lanark ; but I wish it expressly understood that in the event of my said nephew James Francis Watson dying without leaving any lawful male heir of his body, then, and in that event, my said lands of Bankhead are to revert back to my said nephew John Hamilton.”

The circumstances which have occurred are these : James Francis Watson survived the testator, but predeceased his widow, and when the widow's life-rent came to an end by her decease, the estate of Bankhead was claimed by the present appellant, upon the footing that James Francis Watson's predecease of the widow prevented him from taking any interest whatever in the succession, and also that these words “then, and in that event, my said lands of Bankhead are to revert back to my said nephew John Hamilton,” ought to be read not as a clause of reversion intended to bring back an estate which had been taken during his lifetime by James Francis Watson, but as being intended to operate as a simple gift over upon the widow's death in the event of Watson having predeceased that term.

When the clause is taken by itself, nothing can be clearer to my mind than the intention of the testator. I do not say that a testator who writes his own will, and is not a lawyer, is in all cases to be held to have rightly apprehended the meaning of technical words which he may have used on the occasion of making his will ; but I think it is plain that a testator who uses words which have an intelligible conventional meaning is not to be held as having used the words with any other meaning, unless the context of the instrument shews that he intended to do so.

In this case nothing can be more simple than this clause of the will. It commences with an unqualified bequest, making no reference to the time at which it is to operate, of the estate of Bankhead in favour of Watson. I need hardly say that where such a bequest occurs it must take effect *a morte testatoris*, except in one or the other of these two cases—namely, where to give effect to it from that date would disturb any of the provisions already made in the will, or where the testator has clearly indicated, either by express words or by plain implication, that he did not intend it to operate until a later period—here the death of the widow.

Then, so far as regards the condition attached, introduced by the words, “I wish it expressly understood,” they refer to one period, and one period only—the death of Watson ; and upon his death, without mention of any other death or any other event which is to be taken into computation along with it, there is a provision that the property shall revert. I need not say that, in the absence of any context to control the meaning of these words, “revert back,” they plainly point to the case where, a beneficiary having taken under the will, the estate which he took is not to descend to his heir-at-law, or to a person ap-

pointed by his will, but is to go back to some person favoured by the testator. No. 7.
Accordingly, in order to give the meaning to this clause which is requisite if
the appellant is to succeed, I find from the very able and elaborate arguments June 4, 1894.
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Ritchie.
which have been addressed to us by the learned counsel on his behalf, that it is
absolutely necessary, in the first place, to discharge from the clause the ordinary
meaning of some of the words which it employs; and, in the second place, to
introduce into the clause words which are not to be found in it, and are not
connected with it by reference to other parts of the deed. The gloss which
they desire to put upon it, according to one of several constructions more or
less plausible which they suggest, is, "I also leave to my nephew James
Francis Watson, at the death of my widow, my estate of Bankhead; but I wish
it expressly understood that, in the event of my said nephew James Francis
Watson dying during the life of my widow without leaving any lawful male
heir of his body"; and when you come to the latter part of the clause, you
are required to do this violence to the text, that instead of making the estate
go back from one who has taken it already, it is to go to a conditional institute
because the institute has failed to take.

These are very considerable alterations. I do not intend to refer to any other
of the theories put forward, but they appear to me conclusively to shew that it
is impossible to adopt the construction which has been suggested by the appel-
lant, without doing extreme violence, in the first place, to the meaning of some
words in the text; and, in the second place, by bringing in words from outside
the instrument which are not to be found within it. After giving the liferent
of the entirety of his estate to his widow, the testator declares, "at the death
of my wife said annuity to cease." It is perfectly plain that these words are
introduced into that part of the text of the will for the purpose of indicating
the time at which Mrs Hamilton's annuity, chargeable upon the widow's life-
rent, is to cease, and her new right as a liferenter of the lands which are given
in fee to her sons is to begin. I cannot for a moment suppose that those words
were intended to apply to all the subsequent clauses of the deed. I find that the
remaining bequests are stated as distinct and substantive gifts, entirely inde-
pendent of that reference to time as affecting the annuity of Mrs Hamilton.
And then, when he has concluded this destination of the estate of Bankhead
to James Francis Watson, the testator proceeds to deal with the division of his
moveable estate, and it being necessary to specify a time, he again introduces
the words "at the death of my said wife my moveable estate is to be equally
divided."

Various theories of construction have been discussed, some of them not very
much akin to the question which we have to decide in the present case. I think
that the whole substance of the grounds upon which I am prepared to recom-
mend your Lordships to affirm the judgment appealed from is to be found in a
single sentence of Lord Rutherford Clark's opinion,—“I think that it came into
operation from the testator's death; there is no other time assigned.”

I do not think it necessary to trouble your Lordships with any reference to
that class of cases of which one of the most recent is *Glendonwyn v. Gordon*.¹
It refers to a rule of the law of Scotland to the effect that a general conveyance
is not in all cases held to carry estates settled by special destination. But the

¹ Law Rep. May 19, 1873, 2 H. L., Sc. Ap. 317, 11 Macph. H. L. 33, 45
Scot. Jur. 183.

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rule goes no further than this, that a general disposition will presumably carry all lands previously settled under a special destination which the truster or testator has power to dispose of. In order to deprive his general disposition of that effect it is the duty of the litigant who says that the special destination has not been defeated to shew to the satisfaction of the Court, either by the terms of the testator's settlement or by other documents to which it is legally competent to refer, that it was not the intention of the testator to disturb the standing investiture.

I move that the interlocutors appealed from be affirmed, and the appeal dismissed, with costs.

The Lord Chancellor has requested me to state that he agrees with the conclusion at which your Lordships have arrived.

LORD ASHBOURNE, LORD MACNAGHTEN, and LORD MORRIS concurred.

LORD SHAND.—I am also of the same opinion, and I venture only to add a few words in confirmation of what has fallen from my noble and learned friend (Lord Watson). The practical question in the case is whether under the testator's settlement vesting took place *a morte testatoris* or was postponed until the death of the liferentrix. In the former case the only question that would remain is whether the property having so vested has been carried by the general trust-disposition and settlement of Mr James Francis Watson. If there was no vesting until the death of the liferentrix, confessedly the appeal must succeed.

Now, on the question of vesting, I have to observe in the first place that there is no trust here created. Though we have not technical words of conveyance, such as the word "dispone," or any word to that effect, there is a word, "leave," which is sufficient to convey the right; so that the will, in the words of Lord Rutherford Clark, was "a conveyance or equal to a conveyance." Then it is quite settled that the mere existence of a liferent, or a direction that annuities shall be paid by a liferenter, has not the effect of suspending vesting: And finally there is no specification of any time in this deed other than the death of the testator as the period of vesting.

I think that there are further circumstances which confirm the general view of the deed now stated. There are several properties here dealt with. It is admitted that in the case of John Hamilton, one nephew to whom certain lands are conveyed, subject to the widow's liferent, the vesting is *a morte testatoris*. It is conceded that in the case of another nephew, James Hamilton, to whom other lands were conveyed, there was vesting *a morte testatoris*. There is every presumption that the same result should follow in the case of the third nephew, and indeed it is admitted that were it not for a few words beginning with the clause "but I wish it expressly understood," and so on, it is clear that there would have been vesting *a morte testatoris* in the case of James Francis Watson also.

I am unable to gather from the clause which has been founded upon that there was any suspension of vesting so long as the liferent subsisted. As my noble and learned friend has pointed out, it is necessary to insert words in the deed in order to give it the effect which is contended for by the appellant. The words are, "I wish it expressly understood that in the event of my said nephew James Francis Watson dying without leaving any lawful male heir of his body." These words would naturally mean dying at any time without leaving

any lawful male heir of his body, in which case this would be, as I think it is, simply the provision of a substitution. In order to give them any other effect you must add, "in the event of my said nephew James Francis Watson dying during the lifetime of the liferentrix." There are no such words there, and I see no warrant for inserting such words. No. 7.
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But the remaining part of the clause seems to me, as it does to my noble and learned friend, to throw much light also upon this question of vesting, if anything further were needed, because that is a clause of reversion of the property—a declaration "that in the event of James Francis Watson dying without leaving any lawful male heir of his body the lands of Bankhead are to revert back." The conception of that clause is that the lands had first vested in James Francis Watson, and that from him they were to revert or descend to someone else. That, I need not say, is a strong confirmation of the view which I think is to be found generally throughout the deed as a whole, that the vesting was to be a *morte testatoris*. It is no doubt true, as was observed by Lord Young, that the testator contemplated a distribution of his personal estate on the death of the liferentrix; but, with great deference to his Lordship's opinion, I do not think that any further distribution of the heritable estate was provided for beyond that which occurs in the ordinary case of a liferenter and fiars, in which case the liferenter's right is merely a burden on the fee, though the fiars' right to a beneficial possession arises only on the liferenter's death.

With regard to the second branch of the case, I agree with what has been said by my noble and learned friend (Lord Watson) as to the effect of the trust-disposition and settlement of James Francis Watson, the general terms of which were clearly sufficient to convey the lands now in question.

LORD RUSSELL OF KILLOWEN concurred.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

GRAHAMES, CURREY, & SPENS—CAMPBELL & SMITH, S.S.C.—ANDREW BEVERIDGE—WEBSTER, WILL, & RITCHIE, S.S.C.

GEORGE PALMER (Defender), Appellant.—*Sir R. Webster, Q.C.—Shaw.* No. 8.
WICK AND PULTENEYTOWN STEAM SHIPPING COMPANY, LIMITED (Pursuers),
Respondents.—*Sol.-Gen. Asher—T. F. Dawson Miller.*

Reparation—Contribution between wrongdoers—Assignment to one of two wrongdoers of joint and several decree against both.—The widow of a man who had been killed by the breaking down of the tackle used in discharging a ship's cargo raised an action against the shipowner and the stevedore who was using the tackle at the time of the accident for damages, the fault alleged against the former being that his tackle was unfit for the work, and that alleged against the latter being that he had recklessly overloaded the tackle. The pursuer obtained decree against both the shipowner and the stevedore, jointly and severally for a sum of damages and expenses. Thereafter she gave the shipowner a charge for payment of the whole sum. He paid it and obtained from her an assignment to the sum of damages and expenses, and to the decree. He then raised an action against the stevedore for payment of half that sum. The stevedore pleaded in defence that the action was incompetent and irrelevant, in respect that there is no contribution between wrongdoers. June 5, 1894.
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Held (aff. judgment of the Second Division) that the shipowner was entitled to recover half of the damages and expenses from the stevedore, because he was in right of the decree against the latter; and that the rule that there is no contribution between wrongdoers was inapplicable.

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(IN the Court of Session, 24th January 1893, 20 R. 275.)

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ping Co.,
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The defender appealed.

The case was heard in November 1893.

At delivering judgment,—

Ld. Chancellor
(Herschell).
Lord Watson.
Ld. Halsbury.
Lord Shand.

LORD CHANCELLOR.—The question raised in this case is a somewhat novel one. On the 17th of March 1892, in two conjoined actions, in which Mrs Fowlis and others were pursuers, and the present appellant and respondents were the defenders, the Court of Session decreed and ordained the defenders jointly and severally to make payment of sums amounting to £600. On the 24th of May 1892, a similar decree was made as regards the sum of £239, 4s. 1d., the pursuers' costs of the action. The pursuers, as they were entitled to do, sought payment of the entire sum of £839, 4s. 1d. from the present respondents, who were by the decrees made severally as well as jointly liable. The respondents paid the entire amount, but took from the pursuers an assignation of the judgment, and of the moneys thereby secured. The respondents thereupon commenced an action to recover one half of the amount so paid by them from the appellant. This action the appellant maintained was incompetent on the ground that there is no contribution between wrongdoers, that the judgment had been satisfied, and that the assignation of it to the respondents was ineffectual to confer on them any right to recover in this action.

The first of the two conjoined actions was instituted by Mrs Fowlis on behalf of herself and some of her children, and by others of her children, who were majors, against the respondents, to recover damages for the loss of her husband and the father of the children, whose death was alleged to have been due to the negligence of the defenders. His death was occasioned by the fall of a part of the tackle which was being used in the discharge of a vessel belonging to the defenders. They denied the negligence imputed to them, and alleged that if there had been any negligence it was that of the appellant, a stevedore employed to discharge the ship. The pursuers thereupon brought an action against him also, and the two actions were by order conjoined. The jury found negligence on the part of both the defenders. The decree of the 17th of March, to which allusion has already been made, was the decree applying this verdict. The decree of the 24th of May related to the costs.

My Lords, we have before us in the present action only the pleadings and verdict in the conjoined actions. It is at least consistent with these that the jury may have found their verdict of negligence against the shipping company, not on the ground of any personal default on the part of the company or its managers, but by reason of some negligence imputable to the master of the vessel. It is important to bear this in mind.

The learned counsel for the appellant did not contest the proposition that in general, where one of two co-obligants discharges the entire debt, he is entitled, unless there be some equity to the contrary, to call for an assignation of it, and to use such assignation for the purpose of enforcing payment of the share of his co-obligant. It is no answer to such an action to say that the whole of the debt has been discharged, and that there was, therefore, nothing to assign. There can be no doubt that the decrees of the 17th of March and 24th of May created joint and several debts. Why, then, should a co-debtor, who has paid the entire sum due, and received an assignation (it is unnecessary to inquire whether he could have demanded it), when he seeks to recover the share of his co-debtor, be subject more than other co-obligants to the answer that,

the entire debt having been discharged, nothing remains due on the judgment, and that it can, therefore, no longer be proceeded on! The only answer, as it seems to me, must be that the joint debt resulted from a joint wrong, and that the law will not permit or assist any wrongdoer to recover contribution from another. It will be observed, however, that this is to allow the defender to set up his own wrong by way of answer, for the pursuer makes out a *prima facie* case by the production of the judgment and assignation. He has no need to rely on the joint wrong, or to go behind the judgment and assignation. On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share; or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong. Suppose a settlement were arrived at before the case was tried, and the wrongdoers gave a joint and several bond in discharge of the pursuer's claim, can it be doubted that, if one of them were forced to pay the whole, he could recover from the other his share? Why should the case be different where the issue is a decree that they shall jointly and severally pay? The learned Judges in the Inner-House, differing from the Lord Ordinary, have decided in favour of the pursuers in the present action. I am not disposed to dissent from their conclusion unless it can be clearly shewn to be contrary to the established law of Scotland.

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There is certainly no express decision on the point. The appellant relied mainly on a *dictum* of Baron Hume. That learned Judge said,—“It is all *num negotium* in regard to those who are so far engaged in the wrong as to be liable for the consequences; and there is no principle here, as in the case of cautioners binding for the same debt, on which to imply any tacit agreement among them for mutual relief or division of the loss. Nor is the law at all inclined to distribute the damages out of tenderness to the delinquents.” The observation that there was no right to mutual relief was not in any way necessary to the decision. It was a mere *dictum*. On the other hand, Lord Bankton and Lord Kames have both indicated views favouring the right to relief by a person bound *ex delicto* against his co-obligant.

It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of quasi-delict a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion, which I gather my noble and learned friend Lord Watson holds, that such a right may exist. In circumstances such as those with which your Lordships have to deal, I cannot but think that equity and justice are in favour of the conclusion arrived at by the Inner-House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it.

Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather v. Nixan*.¹ The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre,

¹ 1799, 8 Dur. and East 186.

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and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson v. Jarvis*,¹ Best, C.J., in delivering the judgment of the Court, referred to the case of *Philips v. Biggs*,² which he said was never decided; "but the Court of Chancery seemed to consider the case of two Sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." He then proceeded as follows:—"From the inclination of the Court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather v. Nixan*,³ and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that now under consideration.

For these reasons I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—The respondent company are owners of the steamship "Fergus," which, in April 1891, carried a cargo of pig-iron from Middlesborough to Grangemouth, where it was discharged by the appellant. In the course of that operation, David Fowles, one of the workmen in his employment, was killed by the fall of a block, which formed part of the ship's tackle used in unloading.

The family of the deceased brought an action of damages against the company, in which, besides alleging that the ship's tackle was of slighter make than is usually employed in vessels built for carrying pig-iron, they attributed the fall of the block to the defects of an iron hook to which it was attached. They raised a second action of damages against the appellant, in which they repeated some of these averments, and further alleged that it was the obvious duty of the appellant either to reject the tackle or to use it with great caution; and that, in breach of such duty, he recklessly subjected the tackle to severe and unnecessary strains, by putting loads upon it which would have been sufficiently heavy for tackle made for the express purpose of unloading pig-iron.

The cases were sent to trial together, when the jury found against each of the defenders, that the fall of the block, and its fatal consequences, were due to their fault, and they assessed the total damage sustained by the pursuers at £600. There is certainly room for speculation as to the process of reasoning by which the jury arrived at that double result, but I can find nothing in their verdict, or in the record from which the issue was taken, which can be held to impute personal fault to the company or its directors, in the sense that they knew of any flaw in the tackle of the "Fergus," or were affected by any other knowledge which could make them conscious wrongdoers.

The Court applied the verdict, by decerning against the parties to the present appeal, jointly and severally, for the full amount of the damages fixed by the

¹ 1827, 4 Bing. 66.

² Hardres, 164.

³ 8 Dur. and East, 186.

jury, and found the pursuers entitled to expenses in both actions. These were subsequently taxed at £239, 4s. 1d., for which sum also the pursuers obtained a joint and several decree. They extracted both decrees, and gave a charge to the respondent company, who paid their demands in full, and took an assignment to the decrees. The appellant having declined to relieve them of any part of the sums thus paid by them, the company brought this action, in which they ask decree against him for a moiety of these sums. The Lord Ordinary (Wallwood) dismissed the action, on the ground that the company, being joint wrongdoers with the appellant, had no claim of relief. Their Lordships of the Second Division unanimously recalled his judgment, and gave the company decree as craved.

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At the bar of the House the appellant mainly relied on the proposition, which he endeavoured to establish by authority, that, by the law of Scotland, there can be no right of contribution among persons who are jointly responsible for the civil consequences of any delict or quasi-delict. Delicts proper embrace all breaches of the law which expose their perpetrator to criminal punishment. The term quasi-delict is generally applied to any violation of the common or statute law which does not infer criminal consequences, and does not consist in the breach of any contract, express or implied. Cases may and do often occur in which it is exceedingly difficult to draw the line between delicts and quasi-delicts. The latter class, as it has been developed in the course of the present century, covers a great variety of acts and omissions, ranging from deliberate breaches of the law, closely bordering upon crime, to breaches comparatively venial and involving no moral delinquency.

In considering the authorities which were cited on both sides of the bar, as bearing more or less directly upon the present case, it is necessary to distinguish between these two points,—(1) the right of the party injured to select any one or more of the co-delinquents, and to exact full reparation from him or them, without making the rest parties to the suit; and (2) the right, if any, of the co-delinquent who pays to recover a contribution from those persons who were under the same responsibility as himself.

In the case of delicts proper, the first of these points has been established in the law of Scotland from a very early period. Before, and for a considerable time after Lord Stair wrote, the Court of Session was very familiar with claims of reparation for manslaughter, spulzie, and other grave delinquencies, whilst claims of damage in respect of breach of duty by persons in a position of trust and in respect of the negligence of servants, which in recent years have occupied so much of its time, were practically unknown. The result is that the early text-books refer almost exclusively to delicts proper. But the same rule of procedure has been extended to claims arising *ex quasi delicto*; and a recent instance of its application is to be found in *Croskery v. Hendrie and Others*,¹ a case to which I shall have occasion to refer hereafter. The enforcement of the rule in all cases falling within the wide category of quasi-delict has led to consequences which, in my opinion, are inconvenient, if not absurd. Thus, if a body of private trustees commit a wilful breach of directions given by the trustor to the great detriment of the trust-estate, all its members must be made parties to any suit for reparation, because they are held, in that case, to be liable *ex contractu*, whereas if the same body commit a comparatively venial

¹ 17 R. 697.

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breach of duty in violation of the general law regulating trust administration, any member may be sued for the whole loss resulting because he has been guilty of a quasi-deliict.

The second point, which is of crucial importance in this case, has never been the subject of judicial decision, and the authorities which have any direct bearing upon it are somewhat conflicting.

Lord Bankton and Lord Kames both affirm, in the widest terms, that a right of relief *inter se* is competent to all persons concerned in and responsible for the civil consequences of the same deliict—a rule which must apply *a fortiori* in the case of quasi-deliicts. Lord Bankton, after referring to the rule that each co-delinquent is liable, and may be separately sued for the whole, goes on to say i. 10, 4):—"Yet payment and reparation by one liberates the rest, and in equity he ought to have relief against them proportionably, since by his money they are freed from the obligation." In his treatise upon the Principles of Equity, Lord Kames adopts the same doctrine. He discusses (edit. 1800, p. 89) the principle of mutual relief between co-cautioners, and points out that the same principles are equally applicable to *correi debendi*, adding,—“And it makes no difference whether the *correi debendi* be bound for a civil debt, or be bound *ex delicto*, for in both cases equally it is the duty of the creditor to act impartially, and in both cases equally equity requires impartiality.”

Baron Hume, in commenting upon *Smith v. O'Reilly and Others*,¹ expresses a different view. That case raised no question of relief. A band of young men acting in concert had broken a number of street lamps. They were brought before the Sheriff upon a complaint by the contractor to whom the lamps belonged, with concurrence of the fiscal, and were found jointly and severally liable in a fine of £5 payable to the fiscal, and in £30 of compensation to the private prosecutor. In so far as it related to the fine the Sheriff's decree was plainly erroneous, because conjunct and several liability is unknown to the criminal law. The cause was carried by the accused to the Court of Session, where a fine of £1, 5s. each was substituted for the penalty awarded by the Sheriff, and the compensation reduced to £20. No objection was taken except to the *quantum* of the decree for damages. In the course of his remarks the learned Baron says,—“It is all *unum negotium* in regard to those who are so far engaged in the wrong as to be liable for the consequences; and there is no principle here, as in the case of cautioners binding for the same debt, on which to imply any tacit agreement among them for mutual relief or division of the loss. Nor is the law at all inclined to distribute the damages out of tenderness to the delinquents. On the contrary, what the law mainly considers on such occasions is, the convenience of the injured party, that he may recover his damages as speedily and certainly, and with as little trouble and expense as may be.” It is possible that the observations of the learned Baron were directed to the form of the decree which the Judge ought to give to the party injured, when, as in that case, all the delinquents are sued for reparation. If he obtains a joint and several decree against them all, it can in nowise obstruct his convenience in recovering that the delinquent who pays him should have relief from the rest.

I do not think it necessary to cite in detail the passages in Lord Stair's Institutions (i. 9, 5), which were relied on by both parties. They deal with the

¹ Feb. 13, 1800, Hume's Dec. 605.

question whether one co-delinquent can be sued for the whole, which his Lordship states to be not clear in equity, though settled by positive law ; and such expressions as might be held to refer to the right of relief are, in my opinion, susceptible of different constructions. It is, however, material to note that Lord Stair expressly limits the operation of the rule to those persons who have either taken an active share in committing the delict, or who knowingly sanctioned its commission. Mr Erskine (iii. 1, 15), after stating the rule of procedure, says,—“ As soon as the damage is repaired or made up to the party hurt by any of them, the obligation is extinguished as to the rest ; for an obligation founded upon damage cannot possibly continue after the damage ceaseth to exist.” That is certainly true, in so far as the injured party is concerned. His claim is “ founded upon damage ” ; the claim of relief rests not upon any injury sustained by the claimant but upon the fact, as Lord Bankton puts it, that by the use of his money the rest have been freed from their obligation—a circumstance which, in ordinary cases, is sufficient, according to the law of Scotland, to raise a right of relief.

Nor do I consider it necessary to refer in detail to the observations made by the late Lord President (then Lord Justice-Clerk) in *Liquidators of Western Bank v. Douglas and Others*.¹ That was an action against directors based on gross and wilful malversation and on gross habitual and total neglect of duty, in which all were participant ; and, alternatively, on fraudulent concealment, or fraudulent misrepresentation, or gross negligence, in which all of them were implicated. Some of these allegations, if proved, would have amounted to delict. The defenders pleaded that the action could not proceed until an official of the bank, who appeared on the face of the record to be a co-delinquent, was called as a party. The Court rejected the plea upon the ground that the action was founded upon delict or quasi-delict. The observations of the Lord President, upon which the appellant relied, do not appear to me to carry the doctrine beyond that limit ; and it is necessary to notice in connection with them the views expressed by the learned Judge at a subsequent stage of the same case, in *Liquidators of Western Bank v. Bairds*.² His Lordship said,—“ In an ordinary action brought against trustees or managers, or mandatories acting under authority from others, where liability is sought to be enforced simply on the ground of gross neglect or omission, it may be fairly questioned whether all the parties implicated ought not to be called, so that, although liable, it may be, conjunctly and severally, they may yet *inter se* be entitled to relief. The effect of gross neglect may be to deprive trustees of the protection expressly conferred by the trust-deed, or, as in this case, by contract, against liability for omission or for each other. But it does not follow that their liability on that ground, although each may be subjected *in solidum* for loss caused by the gross neglect of all, is of such a nature as to deprive the trustee who is made liable of his relief against co-trustees equally culpable with himself.” These remarks appear to me to indicate that, in the opinion of the learned Judge, the rule of procedure applicable to delicts had in the case of some quasi-delicts been carried beyond equitable limits, and also that the nature of a quasi-delict may be such that one co-delinquent upon whom liability has been fixed may have relief against the rest.

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¹ Jan. 27, 1860, 22 D. at p. 475, *et seq.*

² March 20, 1862, 24 D. at pp. 911, 912, 34 Scot. Jur. 435.

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An opinion to the same effect was expressed by my noble and learned friend Lord Shand in the subsequent case of *Croskery v. Hendrie and Others*¹ already referred to. The action was one of damages against trustees, and was held by the Court to be founded, not upon contract, but upon quasi-delict. In repelling the plea that all the co-delinquents had not been called as defenders Lord Shand said,—“If I thought that by so holding we were prejudicing the question whether, when one of the trustees has been found liable for a breach of trust duty, and there has been no fraud, he could claim a contribution from those who have not been called, but who were also parties to the acts of negligence or violation of duty which created the liability to the beneficiaries, it might have been different. But when a pursuer has reasons for selecting one defender rather than another, there can be no prejudice suffered, as amongst the trustees themselves, in the subsequent question whether those who have not been called, but who were, it may be, equally to blame, must bear a share of the loss to the estate.”

From these authorities, which are to some extent conflicting and in other respects are not so definite as one could wish, I think the following conclusions may be derived: They are at variance in so far as they directly relate to the existence or non-existence of a right of relief among those persons who have incurred civil liability by acting together in the perpetration of an offence against the criminal law. But it does not appear to me that the *dicta* of those writers who negative the existence of such a right can be held to contemplate every case of quasi-delict, whatever be its nature. They *prima facie* refer to proper delicts, and might *ex paritate rationis* be extended to every quasi-delict which, according to the phraseology of Scotch law, *sapit naturam delicti*; but they cannot, in my opinion, be fairly read as referring to quasi-delicts which involve no moral offence on the part of the delinquent. The opinions expressed by Lord President Inglis, and more recently by Lord Shand, point strongly to that interpretation. These opinions refer, no doubt, to persons who in their trust capacity have been guilty of acts or omissions injurious to the state under their charge and amounting to quasi-delict; but it is obvious that the exception which they suggest cannot be founded on the circumstance that the co-delinquents were trustees, but must rest on the principle that a right of relief exists and is available to a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency.

I do not find it necessary for the purposes of this appeal to determine whether and how far the doctrine of Bankton and Kames, or that laid down by Baron Hume, ought to be accepted. I have already indicated my opinion that the circumstances of this case bring the respondent company within the scope of the principle just stated, which I do not hesitate to affirm upon its own merits, whether it be regarded as an exception from the general rule or not. There is weighty and recent authority in its favour, there is no tangible authority against it, and it appears to me to be founded on substantial considerations of equity.

Owing to the novelty of the questions which it involves, I have been led to discuss this branch of the case with, it may be, unnecessary detail. But I desire also to rest my decision upon another and in some respects a broader ground, which is very shortly and forcibly stated in the judgment of Lord Rutherford Clark. This is not an action brought by one delinquent against

¹ 17 R. 697.

whom decree has passed in order to obtain contribution from his co-delinquent who has not been sued. The respondent company do not require to allege and prove either delict or quasi-delict as the foundation of their claim, which rests upon a decree constituting a civil debt against the appellant as well as against themselves. There might be some principle in a Court of law refusing to permit a suitor to aver and prove his own crime or moral delinquency as the medium of recovering from one whom he alleges to have been a co-delinquent. But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case—which is the present case—the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable *in solidum* to the pursuer, and that *inter se* each is liable only *pro rata*, or, in other words, for an equal share with the rest. In this case it is the appellant who seeks to escape from the natural import of the decree, by going behind it in order to establish his own co-delinquency.

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It was urged for the appellant that, seeing it is impossible to determine the exact proportion of the total damage attributable to the fault of each debtor, the whole loss must fall upon the debtor against whom the creditor chooses to enforce the decree, otherwise contributors might have to pay in excess of their real share. I cannot appreciate the force of that reasoning. The creditor is not bound to recover the whole from one; he may take it from all in what proportions he chooses; but that right of selection is not given to him in order that he may assess the damage due by each, but for his own convenience and in order that he may get in his money with the least possible trouble. And I fail to see how any inequality in contribution, such as the appellant suggested, could be redressed by the adoption of a rule which would practically leave it to the creditor to determine whether his damages should be borne by one or more or all of the debtors, and if by all in what proportions. The result of the rule, in many cases, would be that the whole loss would fall upon the debtor who had the least share in causing the injury.

I have not hitherto noticed the English case of *Merryweather v. Nizan*.¹ Assuming it to be an authority establishing the general rule for which the appellant contends—a proposition which seems to admit of doubt—I can only regard it as a positive rule of the common law of England, which is inconsistent with, and ought not to override, the law and practice of Scotland. The merits of the rule are not, in my opinion, such as to commend it to universal acceptance.

For these reasons I am of opinion that the interlocutor appealed from is right and ought to be affirmed with costs.

LORD HALSBURY.—I concur with the proposition that the case of *Merryweather v. Nizan*¹ has been so long and so universally acknowledged as part of the English law that even if one's own judgment did not concur with its principle it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated; but I am not prepared to differ from the views entertained by the Lord Chancellor and my noble and learned friend Lord Watson when dealing with the jurisprudence of Scotland.

The difficulty which has arisen is, I think, one of words. The word "tort" in English law is not always used with strict logical precision. The same act

¹ 8 Dur. and East, 186.

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may sometimes be treated as a breach of contract and sometimes as a tort. But "tort" in its strictest meaning, as it seems to me, ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or quasi-delicts and delicts proper is reasonable and just, though I doubt whether in dealing with an English case one would be at liberty to adopt such a distinction. It becomes unnecessary to consider the form of the suit; but I think that in England the transmutation of the cause of action into a judgment would not prevent the application of the principle of *Merryweather v. Nizan*.¹

LORD SHAND.—I also am of opinion that the appeal in this case should be dismissed, and, having had an opportunity of reading and considering the opinions which have just been delivered by the Lord Chancellor and my noble and learned friend opposite (Lord Watson), I have nothing to add to the reasons which have been given by them.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs.

PARKER & PONSFORD—MACPHERSON & MACKAY, W.S.—THOMAS COOPER & Co.—BOYD, JAMESON, & KELLY, W.S.

No. 9.

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Aberdeen
Joint Station
Committee
and Great
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Co. v. North
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ABERDEEN JOINT STATION COMMITTEE AND THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Pursuers (Appellants).—*Sir Henry James, Q.C.—Murray, Q.C.—James Ferguson.*

NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—*Lord-Adv. Balfour—Sol.-Gen. Asher—Sir R. Webster, Q.C.—Finlay, Q.C.*

Railway—Running powers—Use of joint station—Statute—Construction—Act 29 and 30 Vict. cap. cccxi.—In 1864 the Scottish North-Eastern and the Great North of Scotland Railway Companies built a joint station at Aberdeen, which was by statute declared to be their joint property. It was provided that the control and management of it should be in a joint committee of the two companies. The Scottish North-Eastern Company, with "all the rights, interests, and estate" which it possessed, was afterwards transferred by the Act 29 and 30 Vict. cap. cccxi. to the Caledonian Railway Company. The 99th section of the Act, after reciting that the railways of the North British Company formed, with other railways, lines of communication between London and Scotland, &c., and that it was expedient that free and expeditious transit of traffic over the said lines of communication should be secured, enacted that the expression "Scottish East Coast traffic," as used in the Act, should mean traffic of every description on the Scottish North-Eastern line from or to any place on or beyond and *via* the North British lines. And by the 106th section of the same statute it was provided that "the North British Railway Company may, for the purpose of conveying Scottish East Coast traffic, run over and use with their engines, trucks, and carriages of every description, the Scottish North-Eastern lines, or any part thereof, and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines." Further, the North British Railway were to be entitled to "the joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, wharfs, stopping, loading, and unloading places, sidings, and junctions of the Scottish North-Eastern lines, including, in so far as the company lawfully may, the station at Aberdeen, and all conveniences therewith connected. . . ."

¹ 8 Dur. and East, 186.

After the North British Railway had been for some years admitted to the station, and had enjoyed its conveniences for their traffic, an action was brought by the Joint Committee and the Great North of Scotland Company for declarator that the North British Company had no right, without the consent of the Great North of Scotland Company, to use the station, and for interdict. No. 9.
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The First Division held that, the object of the Legislature having been to give every possible facility for the passage of Scottish East Coast traffic upon the lines in question, the North British Company were entitled not only to running powers through the station at Aberdeen, but also to the use of the station itself, and all the conveniences and privileges connected therewith, in so far as these were enjoyed by the Caledonian Company.

In an appeal *held (rev. the judgment)* that section 106 of the Act of 1866 giving the North British Company the joint or separate use of the stations on the Scottish North-Eastern lines, "including, in so far as the [Caledonian] Company lawfully may, the station at Aberdeen," was to be read as giving the use of the Scottish North-Eastern stations, "including, in so far as the Caledonian Company lawfully may include, the station at Aberdeen"; (2) that the Caledonian Company had no right to give the use of the Aberdeen station without the consent of the Great North of Scotland Railway Company, the other joint proprietor thereof; and (3) that the pursuers were entitled to declarator that the North British Company were not entitled without the consent of the Great North of Scotland Company to use the joint passenger station for the purposes of their traffic, or to run over with their engines the said station or the railway lines of the same.

(In the Court of Session, 28th May 1891, 18 R. 855.)

The pursuers appealed.

At delivering judgment,—

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Ash-
bourne.
Lord Shand.
Lord Bowen.

LORD CHANCELLOR.—This is an appeal from a judgment of the Inner-House affirming an interlocutor of the Lord Ordinary. No question of general principle is involved, the case turning entirely upon the construction of certain statutory provisions and the rights thereby conferred.

The question in dispute is this. In the year 1864 an Act was passed under which a joint passenger station was constructed at Aberdeen by and for the use of the Scottish North-Eastern and the Great North of Scotland Railway Companies. It is not necessary to trouble your Lordships with the terms upon which the expense of constructing that station was contributed by the two railway companies; it is sufficient to refer your Lordships to the rights of the parties in the station when constructed. The station was to be "jointly and equally the property of the company and of the Great North Company." "The lines from the centre of the station to the junction of the Great North of Scotland Railway" were for the purpose of "tolls, rates, and charges to be deemed part of the Great North of Scotland Railway, and the lines from the centre of the station to the Scottish North-Eastern Railway" were "for the same purposes to be deemed parts of the Scottish North-Eastern Railway." The station "when made" was to "be under the control and management of a joint committee" representing the two railway companies. "Each of the companies" was to "be entitled to the free use of the joint passenger station for through and local passenger traffic, and in proportion to their traffic to an equal amount of accommodation therein." And then it was provided that "for all through and local passenger traffic" the stations down to that time used by the two companies respectively were to be abandoned. "The tolls and rates charged by the two companies respectively for the use of their respective portions of the railway and for the use of the joint passenger station" were to "be paid over

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to the joint committee monthly, subject to a deduction of 40 per cent for working expenses," and "the sums so paid to the joint committee" were to "be deemed profits and divided into four equal parts, and three of such four parts were to be paid to the Great North Company," and the remaining fourth to the Scottish North-Eastern Company. The only other provision with which I need trouble your Lordships is that the expense attending the joint committee and the maintenance, management, and control of the joint passenger station were to "be paid by the said companies as the joint committee or the arbitrator should from time to time direct according and in proportion to the use made of the same by those companies respectively."

Now, in the year 1866, the Act was passed upon which the present question turns, but I think it is desirable to pause for a moment before looking at the terms of that Act in order to see what was the position of the two companies with regard to the passenger station. It is perfectly clear that it was joint property; it is equally clear that although the joint committee might specially appropriate a particular part of it for certain purposes to the one company, and another particular part for certain purposes to the other, the statute did not contemplate any general separate appropriation, nor, so far as we know, was any such general appropriation of one part of the station to the one company and the other part to the other company carried out, but there was to be a free use of the station except so far as any portion was specially appropriated, fairly allotted between the two companies in proportion to their traffic. It is conceded by the learned counsel who argued this case on behalf of the respondents that neither of these joint owners could have brought in a third company to participate in the use of that station without the consent of the other. The utmost right that either company had in it was a joint ownership and a right to a joint use.

Under these circumstances in the year 1866 the Scottish North-Eastern Railway Company, one of these two companies, went to Parliament to promote an amalgamation of the Scottish North-Eastern with the Caledonian Railway Company; upon that amalgamation the Scottish North-Eastern was to become absorbed in the Caledonian and all the rights of the Scottish North-Eastern were to pass to the Caledonian, and the Scottish North-Eastern was to cease as a separate corporation to exist. Now, no doubt it was perfectly competent for the Scottish North-Eastern Company to transfer to another corporation such rights as it had, under any agreement for joint use or such rights as arose out of its joint interest. Of course an amalgamation of this sort could not be carried into effect without an application to the Legislature, but there would be nothing at all out of the usual course in the Legislature, if it thought fit to allow such an amalgamation, passing to the Caledonian Company all the rights which the Scottish North-Eastern had previously possessed, including its rights as joint owner and joint user of the station. But when the amalgamation was sought between the Scottish North-Eastern and the Caledonian Companies the North British Company naturally desired to have a voice in the settlement of matters as between the Scottish North-Eastern and the Caledonian, or at all events a voice as regards the terms upon which that amalgamation was to be permitted, because down to that time the Caledonian and the North British had been competing lines to the point at which they came into contact with and in communication with the Scottish North-Eastern, and from that point the Scottish North-Eastern had carried alike traffic which had come along the North British lines,

and traffic which had come along the Caledonian lines. From that point to No. 9. Aberdeen the whole of the traffic had been strictly speaking Scottish North-Eastern, although it may have had its origin on the North British line or may have had its origin on the Caledonian line. It was obvious that if the Scottish North-Eastern was allowed to be absorbed in the Caledonian so that this line which had formed a link between Aberdeen and the termini of the Caledonian and the North British lines was to come into the ownership of one of these two competing companies, there might not unreasonably be an anticipation that the North British Company might be unfairly dealt with as regards its traffic, because whereas the Scottish North-Eastern might be supposed to hold an even hand between them, the Caledonian Company would naturally be disposed to prefer its own traffic. The interest of the North British Company of course was obvious, and it is clear that the provisions which are to be found in the Act were inserted for the protection primarily of the North British Company. As regards the Caledonian, of course it was a matter of indifference to them,—they would have been quite content, I have no doubt, to continue running their own traffic through, and at the same time taking traffic which had its origin upon the North British line to Aberdeen, in the same way as the Scottish North-Eastern had done. But the North British Company naturally enough were not content to trust to that, consequently it is impossible to regard the provisions to which I shall have presently to refer otherwise than as provisions primarily intended for the protection of the North British Company.

The North British Company obtained under the Act running powers over the lines which had been Scottish North-Eastern, so that they could themselves take their traffic over those lines, and not only take their traffic over those lines, but use the stations upon those lines. That undoubtedly was a part of the scheme of the Act, and in so far as those lines belonged exclusively to the Scottish North-Eastern or to the Caledonian there was no difficulty in the matter. Of course it was perfectly competent to either of those railway companies to bargain with the North British and to confer upon the North British the right to use to any extent they pleased both their lines and their stations. But no such bargain was possible as regards the joint station. Neither the Scottish North-Eastern Company nor the Caledonian as its successor could have a right to confer upon the North British Company any power to enter this station, and to use it as of right. That is not disputed; the sole question is whether the Legislature has conferred that right upon the North British Company.

That depends upon the construction of the 106th section of the Act of 1866, and I propose to refer to the words themselves by which the right is supposed to have passed, and to consider first of all their construction both apart from the arguments derived from the supposed object of the Act which is relied upon as stated in section 99, and apart from the force of the argument that it is not likely that the rights of the Great North Company would have been bargained away behind their backs. I say that I shall altogether put aside for the moment those arguments and look merely on the words, of course bearing in mind in construing the language what was the legal position of the parties, that this was not a station belonging to the Scottish North-Eastern Company, and that the right to use that station was a right which they had no legal power to confer.

The 106th section is this—"The North British Railway Company may for

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the purpose of conveying Scottish East Coast traffic run over and use with their engines, trucks, and carriages of every description the Scottish North-Eastern lines or any part thereof, and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines."

Now, I think that the natural construction to be put upon that would be, if it stood alone, to confine it to the lines which belonged to the Scottish North-Eastern Company and the stations belonging to them and as to which they were in a position to confer the right, and that it would not be the natural construction to extend it to property which did not exclusively belong to them and as to which they were not in a position to confer the right. But however that may be, and without dwelling upon the words "connected with the Scottish North-Eastern lines," which were much relied upon, I would observe that the whole section must be read together, and that it will not do to stop there and to consider what would be the effect of these words if they stood alone, because the North British Company were to "be entitled to the conveniences and privileges, and be subject to the regulations and obligations hereinafter mentioned"; and if those conveniences and privileges, regulations, and obligations relate to some of the matters which are covered by the earlier general words of the statute, it is obvious that upon all sound principles of construction you cannot first of all ask what would have been given them by the general words if they had stood alone and then look to see whether it is also given by these special words. The whole section must be read together.

Now, the portion of the section which deals with the use of the stations is the 4th subsection, and amongst the "privileges and conveniences" conferred is "the joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, at the wharves, stopping, loading, and unloading places, sidings, and junctions of the Scottish North-Eastern lines."

Well, if the matter had stood there it might have been open to argument, one way or the other, that the stations of the Scottish North-Eastern lines included this joint station. I confess, my Lords, that my impression would have been to the contrary if there had been nothing more than that, having regard to the legal position of the parties as to this joint station. But then the clause proceeds to say, "including, in so far as the company lawfully may, the station at Aberdeen."

Now, everybody agrees that that expression is elliptical, that something is to be supplied, but it appears to me that when you have an ellipsis of this description, there is on the one hand a natural and grammatical supply of that which is left wanting; and there is, on the other hand, an arbitrary and gratuitous supply, and certainly the natural and grammatical supply is to be preferred unless there is reason for rejecting it.

Now, it appears to me that the words "in so far as the company lawfully may" are obviously a limitation or qualification of the word "including." What, then, is to be supplied after the word "may"? "Including in so far as the company lawfully may include it," seems to me to be the natural reading of the sentence, unless there is some strong reason for reading it otherwise, or perhaps, as you are dealing with the joint or separate use of the station, "including in so far as the company lawfully may include it, the use of the station at Aberdeen." Now, if either of those be the correct method of supplying what is left elliptical, it is obvious that it is really fatal to the argument of the learned counsel for the respondents, and to the view taken by the Court below, because

the company could not lawfully include the station at Aberdeen to the extent of giving the North British Company a right to come in as against the Great North of Scotland Company, nor could they include the use of it to that extent lawfully, and it was only "in so far as the company lawfully may" that it was to be included.

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Now, what is the construction contended for by the respondents? It is said that you are to read it thus, "including in so far as the company lawfully may use it, the station at Aberdeen." It seems to me that that is not the construction, and that to put in a verb in that way is not supplying an ellipsis in any ordinary and grammatical sense; it is putting in the words that are wanted in order to confer the right which it is suggested that the Legislature meant to confer for reasons to which I will allude in a moment.

The judgment of one of the learned Judges in the Court below certainly proceeded very much upon the ground to which I have alluded, and I think it was that view which was substantially contended for by the learned counsel who appeared at the bar for the respondents. The Lord President, indeed, took a different view; he did not regard these words as very important, because the view which he took, although I confess with all deference that I am unable to understand how he arrived at that conclusion, was that supposing that the North British Company had the right which they contended for, nothing more had been given to them than the Caledonian Company lawfully could give. No doubt if that were the conclusion you do not need any words of construction such as are now suggested by the learned counsel for the respondents. Then the case is a very plain one. It is quite certain that anything that the Caledonian Company could lawfully give was to be given as regards the use of the station as well as of others, and I have no doubt myself that these words would be effectual to prevent the Caledonian Company interposing any difficulty, if the North British could arrange with their co-proprietors, the Great North of Scotland Company. To that extent I do not doubt that it is effectual.

Therefore, putting quite aside any argument derived from the improbability that the Legislature would behind the back of a railway company interfere with its rights in a private Act, which really embodies a parliamentary contract—I say putting that aside altogether, and looking at nothing but the plain ordinary and grammatical interpretation of the language, it seems to me to be conclusive against the argument of the respondents.

But, my Lords, reliance was placed by the learned Judges in the Court below, and to some extent has been placed by the learned counsel for the respondents here, upon this. They say that section 99 shews that the Legislature intended to create, or to give the means of a complete and free competition between the Caledonian and North British Companies as far as Aberdeen, and that this free competition which is said in section 99 to be one of the purposes of the succeeding sections, would not be effectually given if the Caledonian Company could succeed to the Scottish North-Eastern Company's right in the station at Aberdeen, and if the North British Company could not insist on a similar right. Well, it may be that it would prevent the competition being as effectual as was contemplated, but it comes to no more than this, that the fact, that that competition could not be made complete without some arrangement with a proprietor outside all the provisions of this Act, had been overlooked, which, of course, is a perfectly possible case; at all events I do not think that any inference can be drawn from this purpose exhibited in the language of section 99 sufficient to

No. 9. justify what to my mind is a violation of the natural and ordinary construction of section 106. And this, I think, is to be observed, that the preamble of the whole Act makes no reference to any such purpose at all. The preamble of the Act makes reference only to the amalgamation of the Caledonian and Scottish North-Eastern Companies, and to the benefits likely to result from such amalgamation. But, my Lords, if there were any force, or whatever force there be in the argument derived from that section, and however great that force is, as I say, it does not seem to me to be possible to contend that it would justify your overriding the natural construction of the language used in the subsequent section. It is difficult to deny that there is at least equal force in any argument the other way, namely, that it is not according to the ordinary practice that in an Act of this description the rights of third parties, who are in no way within the purview of the Act, who are nowhere contemplated in the Act, and in no way came before the mind of the Legislature, should be held to be dealt with by the language used. It does not need authority for the purpose of establishing the proposition that if there be two constructions which are equally open (I am putting it at the very lowest), and the one construction would allow of the rights of third parties being completely preserved, while the other would involve their being infringed, the former is the construction to be preferred; that, I think, can hardly be denied. But when of the two constructions that which would preserve the rights of third parties is the more natural and grammatical, it seems to me that any argument in favour of an interpretation which would put that aside on account of the supposed intention of the Legislature indicated in other parts of the statute, is far more than counterbalanced by the argument derived from the improbability that the Legislature would have so intended.

For these reasons I submit to your Lordships that the interlocutor appealed from must be reversed, and I would suggest to your Lordships that the best course would be to reverse the interlocutor and to "declare that the defenders are not entitled, without the consent of the Great North of Scotland Railway Company, part owners thereof, to use the joint passenger station, or any part thereof, or the conveniences connected therewith, for the purposes of their traffic, or to run over or use with their engines, trucks, or carriages of any description the said station or the railway lines of the same, or the sidings, accesses, or works extending for 200 yards on each side of the passenger shed of the said joint passenger station, or any part of the same" (as to those last words I should have thought that it was hardly necessary to say that, because that is within the definition of "passenger station"), and then to remit the cause to the Court below with that declaration, so that your Lordships should not pronounce immediately any interdict, but should leave the Court below to pronounce the interdict, and to deal with it upon the basis of that declaration.

LORD WATSON.—Whilst I agree with all the observations which have been made by the Lord Chancellor, I am of opinion that section 106, subsection 4, of the Act of 1866, according to its just construction, is absolutely conclusive against the respondents' case. It appears to me to enact in terms that the joint station is only to be included in the arrangement with regard to running powers which that section sanctions, if and provided that the Caledonian Company have power to include it, and that it is to stand excluded from the scope of the agreement if the Caledonian Company have not that power. Now, it is exceed-

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ingly plain to my mind—indeed it is not disputed—that apart from the terms of the Act of 1866 the Caledonian Company could have no power to communicate the use of the joint station to the North British Company or any other company without the consent of the other joint owner of the station, namely, the Great North of Scotland Company. That consent not having been obtained, the joint station is beyond the terms of the Statute of 1866 until such consent has been duly obtained, when it will become operative against the Caledonian Company in terms of the 106th section, and operative against the Great North of Scotland Company in respect of the consent which they will then have given.

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LORD ASHBOURNE.—I concur. The question is one on the construction of private Acts of Parliament. Here it is sought to interfere with or affect the rights of a railway company which was no party to the Act of 1866 by a construction sought to be imputed to its 106th section. I do not assent to that construction, and concur in the views of my noble and learned friend on the woolsack.

It would be very dangerous in the case of such Acts of Parliament to assent to the arguments of the respondents. The sections of these Acts are often inserted to give effect to private arrangements between the promoters and other persons who are desirous of making a good bargain for themselves. When it is sought to stretch the construction of such sections so as to affect the rights of third parties, they must be read with great caution, and often *fortius contra proferentem*. Here the construction which would preserve the rights of third parties is the more reasonable and natural, and no difficulty really arises.

LORD SHAND.—Agreeing as I do with the opinions which have fallen from your Lordships, I only venture to add a few words with reference to the opinion of a learned Judge—Lord Adam—who has gone very fully into the consideration of the clauses which have formed the subject of the argument. His Lordship's judgment appears to me to be based upon two views, upon each of which I venture to differ from the statement he has made.

In the first place, the main point in the case is really to determine the meaning of subsection 5 of section 106 of the Statute of 1866. In dealing with that subsection I find that his Lordship says, with reference to the words upon which practically the whole question between the parties turns—I mean the words “including, in so far as the company lawfully may, the station at Aberdeen, and all conveniences therewith connected”—“Now, what is the meaning of the words ‘in so far as the Caledonian Company lawfully may’? It is an elliptical form of expression, but I think the meaning is that they are to be entitled to the use of the joint station so far as the Caledonian Railway Company may themselves lawfully use it—that is to say, that the North British Railway Company were to have exactly the same privileges and uses as the Caledonian Railway Company.” My Lords, if that had been so, there might be a basis—there probably would be a basis—for the judgment which the Court of Session has pronounced, but I agree with the Lord Chancellor and with your Lordship in thinking that that is not the true construction, or even the meaning, according to the grammatical construction of the words which have been used. It appears to me to be clear that the force of these words “including in so far as the company lawfully may the station at Aberdeen,” is this—including the use of the joint station in so far as the Caledonian Company may give such

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use. The preliminary part of the section deals with use only, and I think that this part of it refers to the use only. If, therefore, all that is given, all that is included, is such use as the Caledonian Company can give, then you are simply thrown back to the question—Can the Caledonian Company, they being themselves only one of two joint owners of the station, and one of two parties entitled to use it, give any use of it without the consent of the other party being obtained? Upon that point it is, as the Lord Chancellor has observed, conceded that as between two joint owners no such use can be given.

The other observation which I desire to make is with reference to the succeeding passage of Lord Adam's opinion in which he refers to the clauses of the Act of 1864, which provided for a certain appropriation of the accommodation at the joint-station. His Lordship in this seems to assume that substantially there was to be an appropriation of one part of the joint station to one of the companies, and of another part to the other company, so that the Great North of Scotland Company might have one part of the station, and the Scottish North-Eastern, or the Caledonian as succeeding them, the other part of the station. His Lordship says,—“That is to say, that the companies who built this station, and whose joint property it was, were to have it appropriated for their accommodation; in other words, part of it in proportion to their traffic is to be set aside for the particular use of the Great North of Scotland Railway Company, and part of it is to be set aside for the use of the Caledonian Railway Company.”

If that had been the state of matters, I think there would have been a great deal to be said for the view that the Caledonian Company having a part of that station set aside for their exclusive accommodation might introduce a third party into that part of the station; but when we look at the provisions of the Act of 1864, I think it is clear that the great bulk of that station was intended to be used for joint accommodation—an accommodation in which the two parties were to be equally interested, as it was joint property—and that being so, there being not two separate stations, as there would be in the case supposed, but substantially one station for joint accommodation, I think, with great deference to Lord Adam, that this reasoning of the learned Judge in support of his judgment fails. I have merely ventured to add these observations in order to shew that so far as I am concerned I have very carefully considered the elaborate opinion which his Lordship has delivered in this case.

I have only further to add that if the canon of construction which has been applied in so many cases, that you are not to interfere with the rights of third parties in a private, personal, and local Act such as this is, public though it be—if it is to be applied here—there can be no possible doubt upon the case. But even taking it upon the footing that the Great North of Scotland Company had appeared before the committee which passed this Act, and that upon their intervention these words “in so far as the Caledonian Company have the power to use” had been inserted, I should have been prepared to hold that the result must be the same, because I think that the North British Company have failed to shew that the Caledonian Company had any power whatever to give the use of the station for which they have here contended.

I therefore agree with your Lordship in thinking that the decision must be reversed.

LORD BOWEN.—I concur both in the reasoning of the noble and learned

Lords who have already spoken, and in the result to which that reasoning has led them. No. 9.

“ORDERED that the interlocutor appealed from be reversed, that it be declared that the defenders are not entitled, without the consent of the Great North of Scotland Railway Company, part owners thereof, to use the joint passenger station, or any part thereof, or the conveniences connected therewith, for the purposes of their traffic, or to run over or use with their engines, trucks, or carriages of any description the said station or the railway through the same, or the sidings, accesses, or works extending for 200 yards on each side of the passenger shed of the said joint passenger station, or any part of the same; and that the cause be remitted with this declaration to the Court below to proceed therein as is just: That the respondent do pay the costs both here and in the Court below.”

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DYSON & Co.—T. J. GORDON & FALCONER, W.S.—LOCH & Co.—JAMES WATSON, S.S.C.

DUNCAN LESLIE (Complainer), Appellant.—*Sol.-Gen. Shaw—J. Wilson—Trotter.* No. 10.

J. YOUNG & SONS (Respondents), Respondents.—*W. Campbell—J. Graham Stewart.*

June 7, 1894.

Leslie v.
Young & Sons.

Copyright—Infringement—Monthly Railway Time-Table—Interdict.—The proprietor of a book of local railway time-tables published monthly presented a bill of suspension and interdict against the publishers of another book of time-tables, for the same locality, selling or exposing for sale any time-tables copied or only colourably different from the complainer's time-tables, or containing excerpts therefrom.

Held upon a proof (*alt. judgment of the First Division*) (1) that in so far as the respondents' publication consisted of ordinary time-tables, there had been no infringement of copyright; but (2) that in so far as the respondents' publication consisted of certain pages of selected and condensed information as to tourist arrangements and Saturday excursions, which were proved to have been copied from the complainer's publication, there had been a breach of copyright, and that the complainer was entitled to interdict against the respondents issuing any publication containing the said copyright matter. .

(In the Court of Session, 20th July 1893, 20 R. 1077.)

The complainer appealed.

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Ash-
bourne.
Lord Shand.

LORD CHANCELLOR.—This is an appeal from a judgment of the Inner-House recalling an interdict of the Lord Ordinary (Lord Low), and assoilzieing the defenders. The action was brought in respect of an alleged infringement by the defenders of the copyright claimed by the pursuer in certain time-tables which were published by him at Perth. The work alleged to have been pirated contains time-tables, and certain other information to which I will more particularly allude presently. The piracy complained of consisted of an alleged improper use of certain time-tables, published by the pursuer relating to railway trains, and also relating to ferries and steamers and coaches. The Lord Ordinary came to the conclusion that the defenders had pirated a part of the pursuer's work in which he had a copyright, in the matter contained in pages 40 to 53 of the defenders' work, with the exception of a particular time-table, and also in certain other pages which he specified, and in respect of these he granted an interdict. The Inner-House, as I have said, recalled that interlocutor, coming to the conclusion that there had been no piracy at all.

No. 10. The time-tables, which are to be found on the earlier pages which I have mentioned, namely, 40 to 52 and part of 53, consist of tables in the usual form found in all railway time-tables, taking Perth in the main as the starting-point, this being a periodical published at Perth for the information of persons coming to or going from (more particularly going from) that place. The information in these time-tables was of course derived by the pursuer from sources which were as open to the defenders as to himself, and he does not and cannot claim any right to the information as such ; he can only claim copyright in them if they are the result in some respect or other of independent work on his part, and if advantage has been substantially taken by the defenders of that independent labour. The mere publication in any particular order of the time-tables which are to be found in railway guides and the publications of the different railway companies could not be claimed as a subject-matter of copyright. Proceedings could not be taken against a person who merely published that information which it was open to all the world to publish and to obtain from the same source.

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As regards some of these tables, there is really nothing more to be said against what the defenders have done than that they have published the same table between the same stations in the same order as the pursuer ; but then those tables, with all those stations and all those times of the trains, are to be found in the companies' books, and neither party would have anything more to do than to copy them in order to arrive at the information which is to be found in both books. It is true that in some cases the mileage has been taken, and is admitted by the defenders to have been taken from the pursuer's book. As regards other of these tables, it is said that they were not mere copies of tables to be found in the railway guides, but that there was a certain selection of stations, the smaller stations being omitted, and a selection of trains, some of the trains also being omitted. That applies no doubt to some of the tables. But, my Lords, looking at these tables as a whole, and having regard to the fact that it is admitted that the defenders' work is, as regards these tables, not by any means in all respects a copy of the pursuer's work, that it is not denied that there was a certain amount of original work done by them in compiling these tables, and that there are the differences which have been pointed out, I do not think it can be said that as regards these tables there has been an appropriation by the defenders of the pursuer's work such as to entitle the pursuer to complain, and to obtain the interdict which he claims. The real truth is, that although it is not to be disputed that there may be copyright in a compilation or abstract involving independent labour, yet when you come to such a subject-matter as that with which we are dealing, it ought to be clearly established that, looking at these tables as a whole, there has been a substantial appropriation by the one party of the independent labour of the other, before any proceeding on the ground of copyright can be justified. I do not, therefore, see my way to differ from the conclusion at which the Inner-House has arrived on this part of the case—that the interdict of the Lord Ordinary ought not to stand.

But there is another part of the case which strikes me as of a very different character. It is not separately dealt with by the Inner-House, although it was specifically mentioned by the Lord Ordinary. It appears to me the only part of the work which can be said to indicate any considerable amount of independent labour, and to be entitled to be regarded as an original work. I refer to the part on pages 63, 65, 67, and 69 containing the information with regard to

excursions. It seems to me that this was a compilation containing an abridgment of information of a very useful character, and such as was likely to be taken advantage of by those who were travelling in the neighbourhood of Perth. Now, those pages have been, the first with some slight variation, and the others absolutely literally, copied by the defenders from the pursuer's book. It is said that they form only a small portion of the whole book—four pages, it was said, out of forty—and that the first part consisted of an A B C timetable which was wanting in the work of the appellant. But I do not think that that is a just way of regarding the matter in point of law, because a compilation of this kind may contain several independent features of different merit, of differing advantage to the public, and likely to operate to a different extent in promoting the sale of the work. It may be that one part of a work of this kind, though containing only a few pages, may be the very thing the presence or absence of which would most largely promote or retard the sale of the work. Therefore, although these pages are but few, it seems to me that nevertheless they may be properly treated as an independent work and protected by the copyright law. If that be the proper conclusion, it seems to me impossible for your Lordships to resist the further conclusion that there has been in this case a piracy, a substantial appropriation of the pursuer's work by the defenders, and that there is therefore a right to an interdict on the part of the pursuer.

For these reasons I think that the interlocutor appealed from ought to be recalled, and that in place thereof the interlocutor of the Lord Ordinary ought to be varied by restricting and confining the interdict to the matter printed upon pages 63, 65, 67, and 69, and that the interdict should be against printing, publishing, selling or exposing for sale, circulating or distributing the time-tables or any other work containing the matter printed on pages 63, 65, 67, and 69 of the defenders' Perth time-tables.

There remains the question how the costs ought to be dealt with. The appellant was in the right in coming to this House, because the respondents had obtained an interlocutor which your Lordships think cannot be supported; and therefore I see no reason why the ordinary rule should not be followed, in accordance with which the respondents would pay the costs of this appeal. But then we come to the question of the costs below. There the present respondents were partly in the right in their appeal from the interlocutor of the Lord Ordinary. On the other hand, the appellant was partly in the wrong in putting forward too large a case, and it was that very large case which involved great expense in the proof. A great part of the proof was occupied with the question as to these time-tables, some of which, as I have said, really were not an abridgment at all, but were matters regarding which, as it seems to me, it was impossible that the pursuer could reasonably complain of an invasion of copyright. It is therefore clear that a large part of the expense of taking the proof before the Lord Ordinary has resulted from the pursuer insisting upon a contention which I believe all your Lordships think, and which the Inner-House also thought, it impossible to support. I believe all your Lordships think that justice will best be attained by ordering the respondents to pay the costs of this appeal, and ordering that the pursuer shall have one-third of his taxed costs of the proceedings at the trial, and in the Inner-House.

LORD WATSON.—I am of the same opinion. Upon the argument which was

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No. 10. addressed to us for the appellant (with, I ought to say, the exception of a few sentences which related to those pages of his book which refer to tourist arrangements and to Saturday excursions), I have had no difficulty in coming to the conclusion that the reasoning of the learned Judges of the First Division of the Court of Session was right, and that, for the reasons assigned in their judgments, there is no ground for granting any interdict against the respondents. But those two points, to which I have already alluded, were overlooked, as it seems to me, by the learned Judges, because they were not pressed upon the attention of the Court. Upon that part of the case I have as little difficulty in holding that an interdict ought to issue. I am not prepared to say that every line or even every page of a compilation such as this carries with it a right to protection as copyright. I should be very sorry to affirm that to be universally true. But it appears to me that, in copying these tourist and excursion tables, the respondents have taken the bulk of that portion of the work which carries such a right. If there are any parts of this work which really involve such merit as to entitle them to the protection of copyright, I think these are chiefly to be found in the pages which have been appropriated by the respondents without a single alteration.

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I think it would be impossible in these circumstances for the respondents to dispute that they have pirated the work to that extent, except by shewing that such part of the work had no protection. I do not think there can be any doubt that a work of this kind, shewing that a considerable amount of original trouble was taken in bringing all the information together in the form of an abstract for the use of a particular locality, is entitled to protection.

LORD ASHBOURNE.—I concur. The portions of this book referred to by my noble and learned friend upon the woolsack, and my noble and learned friend who has just spoken, are, I think, clearly entitled to protection. They are a substantial part of the book; they contain a great deal of very useful information—the result of careful work and accurate compilation—and I can myself well believe that a great many purchasers would be influenced in making their purchases by the existence of those pages and of those pages alone, not needing the other information, which was very accessible and easily obtainable.

Although for the purposes of the order of the House attention is confined to those particular pages, I am myself of opinion from what I have heard in the able arguments which have been addressed to the House, and from my own examination of the books, that the respondents have very largely availed themselves of the labour and general ability shewn by the appellant here, and although attention is necessarily confined in the order of your Lordships' House to the particular pages referred to by my noble and learned friend on the woolsack, still one cannot, in measuring and in considering the question of costs, forget the bearing and the general merits of the rest of the book. I have no doubt, my Lords, that the order proposed to be made is one which is fully in accordance with the justice of the case, and I entirely concur in the portion of the order with reference to costs.

LORD SHAND.—I concur also in the opinions which have been delivered, and in thinking that your Lordships should grant to the appellant relief to the extent to which it is now proposed to be given.

So far as the time-tables are concerned, which really embrace a considerable proportion of the book in point of length, it is to be observed that the infor-

mation there given is derived from common sources accessible to every one. No. 10.
 There is no information there given which is not to be found in the ordinary June 7, 1894.
 railway time-tables which are issued by each of the railway companies—par-
 ticularly the Caledonian and North British Companies, whose railways are the Leslie v.
 subject on which information is given in these books. The only particulars in Young & Sons.
 which I think it is said that some advantage is gained by the use of these time-
 tables is that there is a convenient arrangement for people starting from Perth,
 and a selection of the more prominent stations instead of giving the whole list
 of stations as they appear in the time-tables issued by the railway companies.
 It does not appear to me that there has been either such labour or such ingenuity
 shewn with reference to either of those matters as properly to make them the
 subject-matter of a copyright. Therefore I am of opinion with your Lordships
 that, so far as the mere time-tables are concerned, there should be no interdict
 granted.

As regards the other matter, the list of tours which has been selected, which
 is also no doubt taken from the tables of the railway companies, there has not
 only been a selection, but also a condensation and an arrangement which would
 be of very considerable value to the travelling public. It is clear that those
 have been simply copied, word for word, in the publication which is complained
 of, and I cannot doubt that that forms a material part of the pursuer's book,
 and that he is entitled to the remedy which he asks for it. I am of opinion,
 therefore, that the interdict which has now been proposed should be granted,
 and I concur in the view that has been taken with regard to the expenses
 which ought to be paid to the pursuer.

“ORDERED that the said interlocutors of the 20th of July and the
 17th of November 1893, be reversed, except in so far as the said
 interlocutor of the 20th July 1893 recalls the interlocutor of the
 Lord Ordinary (Lord Low) of the 31st of January 1893: It is
 declared that the interdict should be limited to interdicting, pro-
 hibiting, and discharging the respondents from selling or exposing
 to sale, circulating, or distributing time-tables, or any other work
 containing the matter printed on pages 63, 65, 67, and 69 of the
 publication complained of, and that the appellant (complainer)
 should have one-third of the costs in the Courts below: Cause
 remitted back to the Court of Session in Scotland, to do therein
 as shall be just and consistent with this judgment and this decla-
 ration: Further ordered, that the said respondents do pay to the
 appellant the costs incurred in respect of the appeal to this
 House.”

KEEPING & GLOAG—CLARK & MACDONALD, S.S.C.—C. P. PRITCHARD & MAFFEY—
 ALEXR. MORISON, S.S.C.

INSTITUTE OF PATENT-AGENTS, AND OTHERS (Pursuers), Appellants.—
Byrne, Q.C.,—Murray, Q.C.
 JOSEPH LOCKWOOD (Defender), Respondent.—*M'Call, Q.C.—*
C. H. Lindon—Crossfield.

No. 11.

June 11, 1894.
 Institute of
 Patent-Agents
 v. Lockwood.

Statute—Rules—Ultra vires—Board of Trade—Jurisdiction—Title to sue—
Patents, Designs, and Trade-Marks Acts, 1883 (46 and 47 Vict. c. 57), sec. 101,
and 1888 (51 and 52 Vict. c. 50), sec. 1—Register of Patent-Agents' Rules, 1889.
—The Patents, Designs, and Trade-Marks Act, 1883 (section 101), gave power

No. 11. to the Board of Trade "to make such general rules . . . as they think expedient, subject to the provisions of this Act, for regulating the practice of registration under this Act. . . . (3) General rules may be made under this section at any time after the passing of this Act, . . . and shall, subject as hereinafter mentioned, be of the same effect as if they were contained in this Act, and shall be judicially noticed." (4) Rules to be laid before both Houses of Parliament. "(5) Either House of Parliament may within forty days of the rules being laid before it annul such rules or any of them without prejudice to the validity of anything done under the rules in the meantime."

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Institute of
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The Patents, Designs, and Trade-Marks Act, 1888 (incorporated with the principal Act of 1883 by section 27), enacted, section 1, that "after 1st July 1889 a person shall not be entitled to describe himself as a patent-agent . . . unless he is registered as a patent-agent in pursuance of this Act." Subsec. (2) "The Board of Trade shall . . . make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of section 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." By subsection (3) it was provided "that every person who proves, to the satisfaction of the Board of Trade, that prior to the passing of this Act he had been *bona fide* practising as a patent-agent, shall be entitled to be registered as a patent-agent in pursuance of this Act. (4) If any person knowingly describes himself as a patent-agent in contravention of this section, he shall be liable, on summary conviction, to a fine not exceeding £20."

The Board of Trade made certain rules known as the "Register of Patent-Agents' Rules, 1889," which were laid before Parliament, and were not annulled. They provided a mode by which a patent-agent practising before the Act should be entered in the register of patent-agents on proving to the satisfaction of the Board of Trade that he had *bona fide* practised before the Act. They also provided for the payment of a fee of £5, 5s. on being entered on the register, and of an annual fee of £3, 3s. by all patent-agents on the register, and for erasure of the name from the register if these were not duly paid. These fees were employed for the purpose of keeping up a chartered institute of patent-agents incorporated by royal charter of 1891, and of providing and maintaining its library.

L., a patent-agent who had practised before 1888, and had been registered as a patent-agent, declined to pay those annual fees, maintaining that he had a statutory right to design himself as a patent-agent, and to practise as such. His name was thereupon removed from the register. In an action at the instance of the institute, and of three registered patent-agents against L. concluding for declarator that the defender was not entitled to describe himself as a patent-agent so long as he was not registered, and for interdict against him so describing himself, the Second Division assoilzied the defender on the ground that the rules imposing fees upon the defender were *ultra vires* of the Board of Trade, since they imposed, without statutory authority, a tax upon the defender as a condition of his statutory right to be on the register.

In an appeal the House recalled the judgment of absolvitor, and dismissed the action as incompetent on the ground that the statute in making the use of the designation "patent-agent" by a person not registered a criminal offence and subjecting the person so using it to a penalty did not confer any civil right upon other persons to prevent him using it.

Opinions that the rules were *intra vires* of the Board of Trade.

Opinions (per the Lord Chancellor, Lord Watson, and Lord Russell of Killowen) that by section 101 of the Act of 1883 the rules formed part of the statute, and that it was not competent for any Court of law to entertain any question as to their validity.

Opinion (per Lord Morris) that the rules had only statutory effect in so far as they were made "for giving effect" to section 1 of the Act of 1888, and that the question whether they were so might competently be raised in and determined by a Court of law.

(In the Court of Session, 26th January 1893, 20 R. 315.)
The pursuers appealed.

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LORD CHANCELLOR.—In this case the summons of the present appellants claims a declaration that the defender was not registered as a patent-agent in pursuance of the Patents, Designs, and Trade-Marks Act, 1888, and was not entitled to describe himself as a patent-agent; and, in the second place, that the defender ought and should be interdicted, prohibited, and discharged from describing himself as a patent-agent. The pursuers in the action were the Institute of Patent-Agents and three registered patent-agents practising in Glasgow. An interdict in the terms concluded for by the summons was granted by Lord Low, the Lord Ordinary, who came to the conclusion that the defender had held himself out as a patent-agent when not registered, and that he was therefore liable to be interdicted in the manner prayed.

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Morris.
Lord Russell
of Killowen.

When the case came before the Second Division of the Inner-House they recalled the interdict. They came to the conclusion that although the defender was not registered as a patent-agent, and had been holding himself out as such without being registered, his name had been improperly removed from the register by the Institute of Patent-Agents or the registrar appointed, and, consequently, that although not registered, he could not be treated as having committed an offence by so holding himself out. The majority of the learned Judges came to the conclusion that the rule under which the registrar had purported to erase his name was invalid, being *ultra vires* although duly made by the Board of Trade with the formalities and in the manner prescribed by the Act. They came to this conclusion on somewhat different grounds, to which I shall have to call attention in a moment. I will first state to your Lordships what are the statutory provisions, and what are the rules made under them.

Provisions relating to the registration of Patent-Agents were first made in the year 1888 by the 1st section of the Patents, Designs, and Trade-Marks Act of that year, which provided that after the 1st of July 1889 a person should not be entitled to describe himself as a patent-agent unless registered as such in pursuance of the Act; and, next, that the Board of Trade should as soon as might be after the passing of the Act, and might from time to time, make such rules as were, in the opinion of the Board of Trade, required for giving effect to the section. It contains a further provision, which I shall have occasion to call attention to hereafter. It also provides that,—“If any person knowingly describes himself as a patent-agent in contravention of this section, he shall be liable, on summary conviction, to a fine not exceeding twenty pounds.”

It will be observed that the enactment does not provide for the manner in which the register is to be formed, who is to be the registrar, the formalities requisite for registration, or any particulars in relation to it, but leaves it to the Board of Trade to make such general rules as in their opinion are required for giving effect to the section; the effect, of course, intended by the Legislature being the establishing a complete system of registration for patent-agents. The Board of Trade accordingly made a number of rules, and amongst them a rule requiring a certain fee to be paid on first registration, and an annual fee of three guineas so long as the person continued on the register, and providing further that nonpayment of the prescribed fees should be a ground for erasing the name from the register.

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The Lord Ordinary considered that those rules were *intra vires*. The majority of the Inner-House appear to have thought that no rules with reference to fees could be *intra vires*, inasmuch as the power to impose fees was not expressly conferred. Lord Rutherford Clark, I gather, dissented from that view, and concurred with the Lord Ordinary in thinking that some fees might be properly imposed by rules. He said,—“It is quite possible that fees may be exacted for the maintenance of the register, but the fees which are fixed by the rules are plainly in excess of what is required for that purpose, and it is equally plain that they were not imposed in order to carry that purpose into effect.” I am unable to see upon the record any foundation for that conclusion. It seems to be suggested that there was an admission that they were larger than would be required for such a purpose, but no such admission has been made at the bar, nor does it appear on the record, and I cannot but think that there was some misapprehension as to there being an admission going to that extent.

I confess that it seems to me, if there were any power to impose fees at all, very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a Court of law to canvass their conclusion, and to determine what is the legitimate amount at which the fee may be fixed. Such a department as the Board of Trade is very much more competent to determine a question of that description than Judges can possibly be, and it would be, I think, not an improvement upon any scheme of legislation which gave power to fix fees if those fees were made subject to the control of the Judges according to their views of what fees were reasonable or unreasonable.

The question whether there is power to impose a fee at all is, no doubt, a much more serious question. The contention on the part of the respondent is, that there being no express power given to impose fees, it can never be supposed that it was intended to commit to a public body without express sanction and authority the power to impose taxation, which this in effect is. I cannot myself regard this as properly called taxation. The Statute of 1883, of which this Act in many particulars is an amendment, creates a register, or, at all events, continues a register, and it provides that the Board of Trade, with the sanction of the Treasury, may regulate the fees to be required for registering and doing other acts in connection therewith; and of course the fixing of fees for a great variety of matters being left to a rule-making body is a description of legislation thoroughly well understood. It is every-day practice for those to whom rule-making is committed to have committed to them also the fixing of the fees which are to be paid in relation to matters to be done under the rules. There is, therefore, nothing novel in legislation of this description. But it is said that no such right is expressly conferred. My Lords, it is impossible to my mind to conceive wider language than that which is used in the 2d subsection of the 1st section of the Act of 1888. The truth is, the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the Board of Trade. The section itself contains no provision with reference to the register or the registrar or proceedings on registration, or any of those matters; but it gives very wide power to the Board of Trade to make such rules as are in their opinion required for giving effect to the section. It seems to me that thereupon it was their duty to make all the rules necessary for making the legislation contemplated by the section effective. The Legislature must be taken to have contemplated that a

register could not be made without some one filling the office of registrar, or some corresponding office; that any person performing those duties would require a payment for performing them; that the funds not having been expressly found by Parliament, must be somehow or other provided; and seeing that the system and scheme of the legislation under the previous Act had been that fees on registration should, at all events, go towards the expenses of paying for registration, I cannot but think that it was well within the scope of this enactment that the Legislature should entrust the Board of Trade, who were to make these rules, with the power of fixing such fees as they thought reasonable and necessary for carrying into effect the purposes of the section. Unless they had done so, it seems to me very difficult to say that it would have been possible to carry them into effect at all. With all deference to the learned Judges who have taken a different view, it appears to me that the conclusion at which they have arrived has been induced by not sufficiently regarding the method of legislation which has been followed in the section now under consideration, and not observing that it was the intention of the Legislature, having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade.

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What I am about to say bears also upon the further question which has been argued. It is said that this would be a very large power for the Legislature to commit to any other body; but it must be remembered that it is committed to a public department, and a public department largely under the control of Parliament itself; and not only so, but inasmuch as the section provides that these rules are to be dealt with in the same manner, and subject to the provisions contained in the 101st section of the previous Act, the result is to leave the matter completely in the control of Parliament, because any of the rules made by the Board of Trade may be annulled by either House of Parliament within forty days after they are laid on the table, and the laying of them on the table is made compulsory. Therefore, my Lords, I can see nothing extraordinary in leaving to such a body as the Board of Trade the powers which are in question in this case, at all events when the exercise of their functions by a great public Department of State, itself under the control of Parliament, is placed directly under the control of Parliament also and made subject to its direct action.

That really would be sufficient to determine that these rules were such as the Board of Trade were entitled to make. I will say one word, however, before leaving this part of the subject, upon the point suggested that they involved something harsh or unfair as regards the respondent, inasmuch as it was said that before this he could exercise his profession or calling of a patent-agent without any registration, without the payment of any fee, and now he can only do so and represent himself as a patent-agent by paying an annual fee to keep on the register. That is, in a sense, perfectly true; but, on the other hand, it must be remembered that the position of a patent-agent on the register, when nobody not on the register can call himself a patent-agent, is a position very different, and, in many respects, much more advantageous, than that which he occupied before; and I am not prepared to say that there is any hardship in imposing a small and reasonable fee upon a man who obtains that advantage in order that the register, in the interests of the public, may be carefully and properly maintained.

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Then it is said that a right expressly given him by the statute is interfered with, inasmuch as the statute provides that "every person who proves to the satisfaction of the Board of Trade that prior to the passing of the Act he had been *bona fide* practising as a patent-agent shall be entitled to be registered as a patent-agent in pursuance of this Act." Well, my Lords, a complaint is not now made that he was not so registered. It is sought to read this statute as if it ran thus:—"Shall be entitled to be registered, and ever thereafter maintained on the register," which does not appear to me to fall within the language of the Act. But further than that, the argument loses sight of this, that he is only entitled to be registered in pursuance of this Act. Now, where is there anything in this Act about his title to be registered at all, or how is he to get on the register, or who is to put him there, or what register is it to be, and kept by whom? Nothing of the sort is to be found in the section. The words "in pursuance of this Act" only become intelligible if you read into the section, as the statute provides you shall, the rules which are made under subsec. 2. But if you read into the section, as shewing how he is to be registered in pursuance of the Act, the rules made under subsec. 2, then of course every rule, which is *intra vires* at all events, (putting aside for the moment the other question), is to be read into the section, and have just the same effect as if it had been contained in the Act itself; and if so it is impossible to say that he can claim to be registered otherwise than in the manner which the statute, as filled up, if I may say so, by the rules, provides.

So far I have dealt with the question whether the rules are *intra vires*; but there is no doubt another very important question which has been argued before your Lordships, namely, whether this question can be canvassed in the Courts, when once the rules have been made by the Board of Trade and laid as provided on the tables of both Houses of Parliament. It is said that it is only rules properly made under subsec. 2 which can become part of the Act and be treated as such.

The words of subsec. 2 are,—“The Board of Trade shall as soon as may be after the passing of this Act, and may from time to time, make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of sec. 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section.” Therefore, any rule which in the opinion of the Board of Trade is required to be made in order to give effect to the section, is a rule made pursuant to the provisions of subsec. 2, and any rule made pursuant to the provisions of subsec. 2 is to be dealt with as if made in pursuance of sec. 101 of the principal Act. Now, let us see what is to be the effect as regards rules made in pursuance of sec. 101 of the Act of 1883. First of all, “the Board of Trade may from time to time make such general rules and do such things as they think expedient,” and their “general rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.” The “subject as hereinafter mentioned” is this, that they are to be laid before Parliament and remain before Parliament for consideration for forty days, and during those forty days they may be annulled by a resolution of either House. If not so annulled, or until so annulled, what is the effect? They are to be “of the same effect as if they were contained in this Act.” I have asked in vain for any explanation of

the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same—that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or the rule becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference, if it is open to consideration whether it be so or not.

I own I feel very great difficulty in giving to this provision, that they “shall be of the same effect as if they were contained in this Act,” any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it. Those are points which I need not dwell upon on the present occasion.

Although it is not necessary for the determination of this case to express an opinion upon it, yet, as the matter has been so much discussed, I think it only right to express the opinion which I entertain, that the words to which I have referred are really meaningless unless they have the effect which I have described, and they seem to me to be the apt and appropriate words for bringing about the effect which I have described. They are words, I believe, to be found in legislation only in comparatively recent years, and it is difficult to understand why they have been inserted unless with the object I have indicated.

I have dealt at length with the question whether this rule is *ultra vires* or not and whether it can be so treated, because it is the ground upon which the decision proceeded in the Court below, and inasmuch as an adverse view was expressed to the validity of the rule, it appears to me well that, differing as I do from that view, I should express my differing opinion.

But that does not really conclude this case. The further question remains which was dealt with in some subsequent observations of one of the learned Judges, Lord Young, whether, even assuming that the rule is good, assuming that the name of the defender was properly erased, assuming that he had no right to practise as a patent-agent, assuming that by doing so he rendered himself liable to the penalty prescribed, it is open to the Institute of Patent-Agents and three practising patent-agents to come to the Court of Session and ask for the conclusions to be found in the summons of the pursuer. My Lords, upon

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No. 11. that I confess, with all deference to the Lord Ordinary, I cannot but entertain a very strong opinion. You have here, for the first time, a new offence created June 11, 1894. —the offence of practising as a patent-agent without being on the register. But Institute of Patent-Agents v. Lockwood. for the enactment creating that offence, the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of £20. Can it possibly under these circumstances be open to bring the individual, not before the summary Court at small expense to determine the question of his liability to a £20 penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and, then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the £20 penalty, but would be liable to imprisonment for breach of the interdict?

My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to shew that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison.

For these reasons, I think that this action was not competent. It is not necessary to decide whether there are any cases in which a declaration might be asked. The only declaration asked here is a declaration of the law contained in the 4th subsection of section 1, and a declaration that the defender has broken the law. That is the only declaration asked for. Obviously the sole object of the action is an interdict.

Although not on the grounds on which the Court below have proceeded, I concur in the result that the action cannot be maintained, and move your Lordships that the appeal be dismissed. Although I differ, and I believe all your Lordships differ, from the Court below in the grounds upon which you are dismissing the action, yet I do not think it ought to make any difference with regard to the costs, because, for the reasons I have given, I think that the proceedings ought never to have been taken; that the defender might well defend himself on any ground that he could; and that, therefore, the appeal should be dismissed with costs.

LORD WATSON.—I am of the same mind with the Lord Chancellor on both the points which he has discussed. I agree with the noble and learned Lord that it is impossible to sustain the judgment of the Second Division upon the grounds which have been assigned for it, but that the judgment is right upon a ground which was pointed out by Lord Young at the close of the advising.

It appears to me that were the House to sustain the present action as a com-

petent one it might lead to very unfortunate results. In reality this is a case in which the interference of the civil tribunal was invoked for the purpose of repressing that which the Legislature intended should be dealt with as a crime. I do not think it was intended by the Act of 1888 to create in the patent-agents whose names are on the register a right which they could defend against those who use the term "patent-agent" without having their names on the register by means of a resort to the Court of Session. On the contrary, I think it was the plain meaning of the Legislature that when a man whose name was not on the register chose to hold himself forth as a patent-agent, the full measure of punishment to be inflicted upon him should be a fine within the sum limited, viz, twenty pounds, to be fixed by a summary Court of criminal jurisdiction. There is a mass of statutes regulating sanitary and other improvements for the benefit of the general public, which every neighbouring member of the public has a certain interest in seeing enforced, as to which it would never do to permit the civil Courts to adjudicate. It is clear, upon the face of such legislation, that breaches of those laws were intended to be dealt with simply as a matter of police regulation, to be punished by a fine. Here, in the Act of 1888, the main intention of the Legislature appears to have been to protect poor inventors from being robbed by unskilled patent-agents who failed to make a specification and claim in such a form as would secure to them the fruits of their invention.

Upon the other point, looking to the view which your Lordships take of the incompetency of this suit, it is certainly not necessary for its decision to observe upon the grounds which found favour with the learned Judges of the Second Division; but I concur with your Lordships in thinking that, although the question does not arise in this case for judicial determination, still, seeing that the point has been decided in the Court below, and that we have heard full argument upon it, it is right that your Lordships should express an opinion. I must say that, for my own part, I have felt very little difficulty in rejecting the view which commended itself to the learned Judges of the Court below.

The 1st section of the Act of 1888, by subsection 1, imposes a prohibition upon persons whose names are not on the register against using the description of "patent-agent"; and the next subsection lays upon the Board of Trade the duty of making by-laws or regulations for establishing and maintaining a register of patent-agents; those who had been patent-agents before the date of the Act having their names inserted, as a matter of course, if they complied with the regulations; those who were not in that position, and who were subsequently admitted, having their qualifications tested by examination, or in some other mode.

Now, it appears to me that the whole scheme was left to the discretion of the Board of Trade; and it is impossible for me to say that, looking to those regulations, the Board of Trade have in any measure exceeded that discretion. It was by their opinion, not by any judicial opinion, that the matter was to be determined. The Legislature retained so far a check that it required that the regulations which they framed should be laid upon the table of both Houses; and of course these regulations could have been annulled by an unfavourable resolution upon a motion made in either House. But what is to be the effect if no such motion be made or carried, or if a motion hostile to the scheme be made in both Houses and rejected by both? The statute makes no difference between these cases. The views expressed by the learned Judges in the Court below, so far as I understand them, would in the latter case make

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But I think that all doubt upon that subject is entirely removed by the terms of section 101 of the Act of 1883, which for all practical purposes is incorporated with section 1 of the later Act. "Any rules made in pursuance of this section," in applying the earlier statute to the later, must be read as "Any rules made in pursuance of section 1, subsection 2, of the Act of 1888"; and assuming that the regulations before us were made by the Board of Trade in pursuance of section 1, subsection 2, of the Act of 1888, then in that case these words apply—"shall be of the same effect as if they were contained in this Act, and shall be judicially noticed." My Lords, in regard to these words which I have just read, I do not think I can express my opinion more clearly than by saying that I think that they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself.

LORD MORRIS.—I am quite of the same opinion as the noble and learned Lords who have preceded me, viz., the noble and learned Lord upon the woolsack, and my noble and learned friend opposite, on the two main propositions—first, that the action was incompetent, as being brought by persons who had no right to an interdict; and, secondly, that the general rules made by the Board of Trade in this case are *intra vires* and come within the powers conferred upon them by section 1, subsection 2, of the Act of 1888, combined with section 101 of the Act of 1883.

I could add nothing usefully, and therefore would not waste your Lordships' time by saying more, except that I cannot go to the further proposition which, as I understand, the noble and learned Lord on the woolsack has laid down, that it is not competent for the Courts of justice to consider whether these general rules are *intra vires* or *ultra vires*. I am of opinion that it is not alone competent for the Courts of justice to consider, but that it is their duty to consider, whether the rules are *ultra vires*; that there is no power delegated by the Legislature to the Board of Trade to make any general rules which, when made, are to be considered *intra vires* provided they are laid before both Houses of Parliament, and provided that nobody has taken the trouble either to read them or to make any motion upon the subject.

Subsection 2 of section 1 of the Act of 1888, which has been repeatedly referred to, enacts: "The Board of Trade shall as soon as may be after the passing of this Act, and may from time to time, make such general rules as are in the opinion of the board required for giving effect to this section, and the provisions of section 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." Section 101, subsection 3, which is to be read with that, is: "General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." Now, I admit that the words are very strong; the general rules are to have the same effect as if they were embodied in the Act; I accede to that. But what general rules? General rules which are made for "giving effect" to that section; not all general rules—there is no such power in my opinion given to the Board of Trade. What are the general rules which are to

have the same effect as if they were contained in the Act? The general rules made under the section—general rules such as the Legislature has, under section 101, delegated to the Board of Trade the authority of making. But if a Court of justice (before whom all these questions must ultimately come) considers that certain rules are rules which do not come within this section, in my opinion they would be *ultra vires*, and it would be the duty of the Court not to regard them as operative. As regards the question of their receiving any further sanction from the fact of their being laid before both Houses of Parliament. That is a matter of precaution; they do not receive any *imprimatur* from having been laid before both Houses of Parliament; it is only that an opportunity is given to somebody or other, if he chooses to take advantage of it, of moving that they be annulled. It is a precaution which in ninety-nine cases out of a hundred would be practically a sufficient precaution; but with reference to the abstract proposition which was queried in the judgment of the Master of the Rolls which has been cited, I have arrived at the conclusion that if the rules were not such rules as it was contemplated the Board of Trade should have the authority of making under the sections giving them the authority of making rules, it was the duty of the Court to determine that they were *ultra vires*.

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LORD RUSSELL OF KILLOWEN.—I agree in the conclusion at which your Lordships have arrived.

In the facts of this case, I think the second plea of the respondent is a good answer to the action, on the ground that the remedy is not injunction but summary prosecution under section 1, subsection 4, of the Act of 1888. As to the broader questions, I think the rules are *intra vires*, and are therefore valid and binding, even apart from the provision in section 101 of the Act of 1883, which is incorporated in and made part of section 1, subsection 2, of the Act of 1888, namely, that the rules made are to have effect as if contained in the Act itself. But further, I think that if the rules are to be read as part of the Act (as I think they ought to be) it is not, in this case, competent to judicial tribunals to reject them. Such effect must be given to them by judicial construction as can properly be given to them, taking them in conjunction with the general provisions of the Act or Acts of Parliament in connection with which they have been formulated.

A. Graham Murray, Q.C.—The judgment as it stands is one of absolver. The judgment of the House would lead to a judgment of dismissal.

LORD WATSON.—It ought not to be an absolver. The proper form is, "Recall the decree of absolver, and remit to the Court below to dismiss the action."

"ORDERED that the interlocutor of the 26th of January 1893 be varied by deleting the words 'Assoilzie the defender from the conclusions of the action,' and inserting in lieu thereof the words, 'Dismiss the action': Further ordered that the said interlocutor of the 26th of January 1893, subject to such variation, and also the said interlocutor of the 22d of February 1893, be affirmed: And it is ordered that the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this

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variation and judgment: Further ordered that the appellants pay to the respondent the costs incurred in respect of this appeal."

GEORGE BELOE ELLIS—J. H. & J. Y. JOHNSON—DAVIDSON & SYME, W.S.—MANN & TAYLOR
—BORLAND, KING, & SHAW—DOVE & LOCKHART, S.S.C.

No. 12. JAMES R. BLACK (Complainer), Appellant.—*Lord-Adv. Balfour—Salvesen.*

June 22, 1894.
Black v. Clay.

JOHN CLAY (Respondent), Respondent.—*Asher, Q.C.—J. J. Cook—Mark Napier.*

Lease—Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), sec. 7—Compensation for improvements—Notice—Determination of tenancy.—The Agricultural Holdings (Scotland) Act, sec. 7, provides that "a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act."

The lease of a farm was granted for nineteen years from the tenant's "entry, which is hereby declared to be to the houses, grass, and fallow land" at Whitsunday, "to the arable land in corn crop at the separation of the crop from the ground, and to the barns, barn-yard, and two cot-houses at Whitsunday following." After removing from the houses and grass the tenant, four months before Martinmas, gave notice to the landlord of his intention to claim compensation.

Held (aff. judgment of the First Division) that the tenancy of the holding did not terminate before Martinmas, and that the notice given by the tenant was sufficient.

Opinion (per Lord Watson) that after the tenant's removal from the lands under crop his possession of the barns, barn-yard, and cot-houses unconnected with any land, either pastoral or agricultural, would not be possession of a holding in the sense of the Act.

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Morris.

(IN the Court of Session 7th November 1893, 21 R. 41.)

The complainer, Mr Black, appealed.

LORD CHANCELLOR.—The question raised by this appeal is whether the respondent is disentitled to compensation under the Agricultural Holdings (Scotland) Act, 1883, by reason of his not having "four months before the termination of the tenancy" given notice to the landlord of his intention to make a claim for compensation under that Act, as required by the provisions of sec. 7.

The lease under which the respondent held commenced in 1860, and was for a term of nineteen years, but it has since been extended by tacit relocation. By the lease the lessors set and in tack and assedation let to the lessees all and whole the farm and lands of Winfield for the space of nineteen years "from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is hereby declared to be to the houses (with the exceptions after mentioned), grass and fallow land on the 26th day of May in the year 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barn-yard and two cot-houses at Whitsunday 1861, from these periods respectively to be possessed by the said John Clay and his foressaids during the space above written."

It will be observed that the term runs from the entry of the tenant, which, as to part of the farm, is to be on the 26th of May 1860; as to other part on the separation of the crop; and as to the residue of the subjects comprised in the letting, on the 26th of May 1861; and that these several subjects are to be possessed by the tenant during the space of nineteen years "from these periods

respectively." At what period did the tenancy determine under these circumstances within the meaning of the section to which I have referred ?

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It was contended for the appellant that it determined at Whitsunday 1892, when the tenant ceased to hold the grass and fallow lands, and that his subsequent possession of the arable land was not a possession as tenant but only a privilege accorded to one whose tenancy was already at an end. In support of that contention reliance was placed on the opinions expressed in this House in the case of *Wight v. Earl of Hopetoun*.¹ In that case (where the terms of the lease, so far as regards the grass and arable lands, were very similar to the present) the tenant was entitled to a new term on giving to the landlord notice that he required it "at least twelve months before the expiry of the above term of nineteen years." No more was determined in that case than that the notice given was ineffectual, inasmuch as it was not given twelve months before the term had expired as to a part of the lands held. But there is no doubt that opinions were expressed by noble and learned Lords, especially by Lord Westbury, which give some colour to the contention urged in the present case. That noble and learned Lord said :²—"According to the common law or custom of Scotland, if a lease be granted to a new tenant of a farm partly of arable and partly of meadow or pasture land, for a term of years to commence from Whitsunday, such tenant is entitled to enter on the grass or meadow land immediately on the commencement of the tack ; but the outgoing tenant is entitled to continue in possession of such arable lands as are sown until the separation of the crop from the ground. Still, the lease commences and the term of years runs and is computed in law from Whitsunday, both as to grass and arable, although the common law or custom allows the outgoing tenant to reap and carry away the off-going crop, and gives him a limited right of entry and occupation for that purpose."

I own I have some little difficulty in reconciling the opinion thus expressed with the language used in the lease then under consideration. But in the present case it appears to me to be impossible to adopt the construction contended for. The barns, and barn-yards, and two cot-houses, are to be possessed for nineteen years from the Whitsunday subsequent to the entry on the grass lands. It is not pretended that any such right as this exists "according to the common law or custom of Scotland," which was the foundation of Lord Westbury's opinion, that in the case of the arable lands no tenancy existed, but a mere permissive possession when the term as to the grass lands had come to an end. It appears to me impossible to avoid the conclusion that, as to the barns, barn-yard, and cot-houses, a tenancy is created a year later and terminates a year later than the tenancy of the grass lands ; and if there be a separate lease as to these, how can the lease be construed otherwise than as creating a tenancy in the arable lands which is to continue until the "separation of the crop" after the Whitsunday ? The words of the demise are the same with regard to all three subjects, which are to be possessed for the space of nineteen years from the periods named "respectively."

For these reasons, I cannot but come to the conclusion that the contention that under the lease there was to be one lease, and that as from the Whitsunday when the tenancy of the grass lands came to an end, cannot be supported.

That seems to me to be sufficient to dispose of the appeal. The appellant in

¹ May 27, 1864, 4 Macq. 729, 2 Macph. (H. L.) 35, 36 Scot. Jur. 542.

² 4 Macq. at p. 731.

No. 12. his pleadings rests his case upon the ground that the requisite notice was not given four months before that date. It is true that before the Lord Ordinary
 June 22, 1894. the appellant contended that the actual date when the crop was separated must
 Black v. Clay. be ascertained; but it may be doubted whether this was open to him upon the pleadings; and any such point was abandoned in the Inner-House.

It is not necessary to determine whether when the ish as to the arable land is to be "the separation of the crop," that is to be regarded as synonymous with the Martinmas term, so that the notice would be in time if given four months before "Martinmas," or whether in the case of the present lease the notice would be in time if given before the ish as to the barns, barn-yard and cot-houses when the tenancy comes completely to an end. I understand that my noble and learned friend Lord Watson is of opinion that the former is the correct view. There is an obvious convenience in such a conclusion, and I do not desire to be understood as expressing any dissent from it.

I do not feel pressed by the difficulty suggested in argument with regard to the period prior to which a notice must be given under sec. 28 of the Act in order that the lease may not be renewed. It may well be that having regard to the object in view the prescribed notice under that section must be given prior to the first ish, where several are provided for by the lease. It does not follow that where there is more than one ish the notice required by section 7 must be so given.

I think, therefore, that the interlocutor appealed from should be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—The appellant, who is proprietor of the farm of Winfield, in the county of Berwick, in May 1891, obtained a decree ordaining the respondent to remove from the houses (with the exception after mentioned), grass and fallow land, at the term of Whitsunday 1892, from the arable land at the separation of the crop of the same year from the ground, and from the barns and barn-yard and two cot-houses at Whitsunday 1893. The respondent was tenant under a lease which commenced in 1860. The original term of the lease was for nineteen years; but it was extended for thirteen years beyond that period, by tacit relocation. The decree of removing was in conformity with the stipulations of the lease in regard to entry and ish. The farm was thereby let "for the space of nineteen years from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is declared to be to the houses (with the exceptions after mentioned), grass and fallow lands on the 26th day of May in the year 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barn-yard and two cot-houses at Whitsunday 1891, from these periods respectively to be possessed by the said John Clay and his foresaids during the space above written." It is, in my opinion, material to notice, that the three portions of the entire farm, for which different times of entry are assigned, are each of them set "in tack and assedation," and are to be possessed by the tenant, for the full period of nineteen years from and after their respective dates of entry.

Sec. 2 of the Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. c. 62), confers upon a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements. It is provided by sec. 7 that a

tenant shall not be entitled to compensation under the Act, unless "four months at least before the determination of the tenancy he gives notice to the landlord in writing of his intention to make a claim."

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The respondent quitted possession of the houses (with the exception of the barn, barn-yard, and two cot-houses), and also of the grass and fallow lands, at the term of Whitsunday 1892. He thereafter, on the 6th day of June 1892, gave the appellant notice of a claim for improvements under the provisions of the Act of 1883, which notice was followed by an application to the Sheriff for the appointment of a referee, in terms of sec. 2 of the Agricultural Holdings (Scotland) Act, 1889 (52 and 53 Vict. c. 20). The appellant then instituted the present process of suspension and interdict before the Court of Session, in order to restrain all further procedure towards the assessment of compensation, upon the ground that the notice served upon him did not comply with the requirements of the 7th section of the Act of 1883.

The Lord Ordinary (Low) refused the interdict, and his decision was unanimously affirmed by the learned Judges of the First Division. In the Outer-House the appellant maintained that the actual date at which the last of the respondent's crop of 1892 was separated from the ground constituted the determination of his tenancy within the meaning of the statute; and he contended that a proof ought to be allowed for the purpose of fixing that date. The Lord Ordinary held that such inquiry was unnecessary, being of opinion that the term of Martinmas must be taken as the ish for the arable lands under crop in the year 1892. His Lordship said,—“I think that an ish at the separation of the crop is practically a Martinmas ish. The rent of a farm is due for the crop and possession of each year separately, and the term of Martinmas is regarded as the end of one crop year and the beginning of another. It is assumed, on the one hand, that the crop will be secured by Martinmas; and on the other hand, the tenant has up to Martinmas to secure the crop. No doubt, if the crop is secured before Martinmas the incoming tenant could not be refused access to the land for the purpose of ploughing, but the outgoing tenant is entitled to exercise his discretion as to the most suitable time for gathering the harvest; and accordingly it is not uncommon that the ish and entry of arable land is made 'at the separation of the crop, or Martinmas,' the two terms being used as synonymous.”

When the case went to the Inner-House the appellant adopted a new line of argument. He there maintained that the possession had by the respondent after Whitsunday 1892, for the purpose of reaping and ingathering his crop, did not constitute tenancy, but merely amounted to a privilege accorded to a tenant by the common law, which was not altered in legal character by its introduction into the lease in the form of a stipulation. That was also the chief, if not the only, argument submitted for the appellant at your Lordships' bar; and it was mainly rested upon the decision of this House in *Wight v. Earl of Hopetoun*.¹ In that case the lease expired, as to houses and grass, at Whitsunday, and, as to arable land under crop, at its separation, the landlord being under an obligation to grant a new term, upon a notice, by the tenant demanding renewal, “at least twelve months before the expiry of the above term of nineteen years.” The only question was, whether the specific term of nineteen years, which the contracting parties had in view, was to run from the Whitsun-

¹ 4 Macq. 729.

No. 12. day of entry to the Whitsunday of ish, as to houses and grass, or from the later date of entry to the arable lands till the time of the tenant leaving them. It was held by the House, affirming the judgment of the Court of Session, that Whitsunday was the term which the parties contemplated for the expiry of the nineteen years, and that the tenant, having failed to give notice twelve months before that term, was not in a position to demand a renewal of his lease.

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I cannot regard the decision in *Wight v. Earl of Hopetoun*¹ as establishing the principle contended for by the appellant, which appeared to me to be this: that no words of demise will be sufficient to create a tenancy of arable lands under crop, after houses and grass lands are surrendered to the landlord, so long as the demise is made for the sole purpose of enabling an outgoing tenant to tend his crop, and reap it at maturity. The proposition is, to my mind, not altogether intelligible, because the quality of the possession had by an outgoing tenant of land under crop, after he has flitted from houses and grass lands at Whitsunday, differs, so far as I am aware, in no single particular from the possession of lands under crop which he had enjoyed during the previous years of the lease, which was admitted to be possession under his tenancy. No such general question was really involved in the decision of *Wight v. Earl of Hopetoun*.¹ That it was not the intention of the noble and learned Lords who gave judgment in that case to negative the possibility of a double ish, one for houses and grass, and another for land under crop, appears from the judgment of Lord Wensleydale, who said,²—"If it is a lease with a double termination, one for the houses and grass land, and the other for the arable, I am clearly of opinion that the majority of the Judges have come to the right conclusion."

The leading judgment in this case was, in the First Division, delivered by Lord M'Laren. The Lord President concurred in the views expressed by his Lordship, and in the additional observations which were made by Lord Kinnear. Lord M'Laren was of the same opinion with the Lord Ordinary in regard to the proper construction of the time indicated in the lease as the separation of the waygoing crop from the ground. Upon that point his Lordship observed,—“The reason why the expression ‘separation of the crop’ is used in the clauses relating to entry and removal, is that the incoming tenant may have access to each field as soon as its crop has been ingathered, and shall not be liable to be kept out of possession by a troublesome outgoing tenant in the assertion of a theoretical right to retain possession until Martinmas. But this construction is quite consistent with Martinmas being the autumnal term, wherever it is necessary that something to be done in fulfilment of the lease should be referred to a definite day—payment of rent being a clear case in point. I have therefore no difficulty in holding that, where notice has to be given four months before the autumnal term, the term of Martinmas is the time from which the period of four months is to be reckoned.”

I entertain little doubt that the contract embodied in the lease before us makes effectual provision for three terms of entry and three terms of ish, in regard to different portions of the subjects let; and that, until the arrival of each term of ish, a proper right of tenancy exists with respect to such part of the subjects let as the tenant is bound to quit possession of at that term. I am also of opinion with the learned Judges of both Courts below, and for substantially the same reason, that, in cases like the present, the expression “separation of the crop” ought to be read

¹ 4 Macq. 729.

² 4 Macq. at p. 738.

as signifying the term of Martinmas. I venture to think that, whether tested by reference to their popular meaning, or to their legal effect, "separation of the crop" and the "Martinmas term" are equivalent expressions when they occur in a Scotch lease. When the arable ish is Martinmas, the outgoing tenant could not prevent his successor from ploughing before that term land from which his crop had been removed; nor, in the case of a late harvest, could his successor prevent him from reaping his crop after the term. And, in my opinion, whichever of these expressions be used in the lease, it must be taken to mean the actual term of Martinmas, in all cases where the contractual rights of landlord or tenant are made to depend upon their giving a previous notice. Upon any other interpretation, many conditions, to be performed after Whitsunday at a time previous to, and dependent upon, the date of the tenant's removal from lands under crop, would become inextricable.

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Assuming the right construction of the lease to be that which I have indicated, the question still remains, which of the three periods of ish ought to be regarded, for the purposes of this appeal, as the determination of the respondent's tenancy within the meaning of sections 2 and 7 of the Act.

The definition which the Act gives of the expression "determination of tenancy" is not definitive for all purposes. It is defined (section 43) as meaning "the determination of a lease by reason of effluxion of time, or any other cause." That explanation affords no aid in ascertaining whether the *punctum temporis* from which the time for giving a notice, to be calculated *retro*, is the first, the second, or the last term of removal. That is a question which, in my opinion, must be decided according to the nature and object of the notice; and I can detect no inconsistency in holding that, in one section of the Act requiring notice, the beginning of removal, and that in another the final removal of the tenant may be contemplated.

In this case I have come to the conclusion that the "determination of a tenancy," as that expression occurs in sections 2 and 7 of the statute, refers to the time when the tenant finally gives up possession of the subjects which in the statute are described as his "holding." Section 2 is framed upon the assumption that his quittance of his holding and the determination of his tenancy are to be, in point of time, coincident. A holding which entitles the tenant to the benefit of its provisions must, according to section 35 of the Act, be "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral." The respondent's holding, in so far as it consisted of lands in crop after Whitsunday 1892, was agricultural, and that is, in my opinion, sufficient for the disposal of this appeal. But I entertain serious doubts whether, after his removal in the autumn of 1892, the respondent remained in possession of any holding within the meaning of the Act. I do not think that the bare possession of a barn, barn-yard, and two cot-houses, unconnected with any land either pastoral or agricultural, is possession of a holding recognised by the Act. That view of its provisions does not appear to me to be in the least inconsistent with the main object of the Act, which obviously was to confer certain benefits upon an outgoing tenant. He can have no practical difficulty in intimating his claim of compensation for improvements four months before Martinmas. To postpone that intimation until four months before the following Whitsunday, when he cedes possession of subjects neither agricultural nor pastoral, and not required for any purpose connected with lands agricultural or pastoral, would, in my opinion, be unnecessary, and would suspend for six

No. 12. months his right to recover moneys which he had previously expended for the benefit of his landlord or successor in the tenancy. Not only so, but in so far as concerns the bulk of the statutory improvements specified in part 3 of the schedule, to which the consent of the landlord is not required, it would be difficult, if not impossible, for the landlord to check, or for an arbiter to assess satisfactorily the amount of the tenant's claim, if the time for giving notice were extended to the 15th of January following the tenant's removal from lands under crop.

For these reasons I am of opinion that the interlocutors appealed from ought to be affirmed, with costs.

My noble and learned friend Lord Shand, who heard the argument in this appeal, is unable to be present to-day; but his Lordship has requested me to state that the opinions which I have expressed have been carefully considered by him and have his entire concurrence.

LORD MORRIS.—I have had an opportunity of reading the reasons which have been assigned by my noble and learned friend Lord Watson for his judgment, and I desire to express my entire concurrence.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

ADAM BURN & SON—H. & H. TOD, W.S.—ANDREW WOOD & Co.—
PRINGLE, DALLAS, & Co., W.S.

No. 13. **EDINBURGH STREET TRAMWAYS COMPANY (Defenders), Appellants.—**
Asher, Q.C.—Murray, Q.C.—Vary Campbell.
LORD PROVOST AND MAGISTRATES OF EDINBURGH AND OTHERS (Pursuers),
Respondents.—Lord-Adv. Balfour—Moulton, Q.C.

July 30, 1894.
Edinburgh
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ways Co. v.
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Edinburgh.

Tramway—Sale to Local Authority—Undertaking—Price—Rental value—Tramways Act, 1870 (33 and 34 Vict. c. 78), sec. 43.—Section 43 of the Tramways Act, 1870, provides that where the promoters of a tramway in any district are not the local authority, the local authority may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, require the promoters to sell to them "their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district," such value to be determined by a referee appointed by the Board of Trade.

In an action for the reduction of an award by a referee under this provision, *held (diss. Lord Ashbourne, aff. judgment of the First Division)* that having regard to the fact that the tramway company could not assign the right to use the tramways, the "then value" of the tramway meant the then value of the tramway lines, and that in ascertaining the value the basis of the calculation should be the sum which would be required to construct the lines less a sum for depreciation.

Ld. Chancellor (Herschell). (In the Court of Session, 16th March 1894, reported in the present volume, p. 688.)
Lord Watson. The defenders appealed.
Lord Ashbourne. The case was heard along with *The London Street Tramways Company v. The London County Council*, L. R. [1894], 2 Q. B. 189.
Lord Shand.

At delivering judgment,—

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LORD CHANCELLOR.—In the first of these cases the appellant company was formed under the provisions of a private Act of Parliament in the year 1871. This Act incorporated Part II. and Part III. of the Tramways Act, 1870. Section 43 of that Act entitled the respondents, within six months after the expiration of a period of twenty-one years from the time when the appellants were empowered to construct the tramway, by notice in writing, to require the appellants to sell their undertaking. They accordingly, on the 12th of August 1892, gave notice to the appellants that, in exercise of their rights under that section, they would purchase the appellants' undertaking within the city of Edinburgh. The appellants and respondents having differed as to the price to be paid, the Board of Trade appointed Mr Henry Tennant, of York, as referee, to fix what the price should be. In the narrative of the award or decree-arbitral, which he made, Mr Tennant stated that, in his opinion, after careful consideration of the terms of section 43 of the Tramways Act, 1870, in valuing the tramways, he was not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the tramways to be determined by him according to his construction of the statute was such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation for their present condition, and that in estimating such cost he was entitled to take into account the fact that the tramways were then successfully constructed and in complete working condition.

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The present conjoined actions were thereupon raised by the appellants against the respondents for the purpose of reducing Mr Tennant's award or decree-arbitral upon the ground that his view of section 43 of the Tramways Act, 1870, was erroneous, and for declaration that he ought, under that section, to have fixed the value to be paid by the respondents for the tramways upon the rental basis, and for an order on him to proceed with the reference, and to find and declare the value of the tramway lines according to their rental value.

Both the Lord Ordinary and the First Division of the Inner-House have held Mr Tennant's award to be good, and have assolized the respondents.

The question on this appeal is whether these decisions were correct. The question turns on the construction to be put upon the language employed in section 43 of the Tramways Act, 1870, which prescribes the terms upon which the promoters of a tramway (in this case the appellants) are to sell their undertaking to the Local Authority. The words are as follows:—"Upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking."

It is contended on behalf of the appellants that the value of the tramway must be ascertained by taking into consideration what rental could be obtained for it if let with all the statutory rights of using it possessed by the promoters, and then allowing whatever may be thought the proper number of years' purchase of the rental which could thus be obtained. The sum so arrived at, it was argued, would represent the then value of the tramway within the meaning of the section.

Before discussing the language used by the Legislature it is, I think, neces-

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sary to consider the nature of the rights and powers of the promoters which it is said are to be thus taken into account, and the manner in which they are conferred upon them.

The promoters obtained authority, in the first place, to interfere with public highways by laying down tramways upon them, and maintaining the tramways so laid down. But the most important power which they obtained was that contained in section 34 of the Tramways Act, 1870, which authorised them to use upon the tramways so laid down carriages with flange wheels, or wheels suitable only to run on the rail prescribed by their Act, and provided that, subject to the provisions of their special Act and of that Act, the promoters and their lessees should have the exclusive use of their tramways for carriages with flange wheels or other wheels suitable only to run on the prescribed rail.

It will be seen that the power thus conferred is limited to the promoters and their lessees, the promoters being the person or company authorised to construct the tramways. The right conferred is a personal one, and cannot be claimed by any persons who do not come within the designation of promoters or lessees of promoters. It is not conferred upon the promoters' assignees. A conveyance, therefore, by the promoters of their tramways, or even of their undertaking, would not carry with it the right to the statutory monopoly conferred upon the promoters by the section to which I have referred.

I proceed now to consider the words of the provision upon which the question at issue turns. It is to be observed that, although the undertaking is described as the subject of the sale, it is to be sold, not upon terms of paying its then value, but upon terms of paying "the then value of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." It appears clear that the word "tramway" cannot be read as synonymous with "undertaking." The words which follow "tramway" are, to my mind, conclusive upon this point. What, then, does "tramway" mean as used in the section? I have examined every instance of its use in the statute, and it appears to me in every other case, at all events, to be used to describe the structure laid down on the highway, and nothing more, and I cannot see my way to give any other meaning to it in the section under consideration. The word "tramway" may, no doubt, without impropriety be held to include all proprietary rights attached to it; but I do not think that it can with propriety be held to comprise all the powers in relation to the tramway which are conferred by the statute upon the promoters.

I have already pointed out that the power exclusively to use the tramway was granted to the promoters as such, and is not capable of transfer by them. This is distinctly recognised by the enactment which immediately follows that under consideration. It is provided that when a sale has been made all the rights, powers, and authorities of the promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if the tramway was constructed by such authority under the powers conferred upon them by a provisional order under the Act, and in reference to the same they shall be deemed to be the promoters. It is by virtue of this enactment, and of this alone, that the local authority become entitled to the exclusive use of the tramway, which was previously vested in the promoters. It is the statute, and not the company

which originally constructed the tramways, which confers upon the local authority this right. No. 13.

It is also worthy of note that some, if not all, of the rights, powers, and authorities of the promoters are treated as not included even in the term "undertaking," inasmuch as they are spoken of as the rights, powers, and authorities of the promoters "in respect of the undertaking sold."

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I have so far dealt with the language of the section, without taking into consideration the words within the parenthesis, upon which so much of the argument turned; what was to be paid by the purchasers was the then value of the tramway, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever."

It was contended for the appellants that the presence of the parenthesis indicated that in the opinion of the Legislature the term "value of the tramway" would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure. There is, I think, a fallacy involved in considering the meaning of the words which follow the parenthesis by themselves, and then inquiring how far the meaning thus attributed to them is to be modified by reason of the words which precede. Each part of the provisions throws light on the other. It is by reading it as a whole that the intention of the Legislature is to be ascertained. The words found within the parenthesis, to my mind, support the view that "tramway" is to be construed in the manner which I have indicated, and not in that contended for by the appellants. It is said that the words "exclusive of any allowance for past or future profits of the undertaking" were introduced for the purpose of preventing the arbitrator making any addition to the value otherwise arrived at in respect of such profit. I find it difficult to understand how it could ever be supposed that an arbitrator would make any addition to the value of the tramway in respect of the past profits of the undertaking, or how it could ever have been thought necessary to prohibit his doing so. It is, however, quite intelligible that it might be thought necessary to guard against his allowing for, or, in other words, taking into account past profits in arriving at the value of the tramway. But if the word "allowance" is used in this sense in relation to past profits, its meaning must be the same in relation to future profits. I therefore construe the words as enacting that neither the profits made in the past nor to be anticipated in the future were to be taken into account in assessing the value.

It was argued that if the value of the tramway were arrived at by taking so many years' purchase of the rental which could have been obtained for it, if let, no profits would be allowed for in the value so ascertained. I am unable to adopt this view. How would it be possible to determine the rental which could be obtained except by reference to the profits which had been or which might be made? The rent which a tenant would be prepared to give would obviously depend upon the profits to be anticipated.

It was further argued that the Legislature had only excluded an allowance for past or future and not for present profits. Why, it was asked, if all profits

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were to be excluded were the words "past or future" inserted? To my mind the words cover all profits whether made or to be made, and the reason for their insertion appears to me plain. If the word "profits" alone had been used it would have been open to contention that only profits actually made were referred to, and that the provision did not exclude an allowance for profits to be anticipated in the future.

Reading the enactment as a whole, I can find no indication, but quite the contrary, that the arbitrator in determining the then value of the tramway was to take into account those rights and powers which had been possessed by the promoters as such by virtue of the statute, and which would be thereafter by the same statute conferred upon the local authority.

Reliance was placed by the appellants upon the provision of sections 41 and 42 of the Tramways Act, 1870, enabling the Board of Trade, if the promoters discontinued the working of their tramway or were insolvent, to declare that their power in respect of the tramway should be at an end. In the first of these cases the Board of Trade were empowered to declare the powers of the promoters at an end from the date of the order, in the latter, at the expiration of six months from the making of the order, but in both cases it is provided that the powers of the promoters shall thereupon cease and determine "unless the same are purchased by the local authority in manner by this Act provided." Inasmuch as section 43 applies to a purchase by the local authority within three months after any order made by the Board of Trade under either of the two preceding sections, it was contended that this shewed that the purchase of the undertaking was regarded by the Legislature as a purchase of the powers of the promoters.

I do not think it possible to give the effect contended for to this argument, and to construe the word "tramway" in that part of section 43 which regulates the terms of payment in a different manner to that which a consideration of the section itself suggests on account of the language employed in the two preceding sections. That language is certainly not very felicitous. Whether the undertaking is purchased or not, the powers of the promoters equally cease and determine; the purchase does not keep their statutory powers alive. The powers are possessed thereafter by the local authority by virtue of the statute in precisely the same manner as they were acquired by the promoters.

For these reasons I think the interlocutors appealed from should be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—These appeals,—the one Scots and the other English,—were heard together at your Lordships' bar. They appear to me to raise precisely the same question, under circumstances which differ in no material respect. The majority of the learned Judges in both countries have come to the same conclusion. In Scotland the majority consisted of the Lord Ordinary, with three Judges of the First Division, the Lord President dissenting. In England the decision of a Divisional Court was unanimously reversed by three Judges sitting in the Court of Appeal.

The respondents are local authorities, who have exercised their statutory option of requiring the appellants, who are street tramway companies, to sell a section of their tramway undertaking on the terms and conditions prescribed by statute. In that event, it is enacted that the price payable to the appellants shall be the value, to be ascertained failing agreement by arbitration, of certain

enumerated subjects, comprised in that part of their undertaking which has been taken over by the local authority. No. 13.

In both appeals the rights of the parties are regulated by the Tramways Act, 1870. Section 43 of that Act defines the consideration payable to be "the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such district." In the second, the provisions of the London Street Tramways Act, which became law on the day after the general statute, and by which the respondent company were incorporated, are also applicable. Section 44 of the later Act defines the consideration to which, in the event which has occurred, the company are entitled, in terms identical with those which I have just quoted from the general statute.

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The parties having failed to agree as to the quantum of consideration, applied to the Board of Trade, who, in the first case, nominated Mr Henry Tennant, and, in the second, Sir Frederick Bramwell, to be statutory referee. These gentlemen issued their respective awards; and the judicial proceedings in which these appeals are taken, though differing considerably in form, were instituted by the tramway companies with the same object, viz., in order to have the awards set aside, or corrected, in so far as objectionable. In so far as concerns the valuation of their lands, buildings, works, materials, and plant, the appellants have stated no objection. Their impeachment of the awards is rested solely upon the ground that the referees have failed to give due effect to the enactments of the statutes of 1870 in valuing the particular subject therein described as "the tramway."

It is plain that the expression "the tramway," as it occurs in the clauses already referred to, cannot mean the undertaking of the company, because it is enumerated as one of those parts of the undertaking which are to be separately valued, the sum of the values being the measure of the consideration which the company is to receive. Accordingly, it was not disputed in argument that the words must refer to the structure of stone and iron, or other material, which is affixed to the *solum* of the streets, and upon which tramway vehicles run. So far, the parties are agreed as to the identity of the subject to be valued; but the important question remains, upon what footing it ought to be valued; and upon that point the present controversy turns. I do not regard the question thus raised as one which merely concerns the method of valuation which ought to be followed. In my opinion its solution depends, not upon so-called principles of valuation, meaning thereby the various formulæ, some of them alternative, according to which value may be calculated, but upon the nature and extent of the interest which the Legislature intended should attach to and accompany the structure to be valued and paid for, under the description of "the tramway."

So far as I can judge, the right of property in a tramway line, as such, may be of three different degrees. It may be no higher than bare ownership of the materials of which the line is composed, without any one having the right to retain or use them *in situ*. Again, it may be that the property of the line does not carry with it the privilege of future user, but that others than the owner selling may either possess or be in a position to acquire such privilege. Or, it may be, that the right to use the line for tramway purposes, in perpetuity or for a

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time limited, is inherent in the right of property. Although physically the subject is the same, the interest in it, which must be regarded as the true subject of valuation, is very different in these three cases.

The referees have dealt with "the tramway" as a subject belonging to the second of these classes; and they have accordingly put upon it what may conveniently be termed a construction value. The rule which he followed is thus stated by Mr Tennant, "that the proper value of the said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition, and that, in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition." Sir Frederick Bramwell came to practically the same conclusion. He declined to give any effect to evidence led by the company for the purpose of shewing "the rental value of the purchased tramways considered as let or capable of being let," whilst he received, and took into account, evidence adduced on behalf of the County Council tending to shew "the proper cost of construction of the purchased tramways, and the depreciation of such value, by comparing the condition at the time of sale and purchase with the condition when newly constructed." He refused to admit evidence as to the profit arising from previous use of the tramways; and arrived at his valuation on the basis of cost less depreciation, such valuation to be increased by the sum of £9442, in the event of its being judicially determined that no deduction from the original cost ought to be made in respect of depreciation.

The view maintained by the appellant companies in opposition to that which has been taken by the referees is fully disclosed in their pleadings. In the first appeal the company crave declarator to the effect that the referee is bound to value the lines of tramway purchased by the local authority according to their rental value, and that by capitalising, at so many years' purchase as he may think proper, the rent at which, one year with another, such lines might, in their actual state, be reasonably expected to let, or by giving effect to such rental value in such other manner as he may find and determine to be just. In the second appeal the notice of motion given by the company to set aside or refer back the award is rested upon these grounds,—(1) That the referee ought to have taken into consideration the evidence which they submitted as to the rental value of the tramways and ought not to have excluded the evidence which they tendered as to the profits which they had derived from traffic thereon; and (2) that the evidence given on behalf of the local authority with regard to the cost of construction, either with or without depreciation, ought not to have been considered by him.

If, according to its just construction, the expression "the tramway," as it is used in section 43 of the general and section 44 of the London Tramways Act of 1870, was meant to designate the lines of tramway considered simply as structures and apart from any privilege of user, it would not seem to be doubtful that the awards complained of are in strict conformity with the intendment of these clauses. On the other hand, if the expression, when rightly construed, includes not merely the fabric of the tramway lines, but an exclusive right to use them for tramway traffic in the future, then neither award has exhausted the reference, because it leaves unvalued an important item, which, upon that construction, the Legislature has appointed to be valued and paid for.

Which of these constructions ought to prevail is, to my mind, the only point which your Lordships require to decide. I see no reason to doubt that these words, "the tramway," are capable of being so employed as to indicate that they embrace the use and occupation of the fabric, as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill of a tramway undertaking. But, in their primary and natural sense, the words appear to me to denote nothing more than the fabric of the tramway lines upon which traffic is conducted. In order to give them a wider meaning as they occur in the enumeration of particulars to be valued under section 43, I think it is incumbent upon the appellants to shew, by reference to their context or to the general scheme of the statute, that they were intended by the Legislature to have that wider significance.

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The exclusive occupation and use of any portion of a public street or highway, whether by an individual or a company, is, at common law, an invasion of the rights of the public. Accordingly, an exclusive privilege of using rails laid along a street for tramway traffic cannot exist without statutory sanction, and when a right of that kind has been created its extent and its duration must be wholly dependent upon the terms of the authority given by the Legislature. In the present case, the right of exclusive user, as against the general public, is not one of the subjects which the appellant companies were authorised to acquire, either by agreement or by compulsion, for the purposes of their undertaking. The privilege of user is conferred upon them by section 34 of the Tramways Act, 1870; and they have, in my opinion, no right whatever against the public beyond what is given them by that clause.

Section 34 provides that "the promoters of tramways authorised by special Act and their lessees" may use carriages with flange wheels, or wheels suitable only to run on the rail prescribed by such Act. It then goes on to enact that "subject to the provisions of such special Act, and of this Act, the promoters and their lessees shall have the exclusive use of their tramways for carriages with flange wheels, or other wheels suitable to run only on the prescribed rail." It is not a consideration to be overlooked, that the Act deals separately with the privilege of exclusive use, which is given directly to "the promoters and their lessees." But the appellant companies are not the only promoters to whom the gift is made, and they can have no lessees. Local authorities becoming purchasers under sections 41, 42, and 43 are also "promoters" within the meaning of section 34. They are the only promoters who have power to let the tramway; and they are by section 19 expressly debarred from working the undertaking, except through a lessee. In my opinion, the plain import of the enactments of section 34 is to give the promoters who construct the tramway an exclusive right to use it, which is strictly personal, and is therefore incapable of being communicated by them to any other person; and also to give the same exclusive right to local authorities who acquire the tramway, with the additional power of communicating the privilege to their lessees.

The appellants maintained that the provisions of sections 41, 42, and 44 qualify the enactments of section 34, and shew the intention of the Legislature to have been that the appellant companies' right of user should not be treated as a privilege personal to them, but as a continuing asset, which they could dispose of to the local authority. For reasons which I shall presently state, I do not think the provisions of section 44 have any bearing upon the point. Section 41 deals with the case of the promoters discontinuing to work their

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tramway, and section 42 with the case of their becoming insolvent, so that they are unable to maintain and work their tramway with advantage to the public. In either of these events the Board of Trade are authorised to declare that "the powers of the promoters" shall cease and determine, unless the same are purchased by the local authority "in manner by this Act provided," which admittedly means on the same terms as to price which are prescribed by section 43. It was said by the appellants to be matter of necessary inference from these provisions that "the powers of the promoters," to be purchased by the local authority in the events contemplated, must of necessity include the promoters' privilege of exclusive use. With the majority of your Lordships, I have been unable to appreciate the force of that reasoning. I cannot understand why the powers to be so purchased ought, upon any sound canon of construction, to be read as necessarily including a power or privilege previously given to the promoters in such terms that it was not theirs to sell.

As already indicated, the provisions of section 44 are, in my opinion, of no relevancy to the construction of the terms of sale and purchase prescribed by section 43. Section 44 empowers the original promoters, after they have used their tramway for traffic for a period of six months, to sell their undertaking, with consent of the Board of Trade, to any person, persons, corporation, or company, or to the local authority of the district. If the transaction be not with the local authority, the purchaser comes into the shoes of the seller, and is affected by the provisions of sections 41, 42, and 43. But in no case of sale and purchase under section 44 do the provisions of section 43 with respect to price apply. The parties selling and purchasing are left at liberty to adjust the terms of the transaction according to their own pleasure. The promoters may fix their own price, and decline to accept any other consideration.

I do not suggest that the inference which I derive from the other clauses of the Act, with respect to the personal character of the right of user possessed by the appellant companies, must necessarily govern the interpretation of "the tramway" in section 43. But I think the inference is sufficient to exclude any presumption that the Legislature intended local authorities to purchase and pay for, as inherent in the subject described as "the tramway," a right of future use which did not belong to the sellers, and had already been vested in the purchasers themselves by an express statutory grant.

I shall now advert to the terms of section 43, upon which these appeals really depend. It authorises local authorities, after a certain lapse of time and upon certain conditions which have been duly observed by the respondents, to require the promoters "to sell, and thereupon such promoters shall sell to them their undertaking," or such part thereof as is within the district of the authority making the requisition. The word "undertaking" is not defined in the Act; but it appears to me that it must signify all the real and moveable property belonging to the promoters necessary for conducting tramway traffic, together with all rights and interest in or connected with such property which belong to the promoters, and are capable of being transmitted from them to the purchaser. I do not think the word can be reasonably construed so as to include any property, or any right or interest, which does not belong to the promoters, and does not pass from them to their purchaser under the compulsory contract of sale. On the assumption that the promoters' privilege of use is personal, and therefore limited to the period during which they may continue to be owners of the tramway, the privilege of use after the expiry of that period, which they did not

possess, cannot be regarded as part of the undertaking which they are required to sell. No. 13.

I need not repeat the language which is used in section 43 to prescribe the consideration to be paid by the local authority to the promoters for the sale of their undertaking. The parenthetical words are so introduced as to apply to and qualify the value to be put upon each and all of the particular subjects enumerated. No question has been raised with respect to allowance for compulsory sale or other similar consideration; but the able arguments addressed to us were largely directed to the import and effect of the first part of the parenthesis, "exclusive of any allowance for past or future profits of the undertaking." I understood the appellants to concede that these words are not to be wholly disregarded in estimating the value of the tramway; and, in my opinion, the concession was inevitable. It was urged on their behalf that the making of an allowance for present or future profits, in estimating the value of a tramway line, is something quite different from ascertaining its rental value on the footing of its being a lettable subject, and, consequently, that whilst the first of these things was expressly forbidden, the second was impliedly sanctioned by the clause in question. In the course of the argument an ingenious suggestion was made to the effect that, whilst past and future are, present profits are not, excluded from the consideration of the referee. What can possibly constitute present profits, referable to a mere *punctum temporis*, and distinguished from past and future profits, was not explained in argument, and is a problem which I am unable to solve to my own satisfaction. I see no reason to doubt that the words occurring in the parenthesis were meant to be, and are equivalent to, "any profits whether past or future."

The prohibition of any allowance for past or future profits does not appear to me to be compatible with the adoption of rental value, for which the appellants contend. It is in substance an enactment that the profits which the tramway has earned, or may be capable of earning, are not to be taken into account at all in estimating the amount which is to be paid by the local authority. It may be true that there are some heritable subjects upon which a rental value can be put without minute investigation of their capability of yielding pecuniary profits. The yearly value of a dwelling-house in a particular street may be approximately ascertained by reference to the average of the rents actually paid for similar tenements in the same street, and without entering into an inquiry whether its occupation has been or will be a source of profit to the occupant. But it is a mistake to suppose that valuation by rental is a process disassociated from the idea of profit. On the contrary, it is simply one of several methods used for the purpose of arriving at an estimate of the profits arising from the ownership of heritable estate. It is not a satisfactory method in the case of a tramway line which has never been let, and has no competing line within its district. The questions whether a hypothetical tenant could be found, and what rent he might be reasonably expected to give if he were found, cannot be easily solved, if at all, except by estimating what amount of profit the line had yielded in the past, and was likely to yield in the future. An intending lessee, whether real or hypothetical, would hesitate to pay a rent which was not based upon these data. Again, I can well understand that future profits might be assumed as an element in ascertaining rental value, and yet that, in a compulsory sale, they might afford grounds for a further allowance in respect of the seller's loss of profit arising from disturbance of his business. But the case of past

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profits is very different. When past profits have been taken into account, as enhancing rental value, I am at a loss to understand upon what possible grounds they could be regarded as entitling the seller to any further allowance. I am unconscious of doing injustice to the opinions of the learned Judges from whom I differ when I say that not one of them has suggested in what shape such further allowance could be made.

These considerations all tend to confirm the inference which I draw from the language of section 43, as well as from the other provisions of the Act to which allusion has been made, that inference being that the Legislature, by the expression "the tramway," meant to denote the bare fabric of its lines, unaccompanied by an exclusive privilege of using them. I therefore concur in the judgments which have been moved by the Lord Chancellor.

LORD ASHBOURNE.—The facts of the case have been so fully stated by the Lord Chancellor that I need only refer to them at such length as may make my meaning plain.

The direct question raised before your Lordships is whether the arbitrator was right in valuing the tramway at what it would cost to make, or whether he ought to have ascertained what it could have been let for to a tenant who could use it, and then have capitalised its annual value.

The cases of the Edinburgh Street Tramways Company and of the London Street Tramways Company have been argued together, as they depend upon precisely the same point. The question in the *Edinburgh* case¹ depends upon the construction of sec. 43 of the General Tramways Act, 1870, and the *London* case² depends upon sec. 44 of the London Street Tramways Act; but the two sections are in identical terms, as is the case with many other sections of these Acts. For convenience I shall refer only to the sections of the General Tramways Act, 1870, and shall not deem it necessary to note specially the corresponding sections of the London Street Tramways Act of 1870, which are mentioned in detail in the judgments in the *London* case.² The decision is of deep moment to all the tramway companies of Great Britain, and involves interests of considerable magnitude.

The section is not clear. In any view of the case, it is a cumbrous and unfortunate piece of drafting—not plain or direct—and each side is confronted with difficulties in its interpretation. It is not surprising to find that amongst the Judges before whom the case has come there have been wide differences of opinion; and therefore I have applied myself to the consideration of the case with many doubts and misgivings as to the soundness of my own judgment on important points, where, though I might be supported by the opinions of Judges of eminence, I know my conclusions have been opposed to authorities for whom I entertain the very highest respect.

The clause requires the closest and most critical examination and analysis, in order to see what is the method of the transfer, what is sold, and what is to be paid.

What is the method? As Mathew, J., in the *London* case² has forcibly said,—“Nothing would have been easier than to have said in terms that at the end of the twenty-one years there shall be a transfer of the undertaking, and the company shall be paid for the cost of materials *in situ* capable of being worked, less depreciation.” But the Legislature in its wisdom has used a long,

¹ 21 R. 688.

² L. R. [1894] 2 Q. B. 189, at p. 197.

complicated, and involved sentence, from which we have to spell out and infer such meanings as we can. The transaction is to take place by a sale. A sale involves a selling and buying, a bargaining, and here an arbitration. If what was meant was a statutable transfer at a statutable price, it was certainly not felicitous drafting to enact that the transaction should be carried out by the machinery set out at such length in the section.

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But a far more important consideration in the matter is what is sold and transferred under the section. The undertaking, of course, is sold; but the great difficulty is to give the due and proper meaning to the word "tramway." Is it only the tramway *in situ*, or the tramway with the power to use it? This is really a governing point in the case. Does the sale of the tramway include, or involve, or carry with it the right to use it? The words of the section are,— "When any such sale has been made all the rights, powers, and authorities of the company in respect of the undertaking sold . . . shall vest" in the purchaser. The words here again are not the best or the clearest. They must be read not only with the rest of the section, but also in connection with other sections, in order to see whether the right to the tramway is treated in the Act as carrying with it the right to use the tramway. Sec. 41 deals with the discontinuance of tramways, and enacts that in certain cases the Board of Trade may by order declare that from the date of the order the powers of the promoters shall be at an end, "and the said powers of the promoters shall cease and determine, unless the same are purchased by the local authority in manner by this Act provided," *i.e.* by sec. 43. Thus sec. 41 expressly states that the powers—including the right to use—are purchased under sec. 43. Sec. 42 is to the like effect. It deals with the insolvency of promoters, and provides for the ceasing of their powers "unless the same are purchased by the local authority in manner by this Act provided," *i.e.* again by sec. 43. In this connection it is important to note sec. 44, which enacts,— "Where any tramway in any district has been opened for traffic for a period of six months, the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, corporation, or company, or to the local authority of such district; and when any such sale has been made, all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters." In my opinion a sale under sec. 44 would carry with it the right to use the tramway. Similar words are used in sec. 43; the machinery of sale is resorted to, "the rights, powers, and authorities" are also transferred, and I cannot resist the conclusion that under both sections the buyer was intended to purchase and acquire with the tramway the right to use it.

It was argued before your Lordships that the powers were to be regarded as the creatures of the statute, given independently by its provisions to the "promoters," and that the sale had nothing to say to them, and did not carry, affect, or transfer them. I do not find any such idea in the judgments of the Court of appeal in the *London* case. Lindley, L.J., says,¹—"The vendors have only

¹ L. R. [1894] 2 Q. B. at p. 205.

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a right of user (that is, by sec. 2); they have no land to sell; they have only an easement so far as the land is concerned; but they have an exclusive right to use the tramway (by sec. 29), and to grant licences to other persons to use it (by sec. 37). These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale." The words of A. L. Smith, L.J., on this point are very strong and clear:¹—"I cannot doubt that what is to be sold and bought is not merely the tramway *in situ* as a structure, but the undertaking of the company as a going, toll-earning, concern; that is to say, the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels to the exclusion of all others; to take the prescribed tolls for so doing, and to exercise the other powers contained in the Act. Of this I have no doubt; the words of the section are clear, 'And thereupon the company shall sell,' not their rails and sleepers, but 'their undertaking,' and 'when such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking are to vest in the County Council.' A. L. Smith, L.J., in the clearest words, gave his opinion that the company had to sell "the powers granted to the company of running cars with flange wheels thereon to the exclusion of all others, and of taking the prescribed tolls and the other powers in the Act mentioned"; and he adds emphatically, "that this is what is to be sold by the company to the London County Council, I do not doubt." I concur in this view of A. L. Smith, L.J., which I regard as of the highest importance, as stating and explaining the great value of the subject-matter to be sold.

It may be that the language of the section is involved and roundabout, that the conveyancing is defective, but, to my mind, it is much more in accordance with the language of all the sections of the Act to hold the conclusion I have indicated, than to spell out a narrower one in contradiction to what I believe to be the meaning of section 43 itself, as well as to the clear words of sections 41 and 42, and the construction required to give effect to section 44.

If, then, the undertaking sold comprised or included a tramway capable of being used and with a right to use it, the next great question is, What is the price to be paid for it under the section? The section answers (leaving out the parenthesis for the present), "the then value of the tramway, and all lands, buildings, works, materials, and plant."

The actual tramway, in a very literal sense, consists of little else except its iron rails. "The then value of the tramway" from the old iron point of view would be a ludicrous mockery; and, accordingly, every one—Judges and arbitrators alike—repudiate any such construction, and admit that a wider interpretation must be sought. A. L. Smith, L.J., says,—“There can be no doubt that in any ordinary case, where an undertaking such as the present is to be sold and paid for, its present—that is, its then value—is in practice arrived at by capitalising its rental value.” Matthew, J.² more in detail, says,—“Value is to be ascertained as it would have to be ascertained for rating purposes,” and, therefore, you must construe the word in that sense. “These tramways are

¹ L. R. [1894] 2 Q. B. at pp. 214, 219.

² L. R. [1894] 2 Q. B. at p. 194.

hereditaments capable of earning profits and assessable under the Poor-Law No. 13. Acts. That is clear from the *Pimlico* case,¹ and the meaning which I have indicated of the word 'value' is recognised in many statutes *in pari materia*; July 30, 1894. as, for instance, in the Valuation (Metropolis) Act of 1869, and also in the Street Tramways Co. v. Union Assessment Acts. To get at the value of the hereditament, you take the profits, deduct the tenant's charges and reasonable profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit. By capitalising that rental you arrive at the value of the hereditament." I therefore take it that, apart from the parenthesis, "the then value" would be held to have its ordinary meaning, as stated by A. L. Smith, L.J. Edinburgh Magistrates of Edinburgh.

The *onus* of proving that the ordinary meaning should not be given to the words "the then value" is cast upon those who deny it, and the respondents insist that for this purpose they are entitled to rely upon the parenthesis, which says, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other considerations whatsoever." *Prima facie*, these words imply that, but for their use, the thing excluded would have been included. An exception, a parenthesis, an exclusion, under ordinary circumstances, would be held to qualify and lessen the generality of preceding words. Here, according to the contention, they are used, not to abate, but to destroy and contradict the ordinary meaning of the words "the then value." If the argument is correct, that the value of the tramway is only the value of the materials *in situ*, profits would not need to be excluded, because not comprised in the original subject-matter.

It is admitted that "the then value" is not to be found in the value of old iron; it is admitted that something very much more is to be assessed. Where is the line to be drawn? A. L. Smith, L.J., well puts the question, "Are the words of exclusion in this section so strong, when applied to the things to be paid for, namely, a tramway *in situ*, as to exclude the ordinary way of ascertaining present value?"

It must be borne in mind that the County Council can only acquire ownership rights under the sale. They can let, but cannot themselves use, occupy, or work the tramway. They are debarred from making occupiers' profits; and, therefore, it is most reasonable to provide that no allowance should be made for them in the sale. It is most fair that in a sale to a public authority "the then value" should not be run up by the history of "past" or the anticipation of "future" profits. These words "past or future" are suggested by the word "then." The provision is that no "allowance" is to be made, and that is very far from an enactment that "the then value" may not be ascertained according to the ordinary rule and practice in like cases. The argument of the respondents concentrates attention exclusively upon the parenthesis, and ignores and belittles everything in the section which would explain its terms. The Lord President in his judgment well says,²—"The contention of the Corporation seems to me exposed to the grave objection that it allows words having a subordinate and qualifying position to kill the plain import of the main proposition to which they relate, and does so by ascribing to those words more meaning than, *prima facie*, they bear. I cannot conceive why the Legislature should describe the transaction as a sale, and say the terms are to be the payment of the existing value of the tramway, &c., and then, incidentally and by way of

¹ *Pimlico, &c. Tramway Co. v. Greenwich, L. R.*, 9 Q. B. 9.

² 21 R. 703.

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exclusion, put in words which make the terms inconsistent with sale and purchase, and inconsistent also with payment of existing value."

It must be remembered that "the then value" of lands and buildings has also to be measured under the same section, and it would be almost impossible to ascertain the value of land and buildings without considering what rent a tenant would pay for them. The land and buildings may have cost vast sums, and no one could suggest the reasonableness of giving less than their fair value under this provision. No "allowance" is here to be made for "past or future profits"; but "the then value" is to be arrived at by the ordinary methods.

It is also not to be forgotten that under this section a tramway company might be compelled to sell the most paying and successful part of its undertaking, retaining only the part which barely, if at all, paid its expenses. Under this section, admittedly, they could get no compensation for compulsory sale or for severance. The company concede that they, under its terms, are debarred from "any allowance" for their profits in "the past" or their hope of greater profit in "the future"; but could it have been intended that in providing they were to get "the then value," they were to get less than would come to them under the ordinary rule, and be subjected to an arbitrary standard discovered by the arbitrator?

The *Kirkleatham* case¹ is important as shewing (to quote Henn Collins, J.) "the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials." The section in the present case is framed in an entirely different manner, because, in my opinion, the Legislature contemplated a different operation with different results.

No question of hardship can be considered. The construction of this section is all that is before your Lordships. I venture to think that the construction suggested by the County Council is unreasonable, and that it would be natural to expect that if the Legislature contemplated such a meaning they would have said so in plain language. The weighty words of Mathew, J., are worthy of attention,—“The Act of Parliament was intended to inform such of the public as were disposed to become shareholders in this kind of undertaking, and one would expect plain language addressed to such persons and their advisers as to what the Legislature meant. If Parliament meant to inform the public,—‘You shall not have at the end of twenty-one years compensation for the value of the undertaking, but your undertaking shall be sold for the cost of the materials *in situ*, less depreciation,’ I cannot help thinking that very few tramways would have been constructed, because a shareholder proposing to take shares has to satisfy himself that the profits of the undertaking would not only pay him interest upon his investment, but would restore to him wholly or partially at the end of twenty-one years his capital.”

I have already intimated the doubts which I must entertain of the soundness of my views when I recognise the high authority of those who have reached a different conclusion; but, with all deference and submission, in my opinion, the judgment appealed from should be reversed.

LORD CHANCELLOR.—My noble and learned friend, Lord Shand, is unavoidably prevented from being present. He has prepared a judgment which he desires should be read to the House.

¹ L. R. [1893] A. C. 444.

The following judgment was then read by Lord Watson :—

No. 13.

LORD SHAND.—The two appeals of the Edinburgh Street Tramways Company against the Magistrates and Town-council of the city of Edinburgh and the London Street Tramways Company against the London County Council, involve the decision of the same question, and the arguments of counsel in both cases have been presented on that footing. That question depends on the true meaning and effect of section 43 of the General Tramways Act of 1870, which is incorporated in the special Acts of the Edinburgh Street Tramways Company, and which is substantially in its terms embodied in the London Street Tramways Act, sec. 44.

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The Magistrates and Council of Edinburgh and the London County Council have respectively availed themselves of their statutory powers to acquire portions of the tramway systems belonging to the appellants respectively, having served notices requiring these companies to sell parts of their respective undertakings on the terms prescribed by the provisions of the statutes above mentioned. In order correctly to define these terms, as to which the parties so widely differ, it appears to me to be of importance to ascertain, in the first place, what are the rights or powers belonging to the appellants under their statutes, and whether or how far they are enabled to transfer these rights and powers to the local authorities as purchasers of their respective undertakings.

The promoters were authorised to lay down their tramway lines or rails on the public streets without making any payment or compensation for the ground so occupied to the local authority or other corporation or body in whom the right to the *solum* of the streets might be vested. The tramway companies, however, acquired no right of property, but a right of user only, viz., the right of exclusive use of their tramways for carriages with flange wheels or other wheels suitable only to run on the prescribed rail. And the right acquired was not in perpetuity, for at the end of twenty-one years, and of every succeeding period of seven years, the promoters might be required by the local authority to sell on the terms specified in section 43 of the General Tramways Act of 1870, while the same result might follow within a shorter period than twenty-one years under sections 41 and 42 of the statute, in consequence of the discontinuance of the promoters to work the tramways, or the insolvency of the promoters, followed by an order of the Board of Trade, and a notice to purchase given with consent of the Board of Trade by the local authority.

The Edinburgh Tramways Company could not assign their rights, which were given to them only, and not to assignees; and though by section 46 of the London Tramways Act there was given a power of sale of the undertaking with consent of the Board of Trade, this was subject to the company's obligations and liabilities, one of which was the obligation to sell the undertaking to the local authority, after the lapse of twenty-one years, on the terms specified in section 44 of the company's Act.

Having regard, on the one hand, to the privilege given to the promoters of laying their tramways on the public streets without making compensation for the ground occupied, and, on the other, to the limited rights conferred—limited as to time, in the option of the local authority, and limited also as to extent, the right of user only being conferred—it might reasonably be expected that, should the local authority (who it may be presumed, have themselves a

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right of property or other direct interest in the *solum* of the streets) desire after the lapse of twenty-one years to avail themselves of the statutory power conferred on them to acquire the tramway system or a part of it, they should be enabled to do so on terms which would have relation to the peculiar nature of the promoters' rights, and the privilege which the promoters had obtained to occupy and use the public streets without payment. Accordingly, reading sec. 43 in the light of these considerations, I have come to be of the opinion expressed by the large majority of the learned Judges who have considered the question in the two cases under review, and as I concur in the reasons which have been already stated by the Lord Chancellor, and by my noble and learned friend Lord Watson, I shall content myself with making very few additional observations.

The promoters are required to sell their "undertaking," or so much of the same as is within a defined district, and for that undertaking the local authority are required to pay. The clause proceeds, however, to say that the sale is to be made "upon terms" of payment, followed by a specification which expressly excludes certain elements or items from consideration, and expressly enumerates others, for which payment is to be made. The undertaking is to be sold "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials and plant of the promoters suitable to and used by them for the purposes of their undertaking." In my opinion, the defined terms of payment for the undertaking does not include a capitalised rental of the tramway system as contended for by the appellants.

It must be observed that the promoters, unless in default from having ceased to work the tramways with advantage to the public, have the full benefit of twenty-one years' enjoyment of the exclusive user which the statute on very advantageous terms confers on them; but the notice by the local authority determines the right of the promoters to any continuance of that right of user, which is the sole right they have. Excepting under sec. 43, the promoters had no right to sell their undertaking. They have no power to assign their rights. The interest which belongs to the promoters, and may be transmitted or transferred by them, does not include a right either of property, such as a railway company has in the line which it owns, or even of user by the promoters, for that right was personal and in effect temporary, being subject to determination by a notice which has been given. It includes only, therefore, their tramway as laid upon the ground, and the houses, plant, and other property enumerated in sec. 43, used in connection with the working of it, and of which they are proprietors. It is true that the local authority by the purchase acquires a more extensive right—a right of a permanent nature. This might follow, as it appears to me, because of the direct right of property, or other direct interest, which the local authority has in the streets, and because having once acquired the undertaking the local authority is under no obligation thereafter to sell it as the promoters were. The permanent right thus acquired is not, however, conferred by the promoters, or acquired from them, but is conferred by the special provision of the statute in sec. 43, which declares that "when any such sale has been made" all the rights of the promoters in respect of the undertaking sold shall be transferred to the local authority "in like manner as if such tramway was constructed by such authority under the powers conferred upon

them by a provisional order under this Act, and in reference to the same they shall be deemed to be the promoters." No. 13.

These considerations appear to me to have a very material bearing on the meaning to be attached to the very specific terms of payment expressed in sec. 43 of the statute, and to exclude the contention that the value of the undertaking was to include a capitalised rental, or an estimate founded on profits, or any of the other items included in the parenthetical clause, viz. "(any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever)." I think the terms of the section used were inserted with the purpose of making it clear that the company was to be paid the value of the property it possessed in the tramway and in connection with the working of the tramway, and for that property only, but not for rights which they could not assign, and which they could only exercise for a defined period, and which were thereafter determinable on notice by the local authority. I agree with the learned Judges who have held that an allowance given as an estimate of rental past or future would be in truth an allowance for profits of the undertaking past or future, and that this is excluded by the statute; and I am further of opinion that the enumeration of subjects for the value of which payment is to be made—"the tramway and all lands, buildings, works, materials, and plant of the promoters"—includes exhaustively all that is to be paid for, and does not include any sum as for estimated rental value or estimated profits. The word "tramway" throughout the statutory provisions by which the appellants acquired their rights is used as meaning the tramway lines or structure laid down. It is, in my judgment, used in the same sense in sec. 43, and does not include rental value of a subject which had been held in effect under a temporary right of user which came to an end by the notice to purchase.

It has been said that if the Legislature intended to deprive the sellers of any estimate or allowance for such return as a tenant might give for the use of the tramway system, this would have been expressed in terms more clear—in some such terms as are suggested by Mathew, J., in his very able opinion. There is no doubt that the language used has left room for great discussion and great diversity of opinion. But there is an enumeration of the subjects for which payment is to be made which does not include profits of any kind, and an exclusion of items by language which does mention profits, and is otherwise of a very comprehensive kind—an exclusion of "any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever." It seems to me that these general and comprehensive words are at all events so clear that, if it had been intended to give the appellants what they now ask, the words "or other consideration whatsoever" would certainly have been qualified by such words of exception as "excepting an allowance for such return or rental as a tenant might give for the use of the undertaking."

On these grounds I am also of opinion that the appeals in both cases should be dismissed.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

REES & FRERE—DRUMMOND & REID, S.S.C.—ANDREW BEVERIDGE—
WM. WHITE MILLAR, S.S.C.

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No. 14.

June 5, 1894.
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Stevenson.

MRS F. L. STEVENSON, Appellant.—*Lord Adv. Balfour—Levett, Q.C.*
JAMES STEVENSON (Petitioner), Respondent.—*Murray, Q.C.—H. Tindal*
—*Atkinson.*

Husband and Wife—Parent and Child—Cruelty by husband to wife as affecting right to custody of children—Custody of Infants Act, 1886 (49 and 50 Vict. c. 57) sec. 5.—The wife of a Scotsman (who with her husband's assent had since her marriage chiefly resided in her father's house in England where the three children of the marriage were born) commenced a suit in the English Courts for judicial separation on the ground of cruelty. The husband objected to the jurisdiction on the ground that his domicile was in Scotland.

The husband subsequently presented a petition to the Court of Session for the custody of the children against his wife, who had removed them from his custody under pretence of taking them on a visit to her father. The wife, in answer, averred that on some occasions the petitioner had treated the children with cruelty, and further made specific statements of cruelty to herself.

The Court *granted* the prayer of the petition, holding that the averments as to the father's conduct to the children were not such as to shew that their moral or physical welfare would suffer, and that the averments of cruelty to the wife were not a relevant ground for refusing to the father the custody of his children.

In an appeal the House, holding that the wife's averments of cruelty to herself were relevant in answer to the husband's petition for the custody of his children, and considering it expedient that the inquiry into the husband's conduct should be made in the wife's proceedings for judicial separation, in which the question as to the custody of the children might also be determined, *recalled* the interlocutor of the First Division, on the wife undertaking to abandon the proceedings in England, and to raise and duly prosecute an action of separation in Scotland, and directed the Court to *sist* the husband's petition *in hoc statu*.

Held further that having regard to the interests of the children, the eldest of whom was not more than eight years of age, and all of whom had for the greater part of their lives resided with their mother, the interim custody should remain with the mother.

Ld. Chancellor
(Herschell).
Lord Watson.
Lord Ash-
bourne.
Lord Mac-
naghten.
Lord Morris.
Lord Shand.

(In the Court of Session, 30th January 1894, reported in the present volume, p. 430.)

Mrs Stevenson appealed.

The *Lord Advocate*, for the appellant, stated that the question arose upon the petition of Colonel Stevenson for the custody of the three children of his marriage with the appellant, and the main question was the relevancy of the appellant's answer to that petition. The facts of the case set forth in the answers to the petition were in outline these:—The parties were married on 21st July 1885. The appellant was the third wife of Colonel Stevenson. He had three children by his first marriage, one by his second, and three by the present marriage, a boy of eight years, and two girls of seven and five years respectively. The marriage took place in London, and during the larger part of her married life the appellant had, with her husband's assent, lived with her father in England. All the children were born there, and the eldest child, now eight years of age, had only been for about one year and two months in his father's house.

LORD CHANCELLOR.—What difference does that make ! I do not quite see.

Lord Advocate.—Having regard to the law established by the Custody of Infants Act, 1886, sec. 5, it may be that a course of conduct, the individual items of which would not be very material, would come to have a very great materiality taken all together. One of the complaints here is that we have not got all the facts which might be material. Any judgment upon this question ought, we submit, to be upon ascertained

and not merely upon the relevancy of the statements made by the lady. No. 14.

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The LORD CHANCELLOR, referring to a suit which had been raised by the appellant in the High Court of Justice in London for judicial separation prior to the present proceedings, said that the reasonable thing would be to wait the result of that suit. If the appellant was entitled to a separation everything relating to the custody of the children would be determined at the same time.

The *Lord Advocate* explained that the appellant had presented a petition for judicial separation in England, because she then thought, as she still did, that the matrimonial domicile was in England. The marriage took place in London, and such home as there was had been for six of the seven years of married life in England in the house of the appellant's father. The respondent, however, had objected to the jurisdiction of the English Court on the ground that his domicile was Scotch. The question of custody, however, could be settled in the present petition. The appellant did not dispute the jurisdiction of the Scotch Court in this matter, because the children were in Scotland when they were taken away.

LORD SHAND.—You suggest that there may be considerations arising in the present case under the Guardianship of Infants Act, 1886, that might not have been considered in Scotland apart from that Act, namely, the welfare of the infant, the conduct of the parents, and the wishes as well of the mother as of the father?

Lord Advocate.—Yes, that Act was certainly intended to modify what was regarded as the severity of the Scotch law.

LORD SHAND.—I think the learned Judges in the Court below seem to treat clause 5 as having practically no application to the present case.

Lord Advocate.—We think so.

LORD CHANCELLOR.—According to my understanding of their judgments, what they begin with is this, and they found very largely upon it, that you took these children out of the custody of the father, and out of the jurisdiction of the Scotch Courts by a falsehood. They regard it as a question of enabling that custody to be resumed which the father possessed in common with you, and of which he was deprived by your fraud.

Lord Advocate.—The appellant is not seeking any benefit from the fact that the custody is with her at present. The case may be treated as if she put forward a petition for the custody of the children.

LORD MORRIS.—How can you rely upon the 5th section of the Guardianship of Infants Act, which begins,—“The Court may, upon the application of the mother of any infant,” “make such order as it may think fit regarding the custody of such infant.” Was there any application made to the Court by your client?

Lord Advocate.—Not formally by her, because the matter was raised by the husband first; but we have submitted that the considerations pointed out in that section must apply whoever is the applicant.

LORD MORRIS.—I do not know about that. I think if by the common law of the land the father has *prima facie* a right to the custody of the children, and you are relying upon the statute, you should bring yourself within the terms of the statute.

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LORD WATSON.—On the other hand I think the Statute of 1886 was intended to give the Court a much freer hand in dealing with the custody of children than it had before had.

I should not stand upon the words in the statute as to “the application of the mother.” It appears to me that the wife might appear in answer to an application by her husband, and the same considerations would apply.

LORD SHAND.—Supposing the mother were legitimately in possession of the children,—she is not, but supposing she were,—and then the father presents a petition, and the mother replies to that petition, is it suggested that section 5 would apply in such a case?

Lord Advocate.—Yes. By putting in her answer she practically applies for the custody,—she could put in her own statement, or make an application,—surely that would be sufficient, especially in a case affecting the custody of the children.

LORD CHANCELLOR.—Apparently Lord Adam makes no reference to this 5th section of the Guardianship of Infants Act at all. There is a reference to it in the judgment of the Lord President, but it does not seem to have been very forcibly pressed.

Lord Advocate.—The Lord President says,—“In reaching the conclusion that the prayer should be granted, I have in consideration the welfare of the children, the conduct of the parents, and the wishes as well of the mother as the father.” He quotes the words of the Act. These would not have been considerations under the common law of Scotland.

LORD WATSON.—The appellant has brought an action of judicial separation in England. The respondent objects to the jurisdiction, so that is the first question. If the English Court sustain its jurisdiction, I suppose it will try the action. If it should not sustain its jurisdiction the lady professes to be ready to proceed with an action in Scotland. Practically, the question then is what do the interests of the children require us to determine as to their custody in the meantime?

LORD CHANCELLOR.—What one feels one would wish to do as a matter of justice, without reference to any technicalities, would be to make some order with regard to the custody of the children which should be a temporary order.

LORD WATSON.—I understand from your statement that your client, the wife, has from her means (which seem to be ample as compared with those of her husband) been alimentering the children and getting them medical treatment and education. In fact she has done everything and he has done nothing.

Lord Advocate.—That is so, my Lord, he cannot do anything. He has not the means.

LORD WATSON.—The result of granting the petition would be to invert the position of the children altogether. I have very little consideration for either spouse, but great consideration for the children in a case of this sort.

After some discussion as to the question of jurisdiction, the *Lord Advocate* said that the appellant was willing to abandon the suit of separation in England, and to raise an action of separation in Scotland, if that would tend to clear the matter.

LORD CHANCELLOR.—What do you say, Mr Murray, to this, that supposing

the English suit is abandoned and the appellant undertakes at once to commence and prosecute a suit in Scotland, she should then have the interim custody of the children till its determination?

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Murray.—My client thinks it very hard, inasmuch as it is admitted that his children were taken away by a false statement.

LORD CHANCELLOR.—They were taken where they had almost always been with their mother. One has to look at the interests not of the father or mother but of the children. In the case of very young children the mother is the natural custodian. With one exception these children are all within what is called the age of nurture, and the other is only just above it. Of course one understands the objection on the part of the husband to the suit in England, but if the suit in England is abandoned, and instead of that a suit is brought in Scotland, which is undoubtedly his domicile, and prosecuted there, then, without determining what the ultimate state of things is to be, she should have the custody of the children during the intervening period. Of course the father should have access to the children.

Murray.—I am sorry that I am not in a position to give any consent on behalf of my client to such a course as is suggested.

LORD CHANCELLOR.—Will you tell us why these allegations of the appellant are not relevant and not to be considered. Supposing those statements are true, do you deny that the wife would be justified in refusing to continue to live with her husband?

Murray.—I do not think I can deny that, my Lord. That is to say,—there is only one statement of personal violence such as would justify the separation, but there is one.

LORD CHANCELLOR.—That being so, on what ground could the husband insist that the children should be put in his custody? We are dealing here with very young children, and naturally the children would be in the custody of, in the sense of living with, both the spouses. On what ground could the husband here insist that the children should be put in his custody when his wife cannot live with him?

Murray.—So far as I understand the Guardianship of Infants Act of 1886, it did not in any way alter the *prima facie* right of the father to have the custody of the children.

LORD CHANCELLOR.—But it made it only a *prima facie* right; and would not the *prima facie* right of the husband be displaced by the facts that the husband has so behaved to the wife that she is justified in not living with him, and that the children are so young that giving the custody to the father would take them out of the custody in which they would naturally be as infants? Surely the Act was passed for just such a case as this,—as I understand it,—the rights of the husband, the father, are no longer to be absolute, but if he has misconducted himself he should not be entitled to the custody as an absolute right, but the Court should consider the mother as well as the father, and consider, above all, the interests of the children.

Murray.—Of course I entirely admit the last proposition, but it seems to me that there are two classes of misconduct. There may be

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misconduct between husband and wife which would perfectly entitle the wife to discontinue living with the husband, and which yet would not really interfere with the proper relations of parent to child.

LORD CHANCELLOR.—I cannot agree to that at all, because if one of the spouses, the husband we will say, has so behaved that the wife is justified in saying, "I will not live with my husband," you ought not to put upon her this, that she being the injured party is only to do that under the penalty of having the children committed to the sole custody of the wrongdoer. It is just to meet a case of that sort, as it seems to me, that this Act was passed.

Murray.—According to my view, on the face of the statute this question depends now upon considerations not of the legal position of the husband so much as upon questions of fact affecting the interests and welfare of the children. In directing the custody of the children you are not always simply to follow the course directed by their interests. You may be swayed in making your decision by the conduct of the spouses, one or other.

After consultation,—

LORD CHANCELLOR.—This appeal arises on a petition by a domiciled Scotsman to obtain an order from the Court giving him the custody of the children of his marriage with the appellant. The Court below made an order giving him the custody of the children. The answer set up to his petition by the appellant was that he had been guilty of the matrimonial offence of cruelty, and that she had commenced proceedings against him in the Court of Probate and Divorce in England to obtain a judicial separation. The respondent denied the jurisdiction of that Court, on the ground that the matrimonial domicile was Scotch.

It appears to all your Lordships, having regard to the tender age of the children, and the fact that during the greater part of their life they have lived with the mother, that they should continue to live with the mother while the proceedings between the spouses continue for the purpose of determining what their future relation is to be, and whether the wife is to obtain a separation from her husband or not. The question being raised as to the proper *forum* for the proceedings to try that issue, the appellant undertakes to abandon the English proceedings and to commence proceedings in Scotland, and to proceed therein with due diligence. Your Lordships think that whilst these proceedings are pending the custody should remain where it now is, namely, with the wife. Of course no opinion is expressed at all as to the determination of the issues of fact, which at present are mere allegations, nor as to what should be done when that action is concluded.

LORD WATSON, LORD ASHBOURNE, LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND concurred.

ORDERED that the appellant undertaking to abandon the proceedings in England and to commence without delay an action for separation in Scotland, and to proceed therein with due diligence, the interlocutor appealed from be recalled, and the cause remitted to the Court of Session in Scotland, with directions to sist proceedings *in hoc statu*.

BOWER, COTTON, & BOWER—J. MURRAY LAWSON, S.S.C.—MURRAY, HUTCHINS, & Co.—MACONOCHE & HARE, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1893-94.

ROBERT FALCONER, Appellant.—*Clyde*.
HENRY HILTON BROWN (Procurator-Fiscal of Inverness, Elgin, and Nairn),
Respondent.—*Strachan, A.-D.*

No. 1.

Oct. 30, 1893.
Falconer v.
Brown.

Process—Evidence—Questions in cross-examination affecting character of witness.—At a trial for assault alleged to have been committed upon a doctor sent by a parochial board to vaccinate a child, by the child's father, the doctor was asked in cross-examination whether he was at the time of the alleged assault under the influence of drink. He answered in the negative. The following questions were then put to the doctor,—“ Were you under the influence of drink during any part of the day? What quantity of intoxicating drink had you that day?” The Sheriff-substitute disallowed the questions, and thereafter convicted the accused.

The accused appealed upon a case stated.

The case did not set forth the grounds upon which the Sheriff-substitute had disallowed the questions.

Held that as there was nothing in the case to shew that the questions were not legitimate, and as the answer to them might have affected the judgment of the Sheriff-substitute, the conviction fell to be set aside.

Observed that if the Sheriff was satisfied that the questions were put for the sake of insult, or that they were not to be backed up by evidence, he was right in refusing to allow them to be put.

THIS was an appeal upon a case stated at the instance of Robert Falconer, farmer, Wards, Alves Parish, Elginshire, against a judgment of the Sheriff-substitute of Elginshire (Rampini) convicting Falconer of an assault upon Dr George Hugh Mackay on 7th June 1893.

High Court.
Lord Justice-
Clerk.
Ld. M'Laren.
Ld. Wellwood.

The case set forth as follows:—“ It was proved by the evidence of the said George Hugh Mackay and his coachman, Thomas Murdoch, that when the former called at the farm of Wards, occupied by the accused, for the purpose of vaccinating his child, under orders of the Parochial Board of Alves, the accused knocked him to the ground, beat him with his fist, and compressed his throat. It was proved that the alleged assault took place about seven o'clock in the evening of the day in question. The witness Dr Mackay was asked in cross-examination whether he was at the time of the alleged assault under the influence of drink. He answered that he was not. The following questions were then put and disallowed: . . . (2) Were you under the influence of drink during any part of that day? . . . (3) What quantity of intoxicating drink had you that day? A copy of the notes of evidence taken at the trial by the Sheriff-substitute is sent herewith.”

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The question of law was—"Whether the Court was right in disallowing the questions put to the witness George Hugh Mackay by the agent for the accused?"

Argued for the appellant;—The questions disallowed by the Sheriff-substitute were highly material to the defence of the accused—all the more that the only witnesses to the alleged assault were the person assaulted and his coachman. It was impossible to say that the answer to them might not have induced the Sheriff-substitute to acquit the accused. The conviction, in these circumstances, fell to be quashed.

Argued for the respondent;—The fact of the assault did not depend upon the evidence alone of the doctor, and a perusal of the notes of evidence shewed that the Sheriff-substitute had disallowed the questions as he was of opinion that they were only put to annoy and insult the witness.

The Court intimated that the notes of evidence were not competently before the Court.

LORD M'LAREN.—This case comes before us under the Summary Prosecutions Act, and the question arises under a complaint of the ordinary character for assault preferred by the procurator-fiscal against Robert Falconer for assaulting George Hugh Mackay, Bachelor of Medicine.

The assault is not of a very gross nature, and the circumstances as stated by the Sheriff arise out of the circumstance that Dr Mackay had been sent by the Local Authority for the purpose of vaccinating Falconer's child, and having strong objections to vaccination, and being under the influence of excitement, Falconer had knocked the doctor down and maltreated him in the way set out in the case.

The only question we have to consider is one relating to the admissibility of evidence, and it stands in this position :

The evidence related to the sobriety of Dr Mackay. He was asked whether he was under the influence of drink, and he replied in the negative. Passing over one of the three questions, as to which no argument was addressed to us, the witness was then asked whether he was under the influence of drink during any part of that day, and what quantity of drink he had taken on the day. These questions were disallowed by the Sheriff-substitute, and the question of law is whether the rejection of the evidence was right.

Now, it is undoubtedly the right of every accused person to cross-examine the principal witness or injured party as to his character generally, and specially as to his conduct at or near the time when the occurrence took place, and the Sheriff-substitute recognising that rule rightly allowed the question whether Dr Mackay was under the influence of drink at the time of the assault.

If such a line of cross-examination were indicated in a case which I was myself trying, I think that if the first question had been negatived in an unqualified manner by the witness, and it was proposed to follow it up by special interrogatories, then, in any case, and especially if the witness appeared to be a man of respectability—and there was nothing in the circumstances to suggest doubts as to his sobriety—I should have asked whether the agent was prepared with evidence independent of that of the witness under examination as to his state of insobriety. If the reply had been negative, I should most probably have disallowed as useless the further questions (as the Sheriff-substitute has done), because these could lead to no other result than a persistence in the negative answer already given.

But we are not told on what grounds the Sheriff-substitute disallowed the second and third questions. He does not appear, for anything stated to us, to have inquired whether a case was going to be made as to the habits of Dr Mackay, or whether other witnesses were in attendance to speak to his conduct during the time, or to have elicited whether these questions were put in the *bona fide* conduct of the case, or were merely put for purposes of annoyance. No. 1.
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I shall certainly not assume that the allowance of the questions would have elicited anything to the prejudice of the witness. There is nothing whatever in the proceedings to suggest that it would have done so, and we approach the case with no other information than that special questions were proposed by the agent of the accused, and disallowed by the Sheriff-substitute.

In the absence of any explanation of the special reasons for disallowing these questions, and the questions (if put *bona fide* and with the purpose of following them up) being quite legitimate, I am of opinion that the Sheriff-substitute was in error in disallowing them.

There remains for consideration how far the rejection of this evidence may affect the result of the trial, and whether it vitiates the conviction and sentence. In civil cases it is generally held that if the Judge's ruling disallowing evidence be reversed the verdict necessarily falls. If the Judge admits evidence which the Court of review may hold to be irrelevant or objectionable on other grounds the Court may take into consideration whether the evidence might have affected the verdict of the jury. But where a question is disallowed and the Court has no means of knowing what would have been the answer to that question, it is impossible to say whether this unknown element of evidence ought or ought not to have affected the verdict. Here the circumstances are peculiar. The assault did not arise out of a quarrel, but, as we are told, in consequence of Falconer's objection to the vaccination of his child, and his endeavour to prevent the order of the Local Authority being carried out. I need not say that no medical man has any right to perform an operation—such as vaccination—on a child without the parent's consent. All that can be done is to bring a parent who refuses his consent before the proper Court on a charge of disobedience to the statute. The difference between the doctor and the child's father being of this nature, can we assume that questions as to the doctor's steadiness and sobriety are irrelevant to the inquiry, or that the answers to such questions might not have thrown light on the question who began the assault, and whether the assault was provoked?

I have not read the notes of evidence, because we have held that they are not competently before the Court, and I am quite unable to form any opinion as to how the answer to the questions might have affected the conclusion to which the Sheriff-substitute came. I may imagine that all the probabilities of the case are against the theory of the defence. I have no conception that any just imputation can be made against Dr Mackay, but as a purely legal question I am unable to say that the admission of evidence might not possibly have affected the conclusion arrived at by the Sheriff-substitute, and therefore I am of opinion not only that the second and third questions ought to have been allowed, but that the conviction must be set aside.

LORD WELLWOOD.—I am of the same opinion. I think the Sheriff-substitute, upon the case stated, ought to have allowed the second and third questions to be put. I entirely agree with Lord M'Laren that every Judge has the right to refuse to allow a question otherwise competent to be put to a witness, if he is

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satisfied that it is put at haphazard, and in order to insult and annoy the witness. It is necessary for the protection of witnesses and the decent conduct of judicial business that this power should exist. There are indications here which lead me to think that such were the grounds on which the Sheriff-substitute disallowed the second and third questions, and if he had said so, I should not have been for interfering with his exercise of his discretion. But he has not told us so, and we only know that the questions were put and disallowed.

Now, Dr Mackay was the first witness called, and therefore the Sheriff-substitute had no further information as to the facts of the case than those disclosed in the earlier part of Dr Mackay's evidence.

Dr Mackay denied that he was drunk on the day in question, and the natural course was to test the accuracy of his statement by cross-examination, and if the question was put *bona fide*, the agent for the accused was entitled to ask what quantity of drink he had had during that day.

Now, the Judge might have asked the agent whether he proposed to lead evidence to prove that Dr Mackay was under the influence of drink, and if the agent had replied in the negative, then the Judge might have been justified in refusing to allow the question to be put. But here there is nothing to justify us in holding that the Judge was justified in stopping the cross-examination.

That being so, the only question is, was the evidence so material as to justify us in quashing the conviction, and on that point I have nothing to add to what Lord M'Laren has said.

We are not in a position to judge what the decision of the Sheriff-substitute would have been if the question had been put and answered.

In all probability Dr Mackay would have said he had not drunk to excess. But we cannot tell, and we have therefore no alternative but to say that the Sheriff-substitute was wrong in refusing to allow the second and third questions.

LORD JUSTICE-CLERK.—I agree with everything that has been said by your Lordships. I came to the conclusion independently that it was very likely that the questions put to Dr Mackay in cross-examination were simply meant to annoy. But I have now looked at the notes of the evidence and they confirm the view that the Sheriff's reason for stopping the cross-examination was that he thought it was based on nothing.

We must deal, however, with the case as stated. The Sheriff seems to have thought that by sending us the notes of the evidence he made them part of the case, and that the Court could go into the evidence. We cannot do anything of that kind; the Sheriff is the sole judge as to the evidence. We must have stated to us not the evidence given but the facts found to be proved, and we can only consider whether the Sheriff has been right in law in the conclusion he drew from them.

There is a great distinction to be drawn between questions put to throw dirt and those which relate to relevant matter in the personal history of the witness. Here we are much more careful to protect the witness than in other parts of the United Kingdom, and we are right in not allowing vague suggestions against the character of a witness by a series of insulting questions. If the Sheriff was satisfied that questions were being put for the sake of insult, or that they were not to be backed up by any evidence, I think he would have been quite right to refuse to allow them to be put.

But we do not know that; we must take the case as it stands, and the question

is, was he right in disallowing the questions as incompetent? It must be remembered we are not here dealing with questions put to a witness vaguely to blacken his character. The questions related to the time when the alleged assault was committed; they went to the essence of the case. There could be no reasonable ground for disallowing them at the stage stated other than that the point of the attack was to insult the witness; but that is not before us, the question being simply whether the questions should have been disallowed. I think it must be answered in the negative.

THE COURT quashed the conviction.

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HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Asher—Strachan, A.-D.—*

J. A. Reid, A.-D.—Lorimer, A.-D.—Baxter.

ALFRED JOHN MONSON AND ANOTHER.—*Comrie Thomson—John Wilson—Findlay.*

No. 2.

Dec. 23, 1893.
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Advocate v.
Monson.

Procedure—Proof—List of productions—Photograph.—*Held* that it was incompetent to examine a witness as to the likeness in a photograph which could not be produced, not being in the list of productions.

Procedure—Proof—Question tending to prove crime not charged—Competency.—In a trial for murder, the prosecutor proposed to ask a witness whether a certain document which was pertinent to the case and which bore the name of the witness as a signature was in fact signed by him, the suggestion being that the signature was forged by the prisoner.

Held that as the crime of forgery had not been charged against the prisoner the question was *incompetent*.

Procedure—Proof—Hearsay—Fugitive.—Of two persons charged with the crime of murder, one disappeared and was declared an outlaw. During the trial which proceeded against the other, the prosecutor stated that he had without success exhausted all possible resources for finding the fugitive, and he proposed to elicit from a witness who knew him a statement made by the fugitive to the witness shortly after the alleged murder.

Held that the evidence was *incompetent*, in respect (1) that statements made in the panel's absence could not be evidence against him; and (2) that the failure to find a person did not make hearsay evidence as to statements made by him competent.

Procedure—Precognition of witnesses—Opinion per Lord Justice-Clerk that where the interests of the public in the punishment of crime or the interest of a prisoner charged with crime call for the ascertainment of facts, it is the duty of witnesses on either side to give information to the other side.

ALFRED JOHN MONSON and Edward Sweeney *alias* Davis *alias* Scott, HIGH COURT.
Lord Justice-Clerk. were charged upon an indictment which set forth as follows:—“(1) That you, having formed the design of causing by drowning the death of Windsor Dudley Cecil Hambrough, sometime residing at Ardlamont House, aforesaid, now deceased, did in execution thereof bore or cause to be bored in the side of a boat, the property of Donald McKellar, boat-hirer, Tighnabruaich, Argyllshire, a hole, and having plugged or closed said hole, you did, on 9th August 1893, induce the said Windsor Dudley Cecil Hambrough to embark along with you, Alfred John Monson, in the said boat on the said date; or on 10th August 1893, you, Alfred John Monson, in execution of said design, did in Ardlamont Bay, in the Firth of Clyde, while the said boat was in deep water, remove, or caused to be removed, the plug from said hole, and admit the water into and did sink the said boat, whereby the said Windsor Dudley Cecil Hambrough was thrown into the sea; and you, Alfred John Monson, and

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Edward Sweeney *alias* Davis *alias* Scott did thus attempt to murder him; (2) that on 10th August 1893, at a part of a wood situated about 360 yards or thereby in an easterly or north-easterly direction from Ardlamont House aforesaid, you, Alfred John Monson, and Edward Sweeney *alias* Davis *alias* Scott did shoot the said Windsor Dudley Cecil Hambrough, and kill him, and did thus murder him; and you, Edward Sweeney *alias* Davis *alias* Scott being conscious of your guilt in the premises, did abscond and flee from justice."

The trial took place before the Lord Justice-Clerk and a jury on 12th December 1893 and following days.

Scott disappeared soon after the alleged murder and failed to appear at the diet.

Counsel for the Crown moved that letters of fugitation should be granted and sentence of outlawry was pronounced against Scott.

During the course of the trial, which proceeded against Monson alone, and which resulted in a verdict on 23d December of not proven, the following questions of competency arose and were disposed of.

A witness adduced by the Crown deponed, in examination in chief, that he had seen Scott at Ardlamont. Being asked further—" (Q.) Have you seen Scott since the occasion you mentioned? (A.) No. (Q.) Have you been shewn a photograph by Inspector Stewart and Inspector Greet?"

Comrie Thomson objected, and argued;—To the question put there was no objection, but if it was proposed to follow up that question by asking—"Do you recognise whose photograph it is?" that was incompetent. The photograph not having been produced, the defence had had no opportunity of examining it, and could not cross-examine upon it.

The Solicitor-General stated that he was prepared to prove that the Crown had not discovered the photograph until after the indictment had been served, and therefore too late to be made a production.

Argued for the Crown;—It would be competent to ask a witness,— "Did you see a person with A on such and such an occasion; and if so, do you recognise that person?" and then to ask A, "What was the name of the person with you on such and such an occasion?" A photograph was on this question of evidence in no different position from a person. The defence could suffer no hardship, the photograph and the witnesses being here.

LORD JUSTICE-CLERK.—I have no hesitation in holding that no questions can be asked about a photograph which cannot be produced. A photograph would have been a perfectly proper production to be made in this case, and if produced, it could have been used for any competent purpose; but this is a photograph which it is admitted cannot now be produced. It is one of the advantages of our law that a person accused of a crime is entitled to notice of the articles produced against him, and certainly if a photograph is to be founded upon as part of the prosecutor's case, that photograph ought to be given notice of.

It would be a singular thing to allow evidence as to a photograph simply because it could be proved that the prosecutor did not recover it in sufficient time to produce it. It is not maintained that he can now produce it. That he should be allowed to lead evidence as to what is practically the contents of an article which he cannot be allowed to produce in evidence—that is to say, a likeness shewn by the photograph—is out of the question. It would be to place the defence under every disadvantage as regards preparation of the case or cross-examination at the trial.

2. A large part of the evidence adduced by the Crown upon the ques-

tion of motive was directed to shew that for a considerable period prior to the alleged murder Monson had been in very great financial straits, and that he had a substantial interest in compassing the death of the deceased; that the negotiations for obtaining a lease of Ardlamont had been conducted by Monson himself, and that he had obtained it when he was absolutely without funds. The lease bore to be signed by the factor of the proprietor, by Monson and Cecil Hambrough, and by Adolphus Frederick James Jerningham, Cecil Hambrough's trustee. The suggestion of the Crown was that Monson had forged the name of Jerningham.

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In these circumstances, counsel for the Crown put the lease into Jerningham's hands, and proposed to ask him if it contained his signature.

Counsel for the panel objected to the competency of the question.

Argued for the Crown;—The question fell to be allowed. The whole circumstances of the case must go to the jury—the prisoner's financial position, his relations with the deceased, and the circumstances under which he came to be at Ardlamont. It was highly important to know how he came to be in possession of the house and shootings. The question which was disallowed in the case of *Her Majesty's Advocate v. Pritchard*¹ was not disallowed on the ground that it related to a crime not charged in the indictment, but on the ground that the answer could have no bearing on the crime charged. Here the question which it was proposed to put had a close bearing on the crime with which the panel was charged, and ought, therefore, to be allowed. It fell within the rule upon which the other question in *Pritchard's* case was allowed.

Argued for the panel;—The question was clearly incompetent. In *Pritchard's* case the Crown were allowed to prove, as an incidental fact tending to establish motive, that the panel had been guilty of gross misconduct. The Crown was not, however, allowed to lead proof of the crime of procuring abortion. If the panel was here to be charged with forgery, that crime should have been libelled. He had no notice of it, and was therefore not prepared to meet it.

LORD JUSTICE-CLERK.—This question which has been raised by the prosecutor—the question of putting it to Mr Jerningham whether the signature attached to this lease is his signature or not—is a very important one indeed, and I do not know that in the form in which it occurs here it has ever occurred in a case before. As regards all circumstances tending relatively to throw light on the particular offence charged in the indictment—all ordinary circumstances—which cannot be made matter of criminal charge, it is not necessary in the ordinary case for the public prosecutor to give any notice of them. A person charged with a crime is under the necessity along with his advisers of preparing for every ordinary matter which may be relevant to the charge, and I think that is well illustrated in the case of *Pritchard*.

That was a case where the crime charged was poisoning a wife, and it was held competent to ask a witness whether the prisoner had been having relations of improper intimacy with his female servant, that not being a matter which could have been made the subject of a criminal charge, and being one which might be proved as an incidental fact tending to establish motive; but when it was further proposed to ask the question whether the prisoner in those circumstances had used means to procure premature delivery, that was not allowed. That was

¹ Her Majesty's Advocate v. Pritchard, July 7, 1865, 5 Irvine, 88.

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a suggestion of crime, and crime with which the prisoner might have been charged in the indictment, thus giving him notice that he had to meet that charge. I do not think that that case is exactly parallel to this.

In that particular case what was proposed to be asked could have had no connection with the question which was being tried. The question of the undue familiarity had to do with the question that was being tried. The question of the prisoner having tried to get rid of the consequence of that intimacy could have had nothing to do with it except to throw suspicion upon him as regards the charge upon which he was brought to the bar—suggesting that if he could do the one thing he might do the other—and the Court disallowed it. That is not the case we have here. This is a pure case of a criminal charge under which, as indicating the history which led up to the charge, it is proposed to ask whether a particular document which is pertinent to the case was not signed by the person whom it appears to have been signed by, and therefore is a forgery. Now, if it is a forgery, whoever forged it, or was a party to forging it, it is a criminal act; and if it was thought of sufficient importance in this case to prove that this document was a forgery, then that might have been done by making a charge of forgery, and I must say, in this case no one could have had the very slightest doubt, that it would have been not wrong to make such a charge, if the charge could be proved. If the charge had been made, the prisoner, through his advisers, would have made all preparations to meet it, but his legal advisers have no notice of any such charge, and it is impossible for them at this stage competently to bring forward evidence to meet it. This document was produced by the Crown and laid before the prisoner, but it was not alleged in the indictment that the prosecutor proposed to prove that the document was a forged document. I am of opinion that it would not be safe to allow such a question, which would tend to prove a very serious crime—one of the most serious crimes known to the law—as part of the incidents of a charge of another kind. It appears to me that the only right and proper course is to make that serious crime also matter of a charge, if the public prosecutor considers it to be of such importance to his case, as regards the history of the other crime, that he wishes to have it proved. I have therefore come to the conclusion that I must refuse to allow this question to be put.

3. It was proved that on 10th August, the morning upon which the deceased had met his death, he had started on a shooting expedition accompanied by Monson and another man. The latter had, as stated, left Ardlamont a few hours after the tragedy, and the police had been unable to arrest him. In these circumstances the Crown endeavoured to prove that the man, who was described and known under the name of Scott by witnesses residing at Ardlamont, was the same person as a man Davis or Sweeney, who was proved to be a betting-agent in London. They led evidence to shew that they had made every effort in vain to find Scott; that Monson and Davis or Sweeney were associated in betting transactions, and were in the habit of meeting in various hotels and public-house bars in London prior to the date of the alleged murder; that Davis had left London for the north on or about 7th August, and that the person known as Scott had arrived at Ardlamont on the 8th.

Sydney Russell of London, a bookmaker, was examined by the Crown, and stated that on the 16th or 17th of August Davis, who was well known to him as a brother bookmaker, appeared at his house in London looking fatigued and ill.

Counsel for the Crown then proposed to ask the witness to repeat a statement made to him on the occasion by Davis. No. 2.

Counsel for the panel objected to the question.

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Argued for the Crown;—The evidence led established that the direct evidence of Davis in the matter was entirely beyond the power of the prosecution. Every possible effort had been made in vain in order to find him. There were then only two alternatives—either the evidence of what Davis said must be lost altogether, or it must be taken from some person to whom Davis made the statement. The rules of evidence admitted hearsay or secondary evidence in the cases of dead persons, insane persons, and persons imprisoned as captives of war in a foreign country.¹ The principle of this rule was just that such evidence was the best evidence available under the circumstances, and that it was better to take it than none at all. Such evidence had been admitted in the case of *Robina Burnet*,² which was directly in point, the question being there, as here, whether a person known by a certain name was in reality the same as a person known by another name.

Argued for the panel;—It was not proved that the man Sweeney or Davis was the man who was at Ardlamont, and it was not proved that Davis was dead; on the contrary, the witnesses examined on the point deposed that to the best of their belief the man was alive, and had started on a voyage to Australia for his health. In these circumstances, the case did not fall within the well-known exceptions in which hearsay evidence was admitted. Until a person was proved to be dead or permanently insane, the Crown was not producing the best evidence. The best evidence did not mean the best evidence which happened to be available. In *Burnet's* case it was a letter and not a hearsay statement which was admitted. In any event, what Davis said in the absence of the panel was not evidence against the latter.

LORD JUSTICE-CLERK.—It is quite plain that if this man Scott, Sweeney, or Davis, had been at the bar, it would have been competent to ask this question, and it is equally plain that if the question had been asked and answered, it would have been my duty, as protecting the interests of the prisoner now at the bar, to tell the jury that they could not give any weight to what another prisoner might have said outwith his presence, and that it could only be evidence against that other prisoner himself.

Therefore, taking the case on the footing that Sweeney, Davis, or Scott was at the bar there could be no doubt of the law applicable to the case. Neither the question asked nor the answer given in the conversation between the witness and Sweeney could be evidence against Monson.

The only remaining question is whether, in view of the fact that this man Sweeney might have been a competent witness in this case, if the Crown had chosen to use him, they can, in the circumstances in which they are now placed, prove a statement that he has made. It is a well-established rule of law that you are not entitled to ask a witness to state what was said by another person, if that person is alive and may speak for himself. There is a relaxation of this

¹ Dickson on Evidence (Grierson's edn.), sec. 268; Harvey, 1835, Bell's Notes to Hume, p. 292; Creditors of Cleland, July 1, 1708, M. 12,634; Macdonald's Criminal Law, p. 496.

² *Robina Burnet and Others*, Nov. 17, 1851, John Shaw's Justiciary Reports, p. 497. [The case is also reported in 1 Stuart 50, and 24 Scot. Jur. 12.]

No. 2. rule in the case of persons who are dead, and there is apparently—I do not know on what authority—a relaxation also in the case of a person who is hopelessly insane. From a person in this position it is as impossible to get evidence as it is from a dead person; and therefore it is held that if you can prove what the person said, it may be admitted as evidence, subject of course to the observation that it is evidence at second hand. Another case has been referred to. That is the case of a prisoner of war confined in a foreign country, whom it is impossible for the litigant requiring his evidence to examine. This was decided in a civil case, and, of course, the same absolute strictness may not always be applied in civil proceedings as is observed in protecting the interests of a prisoner charged with crime. But as regards these two cases—the case of an insane witness and the case of one who is a prisoner of war—it is quite plain that the difficulty of the prosecutor does not consist just in this, that he cannot find the witness. He knows where the witness is in both cases, and is able to prove in the case of the insane person that if he were put into the witness-box he could not give any trustworthy testimony; and in the case of the prisoner of war, that owing to the absence of intercourse between the two states, the war prisoner could not be got at to give evidence. The place where the witness was, was known, and the reason why he could not be examined was known in both these cases.

But here the reason given by the Crown for their failure to produce Sweeney as a witness is that they have not been able to find him. Now, it is a new idea to me, as a principle of law, that you are entitled to take secondary evidence of a witness whom you cannot find, and I certainly would not decide that any such secondary evidence should be led unless there was very strong authority laid down by my predecessors in this Court for such a course. It seems to me, on the face of it, that it would be a most dangerous principle. If parties are unable to find a witness, that is a misfortune to the litigant, and a misfortune to which he must just submit. To say that if Sweeney had been found he might have been a competent witness is to state no ground for allowing hearsay evidence of what he said. If the Crown had him and made him a witness his credibility could be tested by cross-examination, and by the observation of the jury of his way and manner in giving his evidence. It is the failure of the prosecutor to find him that makes all this impossible.

I have been referred to the case of *Burnet and Masterton*. That case was certainly a very peculiar one, and the point to be brought out was an incidental one only. Here it is a crucial point, viz., the identification of the absent accused person with the person who was at Ardlamont on the occasion in question. I do not therefore think the cases parallel. But if they were, I am bound to say that I have heard the volume of the reports in which this particular report of the case of *Burnet* appears spoken of by those who knew its history as not being the best authority in law reporting, and I should have liked to have had a much fuller report, and one on which I could go with greater confidence. I cannot be sure that on such a report I would be safe to act. It certainly seems to me that in that case the Court went very far indeed outside of the ordinary rule, although there may have been good grounds for so doing. On the whole matter, I have come to the conclusion that I ought not to allow this question to be put.

4. Professor Matthew Hay, of Aberdeen University, was examined as

a skilled medical witness for the defence, and in cross-examination admitted that by the express direction of the panel's legal advisers he had refused to give any information to the Crown.

The Solicitor-General complained that in refusing to allow the Crown to precognosce the witnesses for the panel, the legal advisers of the panel had acted contrary to the usual practice in such cases. A ruling was asked for future guidance.

Counsel for the panel stated that they had not desired to precognosce the Crown witnesses.

LORD JUSTICE-CLERK.—It seems to me that nothing could be done more prejudicial to either side, than that in a criminal case before a jury, the advisers of a party should direct their witnesses not to allow themselves to be precognosced. I think it is a grievous mistake. I consider it to be the duty of every true citizen to give such information to the Crown as he may be asked to give in reference to the case in which he is to be called; and also that every witness who is to be called for the Crown should give similar information to the prisoner's legal advisers, if he is called upon and asked what he is going to say. I do not say there is any blame attaching to anyone connected with this case, and the witness was quite right to do as he was told. I have no doubt that the legal advisers of the prisoner acted conscientiously. But I have been asked to express my view, and it is that every good citizen should give his aid, either to the Crown or to the defence, in every case where the interests of the public in the punishment of crime, or the interests of a prisoner charged with crime, call for ascertainment of facts.

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Council of
Midlothian v.
Maitland.

THE SUBURBAN DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF
MIDLOTHIAN, Petitioners (Respondents).—*D. Dundas.*

SIR JAMES RAMSAY GIBSON MAITLAND, BART., Respondent (Appellant).—*F. T. Cooper.*

Process—Appeal—Case stated for appeal—Public Health Act, 1867 (30 and 31 Vict. c. 101), secs. 16, 18, 106, 107, and 108—Housing of the Working-Class Act, 1890 (53 and 54 Vict. c. 70), sec. 32 and schedule 3—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62), secs. 2 and 3.—A Local Authority petitioned a Sheriff under the 16th and 18th sections of the Public Health Act, 1867, and the 32d section and 3d schedule of the Housing of the Working-Class Act, 1890, praying the Sheriff to find that certain cottages were in an insanitary condition, and to ordain the proprietor to discontinue the nuisance, and to grant an order closing the premises under the second of these enactments. Thereafter the cottages having been vacated, the petitioners restricted their petition by minute to a conclusion for expenses, and were allowed a proof that the respondent had been the author of a nuisance. Thereafter the respondent allowed decree for expenses to go by default.*

Having been refused a case for the opinion of the High Court, he presented a note of appeal praying that the Sheriff should be called upon to shew cause why he should not state a case.

Held that the cause was not criminal, and that therefore the Sheriff was right in refusing to state a case for appeal against his decision.

* The Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. c. 62), enacted,—Sec. 2.—“ . . . ‘Cause’ means and includes every proceeding which may be brought under the Summary Procedure Act, 1864, and every

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HIGH COURT.
Lord Justice-
Clerk.
Lord M'Laren.
Ld. Wellwood.

THE SUBURBAN DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF THE COUNTY OF MIDLOTHIAN, being the Local Authority of the parish of Cramond, presented a petition in the Sheriff Court of the Lothians and Peebles, at Edinburgh, against Sir James R. G. Maitland, Baronet, of Barnton, under the 16th and 18th sections of the Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101), and the 32d section and 3d schedule, *vide* Scotland, of the Housing of the Working-Classes Act, 1890 (53 and 54 Vict. c. 70),* in which they prayed the Court to find that the respondent had, on or about 11th February 1893, been the author of a nuisance within the meaning of the first of these enactments, in respect that he had allowed seven dwelling-houses belonging to him at Longrow, in the parish of Cramond, and at that date all inhabited, to be in an insanitary condition and unfit for human habitation, and to ordain him to discontinue the nuisance, and also to grant an order closing the premises under the second of the enactments. Thereafter the respondent warned the tenants of the dwelling-houses to quit them at Whitsunday 1893, and they were vacated at that term.

After sundry procedure the petitioners, on 6th July 1893, restricted their petition by minute to a simple conclusion for the expenses of the process, and on their motion the Sheriff-substitute (Hamilton) allowed proof that at the date of the presentation of the petition the respondent had been the author of a nuisance.

The respondent thereupon, on 24th July 1893, lodged a minute desiring to be allowed to depart from the proof, which had been fixed for 25th July, and requesting the Sheriff-substitute to dispose of the question of expenses, to which the prayer of the petition had been restricted, upon the statements in the records and the debates for the parties.

On 25th July the respondent, in consequence of these minutes, objected to the petitioners being allowed to lead proof, and his objection being repelled, withdrew from the diet.

The Sheriff-substitute thereafter, in respect of his nonappearance, discerned against him for the expenses of process.

The Sheriff-substitute having refused the respondent's application for a case, he presented this note of appeal to the High Court, under the Summary Prosecutions Appeals Act, 1875, praying for an order upon the Sheriff-substitute to shew cause why a case should not be stated in terms of that statute.

It is unnecessary to refer to the reasons stated for the note of appeal.

The respondents objected to the competency of the appeal, and argued;—Under the Public Health Act, 1867, sec. 108, appeal was expressly excluded, and it had been recently decided¹ that such a proceeding as the present was not a "cause" within the meaning of section

other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge."

Sec. 3.—"On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction, or complaint under such Act. . . ."

* The various sections of these two enactments, so far as applicable to the case, are referred to in Lord Wellwood's opinion.

¹ Lee v. Lasswade Local Authority, Nov. 2, 1883, 5 Couper, 329, 11 R. (Just. Cases) 1; Couper v. Lang, Dec. 12, 1889, 2 White, 393, 17 R. (Just. Cases) 15.

2 of the Summary Prosecutions Appeals Act, 1875, and was not therefore **No. 3.**
appealable on a case stated under section 3 of the same Act.

Argued for the appellant;—This was a “cause” within the meaning of Jan. 19, 1894.
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trict Commit-
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Maitland. the second half of the definition of the Act of 1875, and therefore appealable under section 3 of the Act. That a “penalty” might be inflicted and recovered where a nuisance of the class in question was shewn to exist appeared plain from the language of sections 103 and 105 of the Public Health Act, and particularly from section 105, which authorised imprisonment in default of payment. Further, although the prayer of the petition had been restricted to a question of expenses under section 105 of the Act of 1867, taken along with section 28 of the Summary Procedure Act, 1864, expenses were to be regarded as a penalty.¹

At advising,—

LORD WELLWOOD.—I am of opinion that this note should be refused on the simple ground that the Sheriff’s interlocutor or judgment which is complained of is not appealable, or at least is not appealable to the High Court of Justiciary.

Under section 108 of the Public Health Act, 1867, appeal is undoubtedly excluded. But the appellant maintains that an appeal is competent in respect that the process is a cause in the sense of the Summary Prosecutions Appeals Act, 1875.

I doubt, for reasons which I shall state afterwards, whether it can be regarded as a “cause” in the sense of that statute; but I am satisfied, and that is sufficient for our decision, that it is certainly not a “cause” which is criminal *quoad* review.

The process, so far as it has gone, and I believe it is at an end, is purely civil. It originated in a petition presented under the 16th and 18th sections of the Public Health Act, 1867, and the Housing of the Working-Classes Act, 1890, section 32, and third schedule, *vide* Scotland. The 16th section of the Public Health Act describes a variety of matters which shall be held to be a “nuisance” in the sense of the Act; and section 18 empowers the Local Authority to present a petition for the purpose of establishing the existence of the nuisance and having it removed or discontinued, and if necessary, for the purpose of obtaining interdict against the recurrence. So far there is nothing to indicate anything of a criminal nature in the procedure; nothing which might not equally be found in any civil process brought for the purpose of interdicting what is alleged to be a nuisance. As tending to shew the civil character of the process, I may refer to the provisions made in sections 106 and 107 for procedure under the heads (*h*), (*i*), and (*j*) of section 16, which are all nuisances, and perhaps greater nuisances than those described in the earlier heads of section 16, and which may equally be interdicted under sanction of penalties and imprisonment. Under section 106 the Sheriff “is to take notes of the evidence in like manner as in civil proofs,” and under section 107 appeal is given under the heads (*h*), (*i*), and (*j*) to the Sheriff, and if the value of the cause exceeds £50 there is a further appeal to the Lord Ordinary on the Bills, and a further appeal to the Inner-House if the Lord Ordinary allows it.

If the party proceeded against is finally held to be the author of the nuisance, and is ordered to discontinue or remove it, and refuses or neglects to do so,

¹ United Kingdom Temperance, &c. Institution v. Parochial Board of Cadder, June 14, 1877, 3 Couper, 447, 4 R. (Just. Cases) 39.

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other provisions of the statute are brought into play. The 20th section of the Public Health Act provides that in such a case the author of the nuisance or the owner, as the case may be, shall be liable in certain penalties per day during his failure to comply with the order of Court.

At that stage, and not till then, the process assumes a criminal or quasi-criminal aspect. Up to that point the person proceeded against may have been guilty of a civil wrong, but it is not until he refuses or neglects to obey the order made upon him by the Court that he incurs penal responsibility. Further, in order to obtain an imposition of penalties a separate petition or complaint must be presented setting forth the respondent's failure to comply with the order of the Court, and praying for the imposition of the statutory penalties. I think it is immaterial whether such a complaint is regarded as incidental to the original petition or not. In substance it is an entirely different process, in which the only matter submitted for the decision of the magistrate is whether the order made in the original petition has been obeyed or not. And although a judgment pronounced by the magistrate in a suit for penalties might be appealable on a point of law, it does not follow that such an appeal would entitle the Court to review the magistrate's determination on the original petition.

But it is unnecessary that I should say more, because this case is ruled by the decision of a full bench in *Lee v. Local Authority of Lasswade*, 5 Coup. 329, 11 R. (Just. Cases) 1. Indeed this is a stronger case, because while in *Lee's* case a penalty might have been sued for and imposed if the Sheriff's interlocutor which was complained of were not obeyed, in the present case that could not be done, because the cottages having been vacated the petitioners by minute departed from the prayer of the petition except as regarded the question of expenses.

Lastly, it seems to me that on the merits there is nothing to appeal, because the appellant, instead of leading evidence, deliberately allowed decree for expenses to go by default.

The LORD JUSTICE-CLERK and LORD M'LAREN concurred.

THE COURT refused the note.

R. S. RUTHERFORD, Solicitor—JOHN CLERK BRODIE & SONS, W.S.—Agents.

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Lord Abinger.

ALEXANDER M'EWEN, Complainer.—*Greenlees*.

THE RIGHT HONOURABLE LORD ABINGER, Respondent.—*D. Dundas*.

Complaint—Penalty—Summary Procedure Act, 1864 (27 and 28 Vict. c. 53), sec. 4, schedule A—Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), sec. 6—Day Trespass Act (2 and 3 Will. IV. c. 68), sec. 1.—Section 6 of the Summary Jurisdiction Act, 1881, enacts that "in all proceedings under the Summary Jurisdiction Acts . . . (b) . . . when the amount adjudged to be paid . . . exceeds £1 but does not exceed £5, the period of imprisonment shall not exceed one month."

In a complaint which bore the heading "Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887," the accused was charged with a contravention of the 1st section of the Day Trespass Act, "whereby" he "is liable to forfeit and pay a sum not exceeding £2," and in default of payment thereof "to be imprisoned, with or without hard labour, for any time not exceeding two calendar months." In the prayer the Sheriff was asked to "convict him of the aforesaid contravention, and to

adjudge him to suffer the penalties provided by the said Act." The Sheriff-substitute convicted the accused, imposed a modified penalty of £1, and in default of immediate payment sentenced him to imprisonment for ten days. The accused brought a suspension on the ground that the complaint contained no statement that the term of imprisonment which the accused might be adjudged to suffer in default of paying the fine of £2 fell in terms of section 6 of the Act of 1881 to be restricted to one month.

The Court *refused* the suspension, holding that the Sheriff-substitute's attention had been sufficiently called to the restriction of the penalty by the Act of 1881 in the reference to that Act in the heading of the complaint.

M'Leod v. Tarras, Oct. 24, 1892, 3 White, 339, 20 R. (Just. Cases) 6, *followed*.

Observations on the form of complaints in regard to the notice to be given to the magistrate of his powers of punishment.

ALEXANDER M'EWEN, plasterer, Fort-William, was charged in the Sheriff Court of Inverness-shire upon a complaint bearing the heading "Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887," which set forth that he had been guilty of a contravention of the Day Trespass Act, in so far as on 25th February 1893 he did "in the day-time . . . trespass by entering or being without leave of the proprietor, the said Lord Abinger, upon the lands commonly known as the estate of Inverlochry, . . . in pursuit of game, . . . whereby the said Alexander M'Ewen is liable to forfeit and pay a sum of money not exceeding £2, and costs of conviction, and in default of payment thereof . . . to be imprisoned, with or without hard labour, for any time not exceeding two calendar months."

In the prayer the Sheriff was asked to convict the accused, "and to adjudge him to suffer the penalties provided by the said Act."

The accused pleaded not guilty, and after evidence led the Sheriff-substitute (Simpson) convicted him, and adjudged him to pay the sum of £1 of modified penalty, with £1, 5s. of expenses, and in default of immediate payment sentenced him to be imprisoned for ten days.

M'Ewen brought a bill of suspension of the sentence. He averred,—“(2) The penalty craved is erroneously set forth in the complaint, in so far as it craves that the complainer should be liable to forfeit and pay a sum of money not exceeding £2 and costs of conviction, and in default of payment thereof at the time appointed be imprisoned, with or without hard labour, for any time not exceeding two calendar months, unless payment be sooner made. The respondent failed to give effect to section 6 of the Summary Jurisdiction (Scotland) Act, 1881, which provides that the period of imprisonment shall not exceed one month where the fine imposed exceeds £1, but does not exceed £5. This statement of the alternative open to the Judge was incorrect and misleading, and did not bring under his notice that he was bound by the above Act to restrict the alternative of imprisonment to one month, to the great prejudice of the complainer.”

He pleaded ;—The conviction complained of should be suspended, with expenses as craved, in respect that the penalty craved by the complaint is excessive, illegal, and misleading.

Argued for the complainer ;—The complaint omitted all reference to the Summary Jurisdiction Act, 1881, and concluded for a greater penalty than the Sheriff was entitled under section 6 of that Act to impose.¹ The complaint must also specify what penalties could competently follow

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¹ *Blains v. Rankin*, May 27, 1892, 3 White, 221, 19 R. 96.

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conviction. If it did not the Sheriff might be misled.¹ If *M'Leod v. Tarras*² was well decided then it was competent for a prosecutor to pray for the imposition of a penalty which could not legally be imposed.

Argued for the respondent;—It was unnecessary (*vide* section 4 of the Summary Procedure Act, 1864, 27 and 28 Vict. c. 53) for the prosecutor to refer in the complaint to the Summary Jurisdiction Act, 1881, but, in any view, the matter was foreclosed by the decision in *M'Leod v. Tarras*. The Sheriff was bound to know his own powers under that Act, and the prosecutor had sufficiently indicated the limit of the imprisonment which he asked the Sheriff to impose by proceeding under the Summary Jurisdiction Acts.³ The complainer had suffered no prejudice, and the matter had been brought to the Sheriff-substitute's notice.

At advising,—

LORD WELLWOOD.—This appeal arises out of a prosecution under the Day Trespass Act (2 and 3 Will. IV. c. 68), which was brought before the Sheriff at Fort-William. The complaint bears to be brought under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887.

In the body of the complaint the prosecutor, after setting forth the trespass complained of, concludes thus,—“Whereby the said Alexander M'Ewen is liable to forfeit and pay a sum of money not exceeding £2 and costs of conviction, and in default of payment thereof at the time appointed, to be imprisoned, with or without hard labour, for any time not exceeding two calendar months unless payment be sooner made.” And in the prayer he prays the Sheriff to convict the appellant, and adjudge him to “suffer the penalties provided by the Act.”

The Sheriff convicted and imposed a modified penalty of £1, and £1, 5s. of expenses, and in default of immediate payment sentenced the appellant to be imprisoned for ten days.

The appellant does not maintain that the term of imprisonment thus alternatively imposed was not within the Sheriff's powers, but he maintains that the conviction must be set aside, because in the complaint the prosecutor names a maximum term of imprisonment of two calendar months, which could not be competently imposed having regard to the provisions of the Summary Jurisdiction Act of 1881, under which the maximum period of imprisonment which can now be imposed where the fine imposed exceeds £1 but does not exceed £5 is one month and not two.

The same objection was stated in the recent case of *M'Leod v. Tarras*, decided in this Court on 24th October 1892, the Court being composed of Lord Young, Lord M'Laren, and myself. We held that the objection was not well founded, our view being that the Act of 1881 being a general Act applicable indiscriminately to all summary prosecutions brought under the Summary Jurisdiction Acts, it was not necessary that its provisions should be specially set forth in the complaint, and that if any reference to it were necessary it was sufficient that the magistrate's attention should be drawn to it by the heading to the complaint, which apprised him that in passing sentence he must have regard to the provisions of that statute modifying the sentence of imprisonment in proportion to the amount of the fine imposed.

¹ Thomson v. Wardlaw, Jan. 23, 1865, 5 Irvine, 45.

² M'Leod v. Tarras, Oct. 24, 1892, 3 White, 339, 20 R. (Just. Cases) 6.

³ Chisholm v. Black and Morrison, June 12, 1871, 2 Couper, 49.

I am of opinion that sufficient grounds have not been shewn for going back upon our decision in *MacLeod v. Tarrae*, which is directly in point. But in view of the doubts expressed during the discussion I cannot say that I hold to my former opinion without some hesitation.

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The objection is technical; the Sheriff has not been misled; he has imposed a competent sentence of imprisonment. The objection, however, is not the less important and difficult on that account. If it is well-founded the conviction must be quashed; but in the absence of any prejudice to the appellant this is not a result to be readily arrived at.

The question is not whether the form of complaint adopted is the best, but whether it is so radically defective that the accused, who has suffered no prejudice, and who took no objection in the Court below, is entitled to go free.

It must be admitted that on first statement it seems a startling proposition that it is competent for a prosecutor to pray for the imposition of a penalty which cannot legally be imposed; but a little consideration shews that the difficulty is more apparent than real.

The form of complaint in schedule A of the Summary Procedure Act, 1864, applicable to statutory complaints, is framed on the footing that the penalty and alternative to be set forth in a statutory complaint are those prescribed by the statute said to have been contravened. Here that was correctly done. The Day Trespass Act has not been repealed. But the Summary Jurisdiction Act of 1881 provides that when, in enforcing a statute such as the Day Trespass Act the prosecution is brought under the Summary Jurisdiction Acts, and a warrant of imprisonment is granted in default of payment of a penalty, a certain scale of periods of imprisonment shall be observed proportioned to the penalty inflicted, and the maximum period of imprisonment competent for a £2 fine under the Act of 1881 is one month and not two.

Before condemning the mode of libelling here adopted it is necessary to consider what is the alternative, and what would be the logical results of our entertaining the objection. Is it proposed to insert *ad longum* in the body of the complaint all the alternatives which are open to the magistrate? I hardly think that this course will be seriously suggested. But a partial insertion would be worse than none. Suppose the prosecutor had here inserted the maximum period of imprisonment (one month) authorised by the Act of 1881 for a £2 fine, the complaint would at once have been objected to as misleading, on the ground that that might lead the Sheriff to think that whatever penalty he imposed he might in default of payment give a sentence of imprisonment of one month, whereas according to the scale of the Act of 1881 he is bound to reduce the sentence of imprisonment in proportion to the fine imposed.

If insertion *ad longum* is impracticable and partial insertion is insufficient, the only other course is to make a general reference to the periods of imprisonment competent under the Act of 1881. Such a reference would no doubt draw the magistrate's attention to that statute; but that is already done sufficiently, I think I shall shew according to practice, by the heading to the complaint.

According to the decisions, it is as essential to the soundness of a statutory complaint that all the alternative punishments open to the magistrate should be set forth in the complaint, as that those specified should be correctly stated and competent. But where an alternative punishment or modification is introduced by a general statute, and not by the statute said to have been contravened, it

No. 4. has not, so far as I know, been the practice to specify the alternative or modification in the body or prayer of the complaint.

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An examination of sections 18 and 19 and schedule K of the Summary Procedure Act of 1864, and the Summary Jurisdiction Act of 1881, furnishes a number of examples. For instance, some statutes authorise the imposition of penalties, but do not expressly authorise imprisonment in default of payment, while at the same time they do not exclude it. But section 18, subdivision 6, of the Act of 1864, and schedule K, subdivision 6, provide that the Judge, if he considers it inexpedient to order execution by pointing and sale, may order immediate imprisonment. Again, section 19 authorises immediate imprisonment, although the special statute allows time within which to pay the penalty, or only directs imprisonment in default of recovery by execution—*Macdonell v. Davidson*, 1 Coup. 9.

Again, some statutes authorise imprisonment without the option of a fine, and yet by section 6, subdivision 1, of the Act of 1881, a fine may be substituted for imprisonment.

And by section 8, subdivision 1, of the same Act, where warrant of pointing and sale is competent, a warrant of imprisonment for a fixed period may be granted in default of recovery.

Now, the only notice to magistrate or accused of these important alternatives introduced by general Acts is in practice the heading to the effect that the complaint is brought under the Summary Jurisdiction Acts. That is held to be sufficient notice that these and other important variations, not only as to procedure, but as to the punishment to be awarded, may be given effect to notwithstanding the terms of the statute said to have been contravened. In substance the accused is informed that he is liable to the penalties imposed by the statute as modified or varied by the Summary Jurisdiction Acts. I think that if it is said that the present complaint is misleading because it specifies a punishment imposed by the special statute which no longer can be imposed in prosecutions brought under the Summary Jurisdiction Acts, it may with equal justice be said that complaints which fail to specify the alternatives which have been introduced by general Acts are also misleading, and yet such an objection has never been taken.

In the course of the discussion an illustration was given, I think by Lord M'Laren, which seems to me to be very much in point. Before the punishment of penal servitude was substituted for transportation, many statutes were passed for the repression of crime, in which one penalty was stated to be transportation. Under the old form of indictment it was necessary, in the case of a statutory charge, to quote the section of the statute founded on, and after transportation was abolished it was still customary to quote statutes which, on their face, stated that the punishment of the crime charged was transportation. No doubt the indictment concluded that the accused, on being convicted, should suffer "the pains of law," and this general expression necessarily would cover penalties which could competently be imposed at the time of the trial. But any uninstructed person looking at such an indictment would gather that transportation was still a competent punishment for the offence. Thus in cases before the Supreme Court, at least, it is clear that it was not thought necessary that special notice should be given in the body of the indictment of the alteration or modification as to punishment which had been effected by the general Act. It may be said that the Supreme Court must be presumed to know the

current law, while it would not be safe to count on all inferior Judges being equally familiar with it; but even if that be so, it does not materially deprive the illustration of its force, as shewing the province of a general statute in connection with statutory charges, whether made in a complaint or an indictment. No. 4.
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I believe the truth to be that there is no appreciable risk of mistake. We have been referred to no instance in which a Sheriff or magistrate has gone wrong in this matter. The general Acts are few in number, and form the elementary education of all magistrates. The Judge in this case was a Sheriff-substitute, who, of course, was familiar with their contents. But I venture to think that one of the first things brought under the notice of any magistrate is the scale introduced by the Summary Jurisdiction Act of 1881, and I do not think there is any risk of a sentence of imprisonment being pronounced without reference being made to that table.

While those are my views I do not wish to be understood as disapproving of the form adopted in some counties of referring specially in the body of the complaint to the scale of imprisonment prescribed by the Act of 1881. Such a form removes at least one possible cause of mistake. But, as I have endeavoured to shew, it is not complete or free from objection, and I am not prepared to hold that such a reference is indispensable.

While I fully recognise the difficulty of the question, I am for refusing the appeal.

LORD M'LAREN.—I concur in all that has been said by Lord Wellwood. I shall only refer to one point, which was, I think, not brought out in his Lordship's opinion. At the discussion an argument was founded on the words of the fourth section of the Act of 1864, which says, "It shall not be necessary to mention in any complaint any Act of Parliament other than the Act declaring the offence for which the conviction is sought, or imposing the penalty or forfeiture which is claimed."

Now, I read these words as expressing an alternative. In the first case if the prosecution is for what may properly be called a crime or offence the indictment must set forth the Act of Parliament which declares the act prohibited to be an offence; and if the prosecution is in respect of what may be called a fiscal offence for the recovery of a fine or penalty, the Act of Parliament which imposes the penalty is to be set out. It is not necessary in cases of the first class to quote the sections of the Act of Parliament which relate to the punishment to be awarded or the penalty to be exacted.

This construction is in harmony with the theory upon which the old indictments were framed, in which it was not necessary, in indictments founded on statute law, to set out what was the punishment of the crime charged, unless, of course, where in the statute the description of the punishment was so related to the offence charged that the one could not be quoted without the other.

LORD JUSTICE-CLERK.—I do not think that the form used in this complaint is a good one for stating the offence with which the appellant was charged, and the penalty which could be exacted or the alternative punishment. I also wish to say that I think that in cases of this kind the rule should be recognised which makes it the duty of the prosecutor to so state his complaint that the magistrate shall have before him a statement of what are his powers in regard to punishment of the offence. There is, however, a decision in the books, in which the result arrived at by the Court is of the same nature as that expressed

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by your Lordships, and I am not prepared to dissent from the judgment in this particular case. At the same time I must say that the question of what was done in the case of the old indictments before the Act of 1887 is not quite applicable here. I think that in complaints in the inferior Courts the practice should be kept up of the prosecutor correctly putting before the magistrate—who is often uninstructed in law—what powers he has in the case.

I notice also in this complaint that the section of the Act under which the prosecution was brought is not stated, but only the Act. I know that it has been held in previous decisions that it is not necessary to quote the section of the Act, if it is quite plain what is the offence charged, and the accused could be under no mistake. I am not prepared to go back on those decisions, provided they are not held to decide that in every case the prosecutor may omit reference to the section. In one case a conviction was quashed where the Merchant Shipping Act—an Act of many clauses—was referred to without any mention of the section founded on. But although there may be cases where the information is sufficient without the section being given, I think it would be more advisable that the section which describes the offence should be referred to. Of course in some statutes there are only two sections, a formal and an operative clause, and in those cases it may not be necessary; but in statutes where there are several clauses I think it right that the section should be referred to. This is now the rule under the Act of 1887, and the rule is made to apply to summary prosecutions.

THE COURT refused the bill.

JAMES ROSS SMITH, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

No. 5.

Jan. 22, 1894.
Lang v.
Pianta.

JOHN LANG, Complainer (Respondent).—*Lees—Ure.*

DOMINICK PIANTA, Respondent (Appellant).—*Dickson—John Wilson.*

Public-Health—Statutory offence—Purveyor of milk—Ice-cream manufacturer—Dairies, Cow-sheds, and Milkshops Order of 1885.—By an Order of the Privy Council issued under the Contagious Diseases (Animals) Act, 1878, and entitled the Dairies, Cow-sheds, and Milkshops Order of 1885, it is enacted, sec. 6, subsec. 1,—“It shall not be lawful for any person to carry on in the district of any local authority the trade of cow-keeper, dairyman, or purveyor of milk unless he is registered as such therein in accordance with this article.”

Held that a seller of ice-cream was not a purveyor of milk within the meaning of this enactment.

HIGH COURT.
Lord Justice-
Clerk.
Lord Kin-
cairney.
Ld Stormonth-
Darling.

DOMINICK PIANTA, an ice-cream manufacturer, residing at 105 Eglinton Street, Glasgow, was charged upon a complaint at the instance of John Lang, clerk to the Glasgow Police Commissioners, which set forth that he “did, on Friday, the 15th September 1893, and for some time prior thereto, in his shop or premises . . . within the district of the said local authority, carry on the trade of purveyor of milk without being registered as such in said district, contrary to ‘The Dairies, Cow-sheds, and Milkshops Order of 1885,’ section 6 (1), issued under the Contagious Diseases Animals Acts 1878 to 1886,” whereby he was liable to a penalty.

The Sheriff-substitute (Birnie) convicted the accused but dismissed him with an admonition, because no similar prosecution had previously been brought in Glasgow.

The accused obtained a case, in which the Sheriff-substitute stated the

following facts as admitted or proved :—"That the said appellant, at the time and place libelled, did carry on the trade of an ice-cream manufacturer and merchant, and was not registered as a purveyor of milk. That the said ice cream is composed of milk, mixed with sugar, corn flour, eggs, and a drop or two of colouring matter, generally annatto. . . . The compound consists of, at least, two-thirds of milk. . . . The appellant uses in his business about 32 gallons of milk per week. The boiling destroys infection, but the frozen mixture carries infection. The appellant does not reside in his shop, but the vendors of ice cream frequently sleep in their shops, or in rooms opening off them."

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The question of law for the opinion of the Court was :—"Whether the appellant is a purveyor of milk within the meaning of the statutes and Order founded on, and required to be registered as such?"

Argued for the appellant ;—The appellant came under none of the three classes of persons who were to be registered under the enactment in question. A "purveyor of milk" was just a person who sold "milk." It could not be maintained that a hotel-keeper who, in a sense, dealt in milk, was a "purveyor of milk," and it was equally clear that the appellant, who mixed certain ingredients with milk, was not intended to be included in that expression.

Argued for the prosecutor ;—The ice-cream here in question, consisting as it did of milk to the extent of two-thirds, was substantially frozen milk. Milk, although it had been boiled and afterwards frozen, was liable when standing in the ice-cream manufacturer's premises to carry infection. The Act was intended to strike at such a case. Hotel-keepers were purveyors of milk in the sense of the Act.

LORD JUSTICE-CLERK.—I must say that what the authorities desire to do in this case seems most laudable, and the consequences of our decision may have the most far-reaching results. It may be of the greatest importance that manufacturers of ice cream should be brought under registration, and their premises be submitted to the inspection and regulation which that implies, just as it may be argued that hotel-keepers and temperance refreshment-room keepers should be registered under the Public Health Act, as they in a sense deal in milk and cream ; and indeed counsel for the prosecutor was prepared to state his case so high, and to ask us to hold that hotels and refreshment-rooms did come within the terms of the Privy Council Order, in so far as they undertook the business of purveying milk.

Such registration may or may not be expedient, but the question before us here is, whether under the terms of the Privy Council Order, the authorities are entitled to enforce the registration of manufacturers of ice cream as being purveyors of milk in the sense of the statute.

Now, the Order founded on is called the Dairies, Cow-sheds, and Milkshops Order of 1885, and section 6, subsection (1), on which especially the case rests, speaks of three classes of people who are to be registered, namely, cow-keepers, dairymen, and purveyors of milk.

As regards what persons are included in the first two classes, there can be no doubt whatever. These names both refer to persons engaged in well-known lines of business. And as regards the third class, I should have thought it equally clear, but for the decision in this case. A purveyor of milk sells a well-known article, namely, milk. If it meant, as is suggested, everyone who sold any article in the manufacture of which milk was employed, we should have to order the registration of bakers, because they mix their flour with milk.

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Surely no more extraordinary or extravagant interpretation of an ordinary word could be suggested. I do not think we could hold that the Legislature, in employing the word, intended it to have any but its plain and usual meaning. It may be that the Legislature may hereafter see fit to give such a wide and unusual meaning to the word, but I have no hesitation in holding that, as the Act stands at present, that meaning does not attach to the phrase "purveyor of milk."

But for the prosecutor it was argued, you may mix substances with the milk, and still be liable to registration; a purveyor of milk cannot escape registration merely by proving that he adds water, chalk, or flour to the milk before he sells it. I would point out that in so adulterating the milk, and still selling it as milk, he would commit a fraud on his customers, besides being liable under other parts of the statute, and under other statutes, to prosecution for the adulteration, and certainly if proceeded against under this Order for failing to register himself as a purveyor of milk, he would not be allowed in defence to take advantage of his own crime, and say "I am not purveying milk." Holding himself out as a purveyor of milk, and selling an article to the public as milk, he is of course liable to fulfil any legal obligation resting upon a purveyor of milk. Here the case is quite different, and I have no hesitation in holding that this conviction must be set aside.

LORD KINCAIRNEY and LORD STORMONTH-DARLING concurred.

THE COURT answered the question in the case in the negative, sustained the appeal, and quashed the conviction appealed against.

CAMPBELL & SMITH, S.S.C.—J. B. DOUGLAS & MITCHELL, W.S.—Agents.

No. 6.

Jan. 22, 1894.
Malloch v.
Hunter.

JAMES MACGREGOR MALLOCH (Prosecutor for the Burgh of Govan),
Complainer (Respondent).—*Lees*.

GEORGE HUNTER, Respondent (Appellant).—*C. N. Johnston*.

Public-Health—Public conveyance used for removal of infectious patient—Proper precautions to prevent infection—Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101), secs. 48 and 49.—The Public Health Act, 1867, section 49, enacts,—“Any person suffering from any infectious disorder who wilfully exposes himself without proper precaution against spreading the said disorder, in any street, public place, or public conveyance, and any person in charge of one so suffering, who so exposes the sufferer,” shall be liable to a penalty.

A medical practitioner was charged with a contravention of section 49, “in so far as” “he being the person in charge of A B,” a person suffering from enteric fever, being an infectious disorder, “did wilfully expose him while he was suffering as aforesaid from an infectious disorder, by placing him in a cab or hackney carriage, being a public conveyance,” and conveying him from his lodgings to a hospital, “without taking proper precautions against spreading the said disorder.”

It was proved that the accused had taken A B, while suffering from enteric fever, to a hospital in a cab, being a public conveyance, that the cab was furnished with leather fittings, but there was no evidence as to what other precautions against spreading the disorder were necessary.

The magistrate convicted the accused.

In an appeal, *held* (1) that there was no offence committed under section 49 of the Act, unless the patient was conveyed without proper precaution being taken against endangering the public safety by spreading infection; (2) that the *onus* lay upon the prosecutor to prove what precautions were necessary, and

that they had not been used ; and (3) that as the prosecutor had failed to discharge this *onus* the conviction fell to be *quashed*. No. 6.

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HIGH COURT.

* Lord Justice-

Clerk.

Lord Kin-

cairney.

Ld Stormonth-

Darling.

GEORGE HUNTER, medical practitioner, residing in Bellahouston Terrace, Govan, was served with a complaint in the Burgh Court at Govan, at the instance of the Burgh Prosecutor, which charged him (first) with a contravention of the Public Health (Scotland) Act, 1867, particularly section 48 * thereof, "in so far as on 28th August 1893, at No. 1 Nithsdale Place, in the burgh of Govan, he being the person in charge of Arthur Robertson Taylor, apprentice engineer, then residing at No. 1 Nithsdale Place aforesaid, and now an inmate of the Combination Fever Hospital at Shieldhall, near Govan, did place the said Arthur Robertson Taylor, who was then suffering from enteric fever, being an infectious disorder, in a cab or hackney carriage without previously notifying the owner or person in charge of said cab or hackney carriage that the said Arthur Robertson Taylor was so suffering, whereby he is liable on conviction to a penalty ; likeas (second) the said George Hunter has contravened the said Act, particularly section 49 thereof, in so far as, time above libelled, he, being the person in charge of the said Arthur Robertson Taylor, did wilfully expose him while he was suffering as aforesaid from an infectious disorder by placing him in a cab or hackney carriage, being a public conveyance, and conveying him from Nithsdale Place aforesaid to said hospital by way of Paisley Road, in the burgh of Govan, without taking proper precautions against spreading the said disorder," whereby he was liable on conviction to a penalty.

The accused pleaded not guilty, and, after evidence led, the magistrate found him not guilty of the first offence charged, but guilty of the second.

The accused obtained a case, in which the magistrate made the following statements :—"It was proved to my satisfaction that on the date libelled the said Arthur Robertson Taylor was suffering from enteric fever, being an infectious disorder, which was in the second week of incubation ; that the appellant was the person in charge of him . . . that the appellant on said date sent for and placed him in a cab, being a public conveyance taken from a stand in Govan Road, which was furnished with leather fittings, the appellant's private carriage being lined with plush, in which public conveyance on the date mentioned the appellant, along with the patient, was driven by his own coachman by way of Paisley Road from Taylor's lodgings in Nithsdale Place, Govan, to the Shieldhall Fever

* The Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101), section 48, provides,—“If any person suffering from an infectious disorder shall enter, or any person in charge of a person so suffering shall place such person in any steamboat, sailing vessel, railway carriage, stage coach, hackney carriage, or other public conveyance, without previously notifying to the owner or person in charge thereof that such person is so suffering, the person so contravening this provision shall, on conviction thereof before any Sheriff, Magistrate, or Justice, be liable to a penalty not exceeding five pounds, and no owner or person in charge of any public conveyance shall be bound to convey any person so suffering.” By section 49, it is provided that,—“Any person suffering from any infectious disorder who wilfully exposes himself without proper precaution against spreading the said disorder, in any street, public place, or public conveyance, and any person in charge of one so suffering, who so exposes the sufferer, or any owner or person in charge of a public conveyance who does not immediately provide for the disinfection of his conveyance after it has with the knowledge of such owner or person in charge conveyed any such sufferer . . . shall be similarly liable on conviction to a penalty not exceeding five pounds.”

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Hospital, which is situated at a considerable distance therefrom. The point as to whether or not the appellant had previously failed to notify to the owner or person in charge of the said conveyance that the patient was suffering from an infectious disorder was not satisfactorily elucidated by the evidence, and therefore I found the first charge of the complaint not proved.

"It was proved to my satisfaction, under the second charge, that the appellant upon the date libelled, as the person in charge of the said Arthur Robertson Taylor, wilfully exposed him in said public conveyance without proper precaution against spreading the said disorder. The witness called for the defence, Dr Middleton, M.D., F.F.P.S.G., Physician and Lecturer on Medicine to the Glasgow Royal Infirmary . . . gave it as his opinion that enteric fever is not infectious from personal contact, if the patient were clean in person and clothing and diarrhoea had not set in; but there was no evidence submitted by the appellant as to the state or condition of the patient at the time he removed him to the hospital, nor as to any precaution having been taken against the spreading of the disorder, beyond the conveyance of the patient to the fever hospital in a cab with leather fittings.

"Upon this state of the facts of the case, I found the second charge proved, and imposed upon the appellant a penalty," &c.

The questions of law for the opinion of the High Court were, *inter alia*, these,—“(2) Whether on the evidence, and on a sound construction of the 49th section, the appellant wilfully exposed the patient in the streets or in a public conveyance? (4) Whether the magistrate was warranted in convicting the appellant in the absence of evidence as to precautions which ought to have been taken but which were neglected?”

Argued for the appellant;—Under section 49 of the Act the offence consisted (1) in exposing the patient by bringing him into actual contact with others; and (2) by failing to take proper precautions to prevent the spread of infection. Now, the prosecutor had failed to prove either of these things. There was no evidence of the first, and it must be assumed that he had failed to prove the second also; for the magistrate had found the accused not guilty of the charge under section 48 of failure to notify the owner of the carriage that he had an infectious patient, and there was no evidence to shew what precautions other than notification should have been taken.

Argued for the prosecutor;—The magistrate had stated that it was proved to his satisfaction that the appellant as the person in charge of the infected patient had wilfully exposed him in a public conveyance without taking proper precautions against spreading infection. This was a finding in fact, and no question of law could be raised upon it. But in any view the complaint was well founded. It was plain that the appellant had acted wilfully in what he had done; a hackney carriage was a public conveyance; the carriage was not disinfected, and the public who might subsequently use it were exposed to infection. The only precaution proved to have been taken was to use a leather-lined carriage, and that, the magistrate was of opinion, was no sufficient precaution. One precaution the accused might have taken was to notify, in terms of section 48, to the owner of the carriage that the accused was in charge of an infected patient. But then the magistrate stated that this had not been properly elucidated at the proof. In short, the accused had failed to shew, as he was bound to do under section 49, that he had taken proper precautions to prevent infection spreading to the danger of the public.

LORD JUSTICE-CLERK.—In this complaint the appellant is charged with two

offences under the Public Health Act. The first offence is charged under section 48, and is that he placed a patient in a hackney-carriage or conveyance while the patient was suffering from an infectious disorder, without giving notice of his condition to the owner or other person in charge of the conveyance. Of this offence the appellant has been found not guilty, and we have therefore only to deal with the offence charged under the 49th section. No. 6.
Jan. 22, 1894.
Malloch v. Hunter.

Under this section the charge is that the accused exposed the patient in a public conveyance without taking proper precautions against the spreading of the disease from which he was suffering. As far as I can see the only evidence of exposure consists in this—that the patient was brought out of his lodgings, put into a cab, and taken to the hospital. The only time, therefore, during which he could have been exposed was while he was being removed from the house and being driven along the streets, and when he was taken into the hospital; because he certainly was not exposed in his lodgings, and he certainly was not exposed at the hospital.

I cannot hold that the mere fact of driving the patient in a cab from his lodgings to the hospital is an exposure without proper precautions, or an offence under the 49th section. Both this section and the 48th recognise as permissible the use of a public conveyance for the removal of a patient although suffering from an infectious disorder. It lies on the prosecutor to prove something more than the mere transit; either that there was no notice to the owner or person in charge of the conveyance, or that certain precautions which ought to have been taken were not taken. If this conviction were to be sustained, then it would only be necessary to prove that a person in charge of a patient put him into a cab and drove him from one place to another. But that is plainly not an offence under the statute, for if the consent of the owner of a cab is obtained, it is a legal and proper way of removing a patient, the duty of disinfecting the cab afterwards being upon the cab-owner. In this case not only is it not proved that the appellant failed in his duty of informing the cab-owner, but he has been held not guilty of such failure.

I therefore think that this conviction was not justified by what is stated in the case, and that we should answer the second and fourth question in the negative, and quash the conviction.

LORD KINCAIRNEY.—I concur. I think the offence under the 49th section consists in the exposure of the patient and neglecting proper precautions. Now, not only is there no proof that any precaution was neglected, but no precaution which ought to have been taken has been suggested from the bar or occurs to myself. I am therefore unable to say that the appellant has neglected any precaution, and therefore unable to say that he has committed a breach of the 49th section.

I do not think it necessary to affirm absolutely that there might not be exposure in a public conveyance without proper precautions even if the patient were conveyed by himself, and not brought into actual contact with other members of the public, if it were proved that there was some precaution appropriate in the circumstances of which the person accused had neglected to make use.

LORD STORMONT-DARLING.—I concur with your Lordships. The “exposure” referred to in the 49th section is an exposure endangering the public safety, not the safety of the patient. The facts found proved in the case do not establish

No. 6. that there was exposure in this sense, or that any specified precautions were neglected.

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If it be said that the danger was to subsequent occupants of the conveyance, that would be obviated by disinfection; but this duty is placed by the statute upon the owner of the conveyance and not on the patient, or on the person in charge of the patient.

THE COURT answered the second and fourth questions in the negative, found it unnecessary to answer the remaining questions, sustained the appeal, and quashed the conviction.

M. J. BROWN, S.S.C.—ROBERT STEWART, S.S.C.—Agents.

No. 7.

Jan. 23, 1894.
Watson v.
Her Majesty's
Advocate.

RICHARD WATSON, Complainer.—*W. Thomson.*
HER MAJESTY'S ADVOCATE, Respondent.—*Lord-Adv. Balfour—*
J. A. Reid.

Reset of theft—Proof—Previous conviction—Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), sec. 19.—The Prevention of Crimes Act, 1871, sec. 19, enacts that where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and "evidence has been given that the stolen property has been found in his possession," then evidence of previous convictions within five years against the accused of any offence involving fraud or dishonesty may be given at any stage of the proceedings, in order to prove guilty knowledge.

Held that under this enactment previous convictions may be proved if evidence has been given that the accused had the stolen goods in his possession, actually or constructively, at any time after they had been stolen.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Ld. Kyllachy.

AT the trial of Richard Watson, in the Sheriff Court, Glasgow, before the Sheriff-substitute (Murray) and a jury, on a libel at the instance of the Lord Advocate charging the accused with reset of theft, the procurator-fiscal tendered evidence of a previous conviction of reset against the accused.* Counsel for the accused objected on the ground (as stated in the Sheriff-substitute's notes) "(first) that no evidence had been given that the stolen property had been found in the pursuer's possession at the time when proceedings were taken against him; (second), alternatively, the property had never been proved to be at any time actually in his possession, but only constructively. Objection repelled (first), because the possession required under the Act did not need to continue till the date of proceedings; (second), that constructive must be held as equivalent for the purposes of the Act to actual possession."

The accused was found guilty, and sentenced to four months' imprisonment.

He brought a bill of suspension and liberation against the Lord Advocate.

LORD JUSTICE-CLERK.—This appears to me to be a very clear case. I take

* The Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), sec. 19, enacts, " . . . Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen."

the second branch of section 19 of the Prevention of Crimes Act to mean this, that if the Judge who tries the case is satisfied that the prosecutor has adduced evidence to go to the jury to shew that the stolen property has been in the possession of the accused at any time after it has been stolen, then it is competent for the Judge to admit evidence of previous convictions for the purpose of proving guilty knowledge. That is what happened here, and accordingly I think that the Sheriff-substitute acted quite competently, and that the suspension ought to be refused.

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LORD RUTHERFURD CLARK.—I agree. Under the statute the previous conviction may be given in evidence in order to prove guilty knowledge, and it may be used for that purpose at any stage of the proceedings, provided only that evidence has been given that the stolen property has been found in the possession of the accused, or, in other words, that evidence has been given to shew that he had been in possession of the stolen property. It is immaterial at what time the stolen property shall have been traced to his possession, if his possession, when coupled with guilty knowledge, is sufficient to support the charge of reset, and the possession may be either actual or constructive.

As the conviction must be tendered in the course of the trial, it is for the Judge to say whether the conditions of the statute have been satisfied. He has to decide whether "evidence has been given" of possession, and if, in his opinion, such evidence has been given, he is bound to admit the conviction.

LORD KYLLACHY.—I am of the same opinion.

THE COURT refused the bill.

W. & J. BURNES, W.S.—CROWN AGENT—Agents.

GEORGE PATRICK, Appellant.—*Shaw.*

No. 8.

THOMAS KIRKHOPE (Procurator-Fiscal of Justice of Peace Court, Ardrossan), Respondent.—*D. Dundas.*

Jan. 23, 1894.
Patrick v.
Kirkhope.

Public-House—Breach of certificate—Master and Servant—Responsibility of master for servant—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. cap. 35).—A barman, when in sole charge of licensed premises, before closing time sold a bottle of whisky to three of his friends, and after closing time (having shut up the shop) went into a room off the bar with his friends, where he and they consumed the whisky. Held that the servant in thus permitting drinking in the premises after closing time had not acted within the scope of his employment, and therefore that his master was not guilty of a breach of his certificate.

ON 6th October 1893 George Patrick, holder of a public-house certificate for premises in Green Street and Vernon Street, Saltcoats, was charged in the Justice of Peace Court at Ardrossan upon a complaint, setting forth that he "did (first) between ten of the clock at night of the 7th, and eight of the clock in the morning of the 8th September 1893, keep open his said public-house for the sale of exciseable liquor, and permit or suffer the drinking of such liquor therein, or on some part of the premises belonging thereto, and sell or give out therefrom such liquor, viz., a quantity of whisky and beer to" three persons named; "and (second) did, time aforesaid, knowingly permit riotous or disorderly conduct within the said house or premises," contrary to the provisions of his certificate, and to the Public-Houses Acts libelled.

HIGH COURT.
 Lord Justice-
 Clerk.
 Lord Ruther-
 ford Clark.
 Ld. Kyllachy.

No. 8.

Jan. 23, 1894.
Patrick v.
Kirkhope.

The accused pleaded not guilty, but was convicted of the contraventions charged, and fined 25s., with the alternative of ten days' imprisonment.

He obtained a case. The case stated,—“The appellant is resident in Glasgow, and while his practice was to visit his licensed premises in Saltcoats two or three times a-week, the business was locally under the charge of James Cherry, spirit-salesman, who divided his time between the appellant's shop and another spirit-dealer's shop in Saltcoats, belonging to the appellant's brother, who also resided in Glasgow. In the absence of both the appellant and James Cherry, a barman named Archibald Philip looked after the shop, and he was in charge of it during the occasion of the alleged contraventions.

“About ten minutes before twelve o'clock, on the night of 7th September 1893,” two constables entered the premises by a back door, and found the barman and the three men mentioned in the charge, with one of whom the barman lodged, in a room leading off the bar. “A fight was proceeding between the barman and two of his companions, the barman and one of the men being bleeding. . . . The three men had been drinking together in the appellant's bar from nine o'clock in the evening till ten o'clock, and at ten o'clock they purchased a bottle of whisky, and were put into the back room by the barman. The other customers on the premises were ordered out, and the front premises closed. The barman and the three men remained in the back room until the quarrel arose, drinking. . . .

“There was produced by the appellant a copy of printed rules to be strictly attended to by shopmen, which the appellant hands to his employees for their guidance and instruction, and to which he had obtained the signature of the barman, Archibald Philip, when he took him into his employment.” The first of these rules was as follows:—“Rule 1. Shop on no account to be opened before eight o'clock A.M., and to be shut promptly at ten P.M. No person to be supplied with drink before or after these hours.” The appellant, on being made aware of what had taken place, dismissed the barman.

The following was the question of law stated for the opinion of the Court:—“Whether, in the circumstances, the appellant is or is not responsible for the acts and conduct of his servant; and whether the facts proved are sufficient to constitute contraventions within the meaning of the Acts libelled on, and to warrant a conviction against the appellant?”

At the hearing the authorities quoted below were referred to.¹

At advising,—

LORD KYLLACHY.—My opinion is in favour of the appellant upon both charges.

The first charge is that the appellant, on the occasion libelled, kept open house, and permitted drinking within his licensed premises after the prescribed hour. It is not disputed that the drinking took place, but it is admitted that the appellant was at the time absent, and that the offence was committed by his barman in his absence and against his orders. The question is, whether, in the

¹ Linton v. Stirling, July 17, 1893, 20 R. (Just. Cases) 71, 1 Adam, 61; Greenhill v. Stirling, March 19, 1885, 12 R. (Just. Cases) 37, 5 Coup. 602; Galloway v. Weber, Jan. 14, 1889, 16 R. (Just. Cases) 47, 2 White, 171; Cundy v. Le Cocq, L. R., 13 Q. B. Div. 1884, 207; Mullins v. Collins, 1874, 29 Law Times Rep. 838.

circumstances set forth in the case, the appellant was responsible for the barman's act?

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Now, I do not at all doubt that for the purposes of this statutory charge the servant is in general to be held identified with his master. He is always when he has acted on his master's behalf and within the scope of his employment. And on the question whether in any particular case he has so acted, I do not consider that it is at all conclusive that the servant acted in disobedience of his master's orders. The question is not whether he has acted according to or against his duty, but whether he was acting within the scope of his employment.

But the facts found in this case appear to me to make it plain that on the occasion charged the appellant's barman was acting, not for the appellant and within the scope of his employment, but for himself, and for purposes of his own. Desiring, apparently, to drink after hours with three of his friends, he put them, when the shop closed, into a back room, having before closing time sold them a bottle of whisky, which he himself joined in consuming. In my opinion this is a kind of case which falls within the principle of the case of *Greenhill*, 12 R. (Just. Cases) 37, 5 Coup. 602, as explained in the recent case of *Linton*, 20 R. (Just. Cases) 71, 1 Adam, 61, and not within the principle of the latter case, with the judgment in which I entirely agree.

With respect to the second charge, I am prepared to decide it on substantially the same ground. The charge here is that the appellant did on the same occasion "knowingly permit" riotous and disorderly conduct within his licensed premises, the *species facti* being that the barman and his three friends to whom I have before referred quarrelled over their cups and fought, the fight taking place, as the case states, "between the barman and two of his companions."

It was argued to us that the second charge was in a different position from the first, inasmuch as it is a charge of "knowingly permitting," and therefore, as it is said, one which requires proof of personal knowledge on the part of the accused. I have not found it necessary to decide whether this is so or not. It is, I think, enough that, as I have already said, the barman was on the occasion in question not acting within the scope of his employment. He was, it is clear, making or joining in a disturbance on his own account, and that being so, it is, I think, impossible to identify him with his master, the appellant, either by imputing to the appellant his knowledge, or by holding the appellant responsible for his act or default.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

THE COURT sustained the appeal, and quashed the conviction.

MACPHERSON & MACKAY, W.S.—EMSLIE & GUTHRIE, S.S.C.—Agents.

THOMAS CARR, Appellant.—*W. Thomson.*

GEORGE NEILSON (Procurator-Fiscal of Police Court, Glasgow),

Respondent.—*Lees—Ure.*

No. 9.

Jan. 23, 1894.

Carr v. Neilson.

Public-House—Trafficking without a certificate—Relevancy—Ambiguous complaint—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), secs. 17 and 37.—A complaint charged the accused with an offence against the Public-Houses Acts, and particularly sec. 17 of the Public-Houses Amendment Act, 1862, in so far as, upon a date and at a place specified, "he

No. 9. did, with William Galbraith and Frank Lambert, traffic in whisky, or other exciseable liquors," without having a certificate in that behalf. The accused having been convicted, appealed. The Court *sustained* the appeal, on the ground that the complaint was irrelevant from ambiguity, in respect that it might mean either that the accused trafficked with the assistance of William Galbraith and Frank Lambert, or that he trafficked by selling to them.

Jan. 23, 1894.
Carr v.
Neilson.

Question whether a charge of "trafficking" in spirits without a certificate, without specification of the mode in which the offence was committed, was relevant.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Ld. Kyllachy.

ON 7th November 1893 Thomas Carr was convicted in the Police Court, Glasgow, upon a complaint charging him with "an offence against the laws for the regulation of public-houses in Scotland, in so far as, upon Wednesday, the 25th day of October 1893 years, he, the said Thomas Carr, did, with William Galbraith, of 448 Argyle Street, and Frank Lambert, of 60 Oran Street, both in Glasgow, traffic in whisky or other exciseable liquors, within the premises occupied, rented, or possessed by the Glasgow St Andrew Club, Limited, situated at No. 460 Sauchiehall Street, Glasgow, without having obtained a certificate in that behalf," in contravention particularly of the Public-Houses Amendment (Scotland) Act, 1862, section 17.

Carr obtained a case. The case set forth that Carr had objected to the relevancy of the complaint on the ground of want of specification, but did not set forth that he had objected on the ground of ambiguity. The magistrate repelled the objection stated.

From the case it further appeared that Carr was clubmaster of the club mentioned in the complaint; that on the evening of 25th October 1893 he on several occasions in the club supplied Galbraith and Lambert, mentioned in the complaint, on their orders, with exciseable liquors; that Galbraith on each occasion paid Carr for the liquors so supplied, which were consumed by Galbraith and Lambert; and that Galbraith and Lambert were visitors at the club, not members.

The questions of law stated by the magistrate were,—“(1) Whether I was right in repelling the objection to the relevancy of the complaint on the ground of the want of specification in the charge as above narrated? and (2) Whether, on the facts held by me as proved, I was right in convicting the said Thomas Carr of the offence charged?”

Argued for the appellant;—The complaint was irrelevant from want of specification. The bare use of the word "traffic" was not sufficient. Under section 37 of the Act of 1862 "traffic" had several meanings, and the accused was entitled to know of which of these he was accused. Further, the complaint was irrelevant from ambiguity, for it meant either that the accused had trafficked with the assistance of Galbraith and Lambert, or that the traffic consisted in the accused selling to them.

Argued for the respondent;—"Traffic" in exciseable liquors denoted one offence and was the statutory word. The complaint therefore was not wanting in specification. As regarded the objection that the complaint was irrelevant from ambiguity, it was too late to urge that now, as the objection had not been taken before the magistrate.¹ But on the merits the objection was ill founded. It merely came to this, that the word "traffic" should have come immediately after "did." Admitting, however, that there was an ambiguity, it was not of a character to make the complaint irrelevant. It was equally an offence as regarded the

¹ Leishman v. Colquhoun, July 13, 1877, 4 R. (Just. Cases) 53, 3 Comp. 482; Stewart v. McNiven, Feb. 2, 1891, 18 R. (Just. Cases) 36, 2 White, 627.

accused whether the traffic was caused with the assistance of Galbraith and Lambert, or by selling to them. No. 9.

Jan. 23, 1894.

Carr v.
Neilson.

LORD JUSTICE-CLERK.—The complaint in this case is somewhat curiously worded. There is no fuller specification of the offence charged than what is contained in the word “traffic.” As to whether that is a sufficient specification I give no decision, but it appears to me a strong thing to say that it is sufficient, and I should require further consideration before reaching such a conclusion. The accused is charged with an offence against “the laws for the regulation of public-houses in Scotland, in so far as upon Wednesday, the 25th day of October 1893, he, the said Thomas Carr, did, with William Galbraith, of 448 Argyle Street, and Frank Lambert, of 60 Oran Street, both in Glasgow, traffic in whisky,” in a club named, “without having obtained a certificate in that behalf.” Now, it is quite plain that that charge is capable of two totally different meanings. It may mean—and this is perhaps the more natural meaning—that the accused carried on the traffic with the assistance of the two persons named, but not themselves cited and charged with the offence. The prosecutor, however, says that that is not the meaning to be put upon the complaint—that it is not the offence which he meant to charge, and it certainly is not the offence which he has proved,—for he says that by “did with A and B traffic” he meant that the accused dealt with A and B in the sense of supplying them with whisky. But if that be so, the complaint is plainly irrelevant on the ground of ambiguity, and ought not to be sustained, for it is susceptible of two totally inconsistent readings each of which sets forth an offence, and it is trite law that a complaint must unambiguously set forth the offence which is charged. I think therefore that this conviction cannot stand.

LORD RUTHERFURD CLARK.—I am of the same opinion. Upon the question whether the word “traffic” is sufficiently specific I express no opinion, but I think that it is worthy of the consideration of prosecutors whether they should not give a fuller specification. I agree with your Lordship in thinking that this complaint is ambiguous. One meaning is that the accused had the aid of these men in carrying on the traffic. That is not what the prosecutor says he meant to charge, and it is not what he has proved. The complaint may also mean, and the prosecutor says it does mean, that the accused sold the whisky to the men. That is such an ambiguity as, in my opinion, ought not to be found in a criminal complaint, and accordingly I think that this conviction should be set aside.

LORD KYLLACHY.—I concur, and on the same grounds.

THE COURT sustained the appeal, and quashed the conviction.

JOHN VEITCH, Solicitor—CAMPBELL & SMITH, S.S.C.—Agents.

WILLIAM CAMERON, Complainer.—*Dewar.*
DUNCAN MACNIVEN (Procurator-Fiscal of Inverness-shire at Fort-William),
Respondent.—*Salvesen.*

No. 10.

Jan. 23, 1894.
Cameron v.
Macniven.

Sheriff—Criminal jurisdiction—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 447, 454, 508, and 509.—The Burgh Police (Scotland) Act, 1892, does not deprive the Sheriff of a county of jurisdiction to try persons for offences committed within a burgh in the county.

No. 10.

Jan. 23, 1894.
Cameron v.
Macniven.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Ld. Kyllachy.

ON 16th September 1893 William Cameron, labourer, Fort-William, was charged in the Sheriff Court at Fort-William, upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of the Procurator-fiscal for the Fort-William district of the county of Inverness, setting forth that the accused "did, on the 21st day of August 1893, within the stable or byre situated in Viewforth Lane, Fort-William aforesaid, belonging to Messrs James Young & Sons, merchants, Fort-William aforesaid, cruelly beat and abuse a mare belonging to," &c., "contrary to the Act 55 and 56 Vict. cap. 55, entitled the Burgh Police (Scotland) Act, 1892, and particularly section 380, and subsection 7 thereof."

The accused was convicted and fined £1, with the alternative of seven days' imprisonment.

He brought a bill of suspension, *inter alia*, on the ground that under the Burgh Police (Scotland) Act, 1892,* the Procurator-fiscal of the county had no title to prosecute for, and the Sheriff no jurisdiction to try, the offence alleged in the complaint.

Argued for the complainer;—The Sheriff of the county had no jurisdiction to try offences occurring within a burgh, when the offences were created by the Burgh Police Act, 1892, except in the case provided for by section 454. The effect of sections 508 and 509 was merely to preserve the Sheriff's jurisdiction in regard to common law offences, or in regard to statutory offences created prior to the Act of 1892.

Argued for the respondent;—The Sheriff's jurisdiction was not to be held as excluded, unless the exclusion was express or clearly to be implied.¹ Here the Act could not be construed to mean exclusion. On the contrary, the jurisdiction was by sections 447 and 508 preserved. Section 509 meant no more than that where a prosecution had been instituted in the Burgh Court, the Sheriff could not exercise his jurisdiction in relation to the particular offence.

LORD JUSTICE-CLERK.—It is a fixed rule of our law that the Sheriff of a

* The following clauses of the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), were referred to :—

Section 447 enacts,—“Without prejudice to the jurisdiction of the Sheriff, Justice of the Peace, Burgh, or Dean of Guild Courts, as hereinafter provided for, all prosecutions, actions, and proceedings, for crime and offence, or contraventions of this Act, or any bye-laws, orders, rules, or regulation made thereunder, committed within the burgh, or for the recovery of fine, penalties, forfeitures, or expenses under the provisions of this Act, or any other Act under which the magistrate has jurisdiction (the mode of recovery which is not herein otherwise provided for), shall be instituted, sued for, or carried on before the Magistrates of Police, or any of them, in the Police Court, at the instance of the burgh prosecutor, to be appointed as herein authorised. . . .”

Section 454 enacts,—“ . . . The Sheriff shall have power to sit in the Police Court, with consent of the magistrates, on any special occasion, or under any continuing arrangement. . . .”

Section 508 enacts,—“The prosecution authorised by this Act, under complaint by the burgh prosecutor, shall be without prejudice to complaints at the instance of any party or parties who are at present entitled to make the same.”

Section 509 enacts,—“No jurisdiction conferred by this Act shall be held to exclude the jurisdiction of the Sheriff, Justices of the Peace, Burgh or Dean of Guild Court, where the case shall in the first instance have been before, or taken up by such Sheriff, Justices of the Peace, Burgh or Dean of Guild Court.”

¹ Clark and Bendall v. Stewart, June 8, 1886, 13 R. (Just. Cases) 86, 1 White, 191.

county has jurisdiction at common law in all manner of offences, whether at common law or created by statute, provided the maximum punishment involved does not exceed that which the Sheriff is entitled to impose, and lately his jurisdiction has been extended to what used to be called the pleas of the Crown, but which are no longer capital. To deprive the Sheriff of this inherent jurisdiction over any new crime created by statute, his jurisdiction must be distinctly excluded by the Act of Parliament creating the new offence. I do not say it must be expressly excluded; the exclusion may be merely by implication, but to be valid it must be distinct and unambiguous.

Now, the offence libelled here is created by sec. 380 (7) of the Burgh Police (Scotland) Act, 1892. I find that by clause 477 of the Act jurisdiction to try the offence is conferred on the Burgh Police Court appointed to be created in terms of the Act. I also find that the jurisdiction so conferred is "without prejudice to the jurisdiction of the Sheriff, Justice of the Peace, Burgh, or Dean of Guild Courts, as hereinafter provided for." "Hereinafter" in this clause refers us on to clauses 508 and 509, and these recognise that complaints under the statute may be tried at the instance of other parties than the burgh prosecutor, and in other Courts than the Burgh Police Court. Section 508 expressly declares that prosecutions authorised by the Act at the instance of the burgh prosecutor are to be without prejudice to complaints at the instance of any party who at the passing of the Act had the right to make the same. Now, section 509 expressly reserves the jurisdiction inherent in the Sheriff, and states that it shall not be excluded by any jurisdiction created by the Act. I take the section to mean that the Sheriff can take up such cases provided they are raised in his Court before any proceedings are taken in the Burgh Police Court. It therefore seems to me that the purpose of section 509 is to prevent one complaint being raised in the Burgh Police Court and another in the Sheriff Court against the accused in reference to the same offence, and to prevent not only the oppression of a man by being tried twice, which is met by the common law, but the oppression of having two complaints served on him for the same offence, and his being made the shuttlecock of competing jurisdictions.

But here that question cannot arise, for we are told that, although the Act has been adopted in Fort-William, no Burgh Police Court had been instituted at the time of the offence libelled, and therefore if the case was to be tried at all, it must be before the Sheriff, and I hold that his jurisdiction is not excluded in such a case as this. The Sheriff's jurisdiction remaining intact, it follows that the right of the Procurator-fiscal to prosecute is reserved in terms by section 508. The suspension therefore falls to be dismissed.

LORD RUTHERFURD CLARK and LORD KYLLACHY concurred.

THE COURT refused the bill.

JAMES ROSS SMITH, S.S.C.—GILL & PRINGLE, W.S.—Agents.

JOHN LUNDIE, Complainer.—*R. M. Smith.*
DAVID MACBRAYNE, Respondent.—*Salvesen.*

No. 11.

Procedure—Amendment—Instance—Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), secs. 531 and 542—Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), sec. 5.—The Merchant Shipping Act, 1854, sec. 531, enacts that in Scotland summary complaints under the Act, when of a criminal nature or

Jan. 23, 1894.
Lundie v.
MacBrayne.

No. 11. for penalties, may be brought at the instance of the procurator-fiscal, or at the instance of any party aggrieved, with the concurrence of the procurator-fiscal.
 Jan. 23, 1894. *Held* that where the complaint is at the instance of a party aggrieved, the concurrence of the procurator-fiscal must be given before service of the complaint on the accused, and that it is incompetent to amend the complaint by the procurator-fiscal appending his concurrence when the complaint is called for trial.
 Lundie v. MacBrayne.

HIGH COURT.
 Lord Justice-Clerk.
 Lord Rutherford Clark.
 Ld. Kyllachy.
 ON 22d August 1893 John Lundie, hawker, Fort-William, was served with a complaint to the Sheriff of Inverness-shire, under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of David MacBrayne, shipowner, Glasgow, charging the accused with having been guilty of an offence within the meaning of the Merchant Shipping Act Amendment Act, 1862, and particularly section 36 thereof, in so far as having travelled as a steerage passenger by the steamer "Chevalier," belonging to the complainant, from Oban to Fort-William, he refused to pay the fare or to exhibit a ticket for the fare.

On the case being called in Court on August 24th the agent for the accused objected to the instance in respect that there was no concurrence by the procurator-fiscal.* The Sheriff-substitute (Menzie) sustained the objection, but allowed the procurator-fiscal to add his concurrence to the complaint.

The accused pleaded not guilty, but was convicted and fined 5s.

He brought a bill of suspension, pleading, *inter alia*, that the complaint having been presented without the concurrence of the procurator-fiscal, the proceedings were *ab initio* null; and further, that the amendment, not being an amendment within the meaning of the Summary Jurisdiction Acts, was incompetent.†

Argued for the complainant;—It was incompetent to amend the complaint by adding the concurrence of the procurator-fiscal after service on the accused. Without the concurrence of the procurator-fiscal there was no instance, and consequently no complaint. There was no room, therefore, for amendment, there being no complaint to amend.¹

Argued for the respondent;—Looking to the terms of the Summary Procedure Act, 1864, section 5, and of the Merchant Shipping Act, 1854, section 342, the amendment was competent, the accused having appeared to plead, and having suffered no injustice.² The concurrence of the procurator-fiscal was required merely to shew that there was a fair case for

* The Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 531, enacts,—“In Scotland all prosecutions, complaints, . . . under this Act . . . may be brought in a summary form . . . when of a criminal nature or for penalties, at the instance of the procurator-fiscal of Court, or at the instance of any party aggrieved, with concurrence of the procurator-fiscal of Court. . . .”

† The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), sec. 5, enacts,—“No objection shall be allowed by the Court to any complaint under this Act for any alleged defect therein in substance or in form . . . not changing the character of the offence charged.” A power is given to the Court to direct an amendment if it shall appear that the accused has been misled by the defect.

The Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 542, enacts,—“No order, decree, or sentence pronounced by any Sheriff or Justice of the Peace in Scotland shall be quashed or vacated for any misnomer, informality, or defect of form. . . .”

¹ Mitchell v. Campbell, Jan. 5, 1863, 4 Irv. 257.

² Armstrong v. Stevenson, Nov. 1, 1892, 20 R. (Just. Cases) 21, 3 White, 373; Owens v. Calderwood, Feb. 20, 1869, 7 Macph. 556.

trial. The analogy of decisions in the civil courts bore out the respondent's contention.¹

At advising,—

No. 11.

Jan. 23, 1894.
Lundie v.
MacBrayne.

LORD JUSTICE-CLERK.—In this case the complaint upon which the conviction proceeded required the concurrence of the procurator-fiscal, and the instance was found by the Sheriff-substitute to be bad because that concurrence had not been given. The accused had been cited to appear, and had appeared, on this defective complaint, but at the trial the Sheriff-substitute allowed the complaint to be rectified by the procurator-fiscal appending his concurrence in a minute. That, in my opinion, was not a competent proceeding. There is no proper instance, and that was a fatal defect. That is a defect in substance and not in form merely, and therefore it does not fall within the power of amendment conferred by section 5 of the Summary Jurisdiction Act of 1864. Where the concurrence of the procurator-fiscal is necessary it must be given before the warrant for service is granted. This conviction must be set aside.

LORD RUTHERFURD CLARK and **LORD KYLLACHY** concurred.

THE COURT quashed the conviction.

JAMES ROSS SMITH, S.S.C.—**GILL & PRINGLE, W.S.**—Agents.

ROBERT LAMB (Procurator-Fiscal of Aberdeen), Appellant.—*Dickson—W. Brown.*

No. 12.

GEORGE BROWN, Respondent.—*Glegg.*

Mar. 5, 1894.
Lamb v.
Brown.

Public-House—Public fair—Home Drummond Act, 1828 (9 Geo. IV. c. 58), sec. 8—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. c. 35), sec. 6.—Held that the holder of a certificate for the sale of exciseable liquors under the Public-Houses Acts Amendment Act, 1862, is entitled under section 8 of the Home Drummond Act to sell liquor at a public fair or market in the same parish with his licensed premises, or in any adjoining parish, without obtaining special permission to do so under section 6 of the Public-Houses Acts Amendment Act, 1862.

GEORGE BROWN, spirit-dealer, Stoneywood, parish of Newhills, Aberdeenshire, was charged upon a complaint at the instance of Robert Lamb, procurator-fiscal of the burgh of Aberdeen, which set forth that he, holding a certificate for the sale of exciseable liquors in the form of No. 2 of Schedule A of the Public-Houses Acts Amendment (Scotland) Act, 1862, for premises situated at Stoneywood, "did, on 1st November 1893, within a tent occupied by him, and then erected in a field situated between Bedford Road and Fullerton Road, within the city of Aberdeen, occupied (said field) by Arthur Angus, retired farmer, Hayton Road, Aberdeen, and then used as the Aulton Market stance, sell exciseable liquors to James Wood, labourer, Esslemont Avenue, and James Hay, cattleman, Spital, both of Aberdeen, and to other persons to the complainer unknown, without having obtained a special permission in that behalf in terms of section 6 of the said Act,* contrary to the terms" of his certificate.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Ld. M'Laren.

¹ *Borthwick v. Grant*, Feb. 17, 1829, 7 Sh. 420; *Lyle v. Mackay*, Jan. 23, 1849, 11 D. 404.

* Section 6 of the Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35), enacted,—“On a representation being made to the chief magistrate, or failing him the two senior acting magistrates of any burgh, or to any two justices of the peace of any county respectively, by any person holding a certificate for keeping an inn and hotel, or public-house, and duly licensed to

No. 12.

Mar. 5, 1894.
Lamb v.
Brown.

The accused pleaded not guilty, and after evidence led the Magistrate held the following facts proved:—That the Aulton Market was held within the burgh of Aberdeen, in the parish of Old Machar, which was a parish immediately adjoining that in which the licensed premises of the accused were situated; and that the tent from which the alleged sale took place was within the limits of the market stance.

The complaint was dismissed by the Magistrate, on the ground that the accused was entitled under section 8* of the Home Drummond Act (9 Geo. IV. c. 58) to sell liquor at the fair referred to without a special permission obtained in that behalf from the magistrates under section 6 of the Public-Houses Acts Amendment Act, 1862.

The Procurator-fiscal took a case, in which the above facts were stated and the following question of law submitted for the opinion of the High Court:—"Whether the respondent, as holder of a certificate to sell exciseable liquors at premises situated in the parish of Newhills aforesaid, was entitled to sell such liquors at St Luke's Fair, being a lawful fair in the parish of Old Machar immediately adjoining thereto, and that without having obtained special permission in the manner required by section 6 of the Public-Houses Acts Amendment (Scotland) Act, 1862?"

Argued for the appellant;—The "entertainment" referred to in section 6 of the Act of 1862 was the entertainment supplied by a publican upon the public or special occasion. A fair was a public or special occasion. A public fair was in the same position as a trade society's picnic, in which case a special permission was necessary.¹ The 6th section of the Act of 1862 must be held to have repealed by implica-

sell exciseable liquors to be consumed on the premises, that it is intended that any public or special entertainment shall take place therein, or in any other place or premises situated within the respective jurisdictions of such chief magistrate or magistrates or justices, during any particular time, such chief magistrate or magistrates or justices, as the case may be, may, if he or they shall think fit, and on being satisfied that such inn and hotel, or public-house, place, or premises possesses the necessary accommodation, and that the entertainment is for a public or special occasion of a legitimate and proper character, and not originating directly or indirectly with the person holding such certificate, grant such person a special permission in writing to keep such inn and hotel, or public-house, place, or premises open, and to sell therein, on such public or special occasion, and for that purpose only, such exciseable liquors as he may be duly licensed to sell as aforesaid during such time, and beyond the hour prescribed by his certificate for closing, Sunday excepted, and under such regulations as such chief magistrate or magistrates or justices of the peace shall think fit to appoint."

* The Home Drummond Act (9 Geo. IV. c. 58), sec. 8, enacts,—“And be it further enacted that no such certificate as aforesaid shall entitle any person to keep a common inn, alehouse, or victualling-house, or to obtain an Excise licence for selling ale, beer, spirits, wine, or other exciseable liquors by retail to be drunk or consumed in any other house or premises than the house and premises specified in such certificate: Provided always that nothing in this Act contained shall be construed to prohibit any person who shall have obtained such certificate from selling ale, beer, spirits, wine, or other exciseable liquors in boats or vessels moored in rivers at any time, or in houses, booths, or other places at the time and within the limits of the ground, town, or place, in or upon which is holden any lawful fair, in the same parish with the house or premises for which any person shall have obtained a certificate as aforesaid, or in any parish immediately adjoining thereto.”

¹ *Hutcheon v. Cadenhead*, Jan. 9, 1892, 3 White, 119, 19 R. (Just. Cases) 32; *McDonald v. Gordon*, Nov. 3, 1868, 1 Couper, 105, 7 Macph. 45, 41 Scot. Jur. 48.

tion the proviso as to the sale of liquor at public fairs in section 8 of the Home Drummond Act. No. 12.

Counsel for the respondent was not called upon.

At advising,—

Mar. 5, 1894.
Lamb v.
Brown.

LORD JUSTICE-CLERK.—The question which is raised by the appellant in this case is whether or not the magistrate who tried the case was wrong in law in acquitting the accused of the offence charged, that acquittal being founded upon the respondent's plea based upon section 8 of the Home Drummond Act of 1828.

It is admitted that there is no direct statutory repeal of that section, and if it had been repealed by implication, one would have expected that in ordinary course notice of such repeal would have been taken by the Statute Law Revision Committee. That might or might not be the case, but their not having recognised that there was such repeal is at least consistent with the contention of the respondent. By section 6 of the Public-Houses Act of 1862 magistrates are empowered to grant to a person who already holds a certificate a special permission for the sale of exciseable liquors if it be represented that a public or special entertainment is about to be held at a particular place and time, and if the magistrate is satisfied that the premises proposed to be used are suitable. Now, the appellant maintains that this clause by implication repealed the provision of clause 8 of the Home Drummond Act. I can see no grounds for so holding. Clause 6 of the 1862 Act only applies where a public or special entertainment, not originating directly or indirectly with the publican, is about to be held in certain premises and at a particular time. How that can repeal the right given to a publican by the Home Drummond Act to sell exciseable liquors at a public fair held in the parish or adjoining parish, I am at a loss to see. Counsel for the appellant submitted a very ingenious argument in which he maintained that the public entertainment referred to in section 6 of the 1862 Act was the entertainment supplied by the publican on the public or special occasion. It is plain that this is not the meaning of the Act. The "entertainment" referred to is an entertainment in the sense of a gathering of persons for entertainment, and it is in respect that such is proposed to be held that the publican is entitled to apply for an exceptional licence. But the Act of 1828 specifically allows him to sell liquor at fairs under his certificate without obtaining any special permission. I am quite clear that the clause of the Act of 1862 will not bear the interpretation which the appellant desires to put upon it, and that it cannot be held to repeal by implication the express provision of the previous Acts in respect to the sale of liquor at public fairs.

LORD M'LAREN.—The question is, whether a provision of the Home Drummond Act has been repealed by implication by section 6 of the Public-Houses Statute of 1862? Now, there are two cases—and only two so far as I am able to see—in which one statutory enactment is held by implication to repeal a prior enactment. The first is where there is an exact identity between the two provisions, as to the subject-matter and as to the mode of dealing with it, and the only difference is as to the language employed. The second case is where there is such repugnancy in the modes in which the two statutes deal with the same matter that the provisions cannot stand together. Between those extremes we have many instances where subsequent legislation only modifies or varies the effect of the provision made in the earlier statute.

No. 12. Now, the scope of the enactments before us is very different. One enactment deals with the sale of liquors in boats and vessels, in rivers or harbours, and at fairs or markets; while the other is not limited as to place or time, but gives power to the magistrate to grant a special permission when the application has reference to a public entertainment about to be given, and when he is satisfied that the entertainment is of a legitimate and proper character.

Mar. 5, 1894.
Lamb v.
Brown.

Such enactments are not identical, and it is also plain that they are not contradictory. The enactments can perfectly well stand together, and therefore there is no case of implied repeal.

LORD RUTHERFURD CLARK concurred.

THE COURT dismissed the appeal.

ALEX. MORISON, S.S.C.—J. DOUGLAS GARDINER & MILNE, S.S.C.—Agents.

No. 13. JOHN MACDONALD, Complainer (Respondent).—*Jameson—Cook.*
JOHN PATTERSON, Respondent (Appellant).—*Salvesen—William Thomson.*
Public-House—Complaint—Relevancy—“On Sunday or about that time”—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35).—A person was convicted of a breach of his certificate upon a complaint which set forth that he did sell liquor “upon Sunday the 31st day of December 1893, or about that time.”

Mar. 5, 1894.
Macdonald v.
Patterson.

Held in an appeal by him upon a case stated under the Summary Prosecutions Appeals Act, 1875, that the complaint was irrelevant in respect that the words “or about that time” must be taken as including the days immediately before and after the Sunday specified, and therefore as including hours on Saturday and Monday, when the sale would not have been an offence.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Ld. McLaren.

JOHN PATTERSON, hotel-keeper, Hawick, was charged in the Police Court of the burgh of Hawick at the instance of the Burgh Prosecutor, John Macdonald, upon a complaint that he had been “guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as, upon Sunday the 31st day of December 1893 years, or about that time,” he did open his hotel and sell one bottle of whisky to a person named, “contrary to the terms and conditions of his certificate.”

The accused pleaded not guilty, and after evidence led the Magistrates convicted him of the offence charged.

The accused took a case, in which the following question of law was submitted for the opinion of the Court:—“Is a relevant offence under the statute libelled in the complaint?”

Argued for the appellant;—The complaint libelled a sale of liquor on “Sunday, or about that time,” and it therefore included a period of time extending beyond the limits of Sunday. The extension could only be to Saturday and Monday immediately preceding and following, and as the sale might have been during the lawful hours on those days the complaint did not necessarily set forth any offence.¹

Argued for the respondent;—The words “or about that time” must be considered as mere surplusage. But in any view if the complaint had merely libelled the sale of liquor “on Sunday 31st,” the subsequent words “or about that time” would by the Criminal Procedure Act, 1887, have been implied. Now the express insertion of what was by statute implied could not have the effect of vitiating a complaint. The words must be read as referring to the prohibited hours on Saturday night or Monday

¹ Drummond v. Latham, Feb. 3, 1892, 3 White, 166.

morning.¹ Selling during unlawful hours was the substance of the charge, and the particular day was not essential. The time of selling the liquor was limited by the words "contrary to the terms and conditions of his certificate." Where there was in the complaint a reference to the certificate it was unnecessary to set forth specifically that the person to whom the liquor was sold was not a *bona fide* traveller or resident in the house, and on the same principle the reference to the certificate must be held as limiting the time to prohibited hours.

No. 13.

Mar. 5, 1894.
Macdonald v.
Patterson.

LORD M'LAREN.—The point argued is short and simple, and there is really not much to be said about it. The question is whether in a charge for a contravention of certificate in respect that the accused on "Sunday the 31st December, 1893" opened his hotel for the sale of exciseable liquors, the relevancy of the libel is affected by the addition of the words "or about that time."

It is objected that the libel is irrelevant because it charged not the precise offence of selling spirits on Sunday, but on that day "or about that time."

If the latter words are omitted, it is said that under the Criminal Procedure Act of 1887 the words or expression would be implied, and that the expression of what is by statute implied ought not to have any destructive effect on the complaint.

No doubt under the statute it might be competent to prove, under a charge of selling liquor upon a particular Sunday, that the offence was committed upon some other Sunday within the latitude allowed by law to the prosecutor. But I cannot take that to be the effect of the words as expressed in this libel. They must mean that the accused sold the liquor on the Sunday in question, or on some part of the Saturday preceding, or Monday following, without defining what part of Saturday or Monday.

Now it is not an offence to sell liquor at any time on Saturday or Monday. Had the prosecutor charged a sale within the prohibited hours on Saturday or Monday it may be that in that case the words "or about that time" would have included the prohibited hours of Sunday. But the converse does not hold good. As the words stand, the extension of time must necessarily apply to any hours on the days nearest, and thus includes hours when it is no offence to sell liquor.

The objection is certainly technical, and if it had come before us by way of suspension I should have hesitated to sustain it unless it had appeared that the objection had been stated at the time and repelled.

But here we are called upon to deal with it in answer to a specific question of law put to us on a case stated for our opinion, and accordingly I am of opinion that the conviction must be quashed.

LORD RUTHERFORD CLARK.—The complaint states that the offence was committed "on Sunday or about that time."

I cannot doubt that the time libelled includes other days than Sunday. It is impossible to read it as referring to other Sundays.

Therefore, in my opinion, the libel is irrelevant unless it is competent to charge an offence under the statute without setting forth that the act was committed within certain hours prohibited by statute. I do not think that this is competent, and therefore I am of opinion that the complaint is irrelevant.

¹ Baird v. Rose, Sept. 27, 1865, 5 Irvine, 200.

No. 13. I refer to my opinion in the case of *Dingwall v. Stevenson* (Nov. 2, 1892, 3 White, 362, 20 R. (Just. Cases) 16), where I had occasion to express my views as to the necessity for a specific averment of the thing which the Act prohibits and declares to be an offence.

Mar. 5, 1894.
Macdonald v.
Patterson.

LORD JUSTICE-CLERK.—I am of the same opinion, and I think that in a case where the prosecutor is libelling an offence which cannot be committed except within a certain time, he is bound to state that it was committed within that time. That doctrine has always been applied in cases brought under the Poaching Acts, and I do not know of any case under the Public-Houses Acts in which in a complaint for selling liquor on week days during prohibited hours it has not been stated that the sale was within those hours.

It is plain that the libel would include here more than Sunday the 31st December—not only the day before but the day after the 31st. It would include therefore hours when there might be no offence committed.

I do not feel the same difficulty in giving effect to this plea—critical though it be—which Lord M'Laren has. Had the plea been based merely on the absence of specific detail, I do not think we could have listened to it. But where there has been an essential blunder committed—even though technical—in a material part of the libel going to the essence of the case, I do not think that the prosecutor is entitled to say that if the blunder had been pointed out the libel might have been amended. It is not the duty of the prisoner to take care of the prosecutor and get his libel amended; and where a libel is essentially bad the prosecutor must take the responsibility of pressing it to a conviction, for a conviction following on it must be bad also.

THE COURT answered the question in the case in the negative, and quashed the conviction and sentence appealed against *simpliciter*.

FYFE, IRELAND, & DANGERFIELD, S.S.C.—SHIELL & SMITH, S.S.C.—Agents.

No. 14. CHARLES HENRY MADIN, Appellant.—*Lord-Adv. Balfour—A. J. Young.*
JAMES M'LEAN AND OTHERS, Respondents.—*M'Clure.*

Mar. 19, 1894.
Madin v.
M'Lean.

Public-House—Club—Bona fides—Excise.—By one of the rules of admission to a working-men's club it was provided that intending members should only be admitted to the club by enrolment in a register (subject to the power of rejection by the committee), and upon payment of entry-money of 6d. and subscription of 3d. quarterly. This rule was habitually disregarded, and the bar-keeper was authorised by the committee to admit any person whose appearance he considered respectable on payment of the club subscription of 3d. for three months without enrolment or payment of entry-money or consideration of the case by the committee.

Held that whatever character the club might have possessed according to its written constitution, it was not, by reason of its permitting such a system of admission, a *bona fide* club, and that a sale of spirits to a member so admitted was a sale for which an Excise licence to retail spirits was required.

HIGH COURT.
Lord Justice-
Clerk.
Lord Kin-
cairney.
Ld Stormontli-
Darling.

JAMES M'LEAN, James Neill, and David Nairn, the chairman, secretary, and treasurer respectively of the committee of management of a club known as the Montrose Working-Men's Club, and occupying premises at 38 Wharf Street, Montrose, were charged at the instance of Charles Madin, officer of Inland Revenue, in the Justice of Peace Court of Forfarshire, upon a complaint which set forth that they had contravened the 26th section of the Excise Licences Act, 1825 (6 Geo. IV. c. 81), as amended and altered by the 43d section of the Inland Revenue Act,

1880 (43 and 44 Vict. c. 20), by selling to one John Mitchell, supervisor of Inland Revenue, and that without having taken out a licence, a quarter of a gill of spirits. The accused pleaded not guilty, and after evidence led the Justices dismissed the complaint. No. 14.
Mar. 19, 1894.
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The complainant craved a case, in which the Justices stated the following facts as proved :—The accused were members of the committee of management of the club, and along with the other members of committee, which consisted of seven members, had power to conduct its affairs in conformity with the constitution and bye-laws of the club. This committee took on let the premises at No. 38 Wharf Street, Montrose, from Alexander Langlands, the proprietor thereof, and David Nairn, the treasurer, paid the rent. Alexander Cathro, a member, was clubkeeper, and was also engaged to act as barkeeper, and was responsible to the committee. On 28th July 1893 John Mitchell, supervisor of Inland Revenue at Stonehaven, who was then a stranger to Cathro, visited the premises, and requested to be supplied with drink. He was refused, not being a member. He then asked Cathro how he could become a member, and being told was, at his own request, admitted a member of the club and supplied with a ticket of membership (for which he paid 3d. for three months) by Cathro, who had authority to admit those whom he knew or from whose appearance he could gather would be decent respectable members. Members were admitted for a year upon payment of 1s. for a ticket, for half a year upon payment of 6d., and for three months upon payment of 3d. Cathro considered that Mitchell would make a suitable member and supplied him with a ticket, on which was printed "Bye-laws of the Club." The bye-laws, which were produced, shewed that the club took in magazines and newspapers, and that games might be played on the premises. The following were among the bye-laws :—"(4) Games of hazard, and the use of dice for gambling purposes, and betting or wagering on the games are prohibited under penalty of expulsion. (5) The bar for the supply of beer, whisky, aerated waters, cigars, and tobacco, will open at 8 o'clock daily, with the exception of Sunday, and close at 11 P.M. Members may have dinner, tea, coffee, &c., by special arrangement with the clubmaster."

Mitchell, after admission as a member, asked for a nip of spirits, which Cathro supplied, and for which Mitchell paid Cathro 2d. Mitchell was not introduced or proposed for admission as a member of the club. Cathro was the servant of the club committee, and acted in accordance with their instructions in admitting Mitchell a member of the club and supplying him, as a member of the club, with spirits. There was no Excise licence in force for the sale of spirits in the premises. There was put in evidence by the respondents the undernoted excerpt from "Conditions of Membership" of Montrose Working-Men's Club.*

The question of law submitted for the opinion of the Court was :—
"Whether, upon the facts stated, we were justified in holding that the said club was a *bona fide* club, and that Mitchell was duly admitted a

* "Membership of the club shall be constituted by the payment in advance of 3d. quarterly, 6d. half-yearly, or 1s. annually, and enrolment in the register of members, but only members who are enrolled for a year current at the time of the general meeting shall have a voice in the management of the club.

"After the 1st day of June 1893 each person desirous of becoming a member of the club shall pay the sum of 6d. of entry-money besides the ordinary subscription.

"The committee shall have power to reject persons wishing to become members, or to expel those who may be disorderly, and generally to enforce the rules."

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member thereof, and that the sale of spirits to him was not a sale for which an Excise licence to retail spirits was required by the respondents?"

Argued for the appellant;—(1) It was plain that, according to the original constitution of the club, Mitchell was not duly elected a member. All the conditions of membership, except the payment of 3d. for three months, were violated. (2) If it were held that the rules of the club were not in force when he was admitted then it seemed clear that, upon the facts stated, the so-called club was simply a shebeen for the sale of drink to all comers.

Argued for the respondents;—(1) The Justices had found in fact that Mitchell had been duly admitted. (2) As regarded the *bona fides* of the club, the committee were entitled to delegate, as they did to Cathro, their powers as to admitting or rejecting an intending member. The fact that Mitchell had to pay a subscription, however small, was evidence of the *bona fide* nature of the club.

LORD JUSTICE-CLERK.—There are certain rules of this club which are produced and quoted in full in the case as the conditions of membership of the Montrose Working-Men's Club. All I have to say about them is this, that if these were the conditions of admission that were in operation, then I think that the club was a *bona fide* club in every sense of the word; a club in which the committee had the selection and the rejection of members; a club in which there was enrolment in a register of members, an entry-money, and an annual subscription; and if anything had been done in the clubhouse which was contrary to these conditions of membership, then whoever did it would be liable for breach, either to the committee if it was a breach of the rules not involving public consequences, or to the law if it was one which did involve public consequences.

But then it is said by the respondents as matter of fact—and I take it as matter of fact—that these were not the rules which were in operation at all. It is a very remarkable thing that rules should be produced by the respondents which they themselves said before the Justices were in operation, and which they at the bar, because of the exigencies of their case, now say may not have been in operation. But I take it that the Justices have found that certain other rules were in operation. Now, what were those rules? They were—that a certain Mr Cathro, who was barkeeper of the club and also a member of the club, had authority to admit those whom he knew, or those who from their appearance he considered, would be decent and respectable members, and that he did admit this Mr Mitchell as a member of the club at his own request; that Cathro received 3d. from him; and that by that payment he became a member of the club for three months, and that he was served with spirits. Now, taking it to be the fact that the club admitted its members in this way, I have no hesitation in holding that the Justices were wrong, for they held that this was a *bona fide* club, and therefore acquitted the respondents. I think a more plain case of *mala fides* in the working of a club could not possibly be presented. If you are going to carry on a club at all, and carry it on as a sham, you will have some kind of ceremony that has to be gone through, and what conceivable ceremony more utterly unlike *bona fides* could there be than that a club should have rules by which admission shall be carried out in a particular way, but that the committee, without the club, should abrogate the rules and give power to the manager to admit anybody off the street as a member of that club, whether he knew him or not?

It is not an easy thing of course in cases of this kind to draw lines and to say exactly where *bona fides* ends and *mala fides* begins, but I think it is easy in this case to come to the conclusion that you are very far beyond the line when it is maintained on the part of the club that these are the rules, and that this man was *bona fide* admitted as a member under them. This case probably may be useful for purposes of instruction. I think it probable that this club began in respectability, and I cannot help suggesting that if it is to go on in respectability it will avoid having such a plan as this for admitting new members, which it could have no object in doing except to sell liquor to them. The result of this case will, I hope, not be to lead to any further prosecution, and I think the respectable members of the club ought to be well satisfied to have it held that their committee have brought them into the position of being held on that occasion—for I put it no further—to have been acting not as a *bona fide* club, but in *mala fide*. I am quite certain that when this club was originally formed—containing, as I have no doubt it does, many most respectable members—if it had been proposed in that meeting that members should be admitted to the club in such a way as the respondents now maintain that this man was admitted, every respectable man at that time probably would have refused to have anything to do with its formation. But the question before us is, whether upon the state of facts found proved the Justices were right in the course they took of holding that the club was a *bona fide* club. I am of opinion that they were not.

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Lord KINCARDINE.—I substantially concur. The first question put is whether the Justices were justified in holding that the club was a *bona fide* club. Now, when the question is whether a club is a *bona fide* club or a sham one—a shebeen—I think you are perfectly certain to find that the printed constitution of the club is all quite right, and I think that if regard were had to the printed constitution only, it could not be said that this was not a *bona fide* club. But then it seems to me that the question is not about the printed constitution of the club, but about the practice, and I take the practice to be as is stated. The committee did not act according to their regulations and constitution, but they acted differently, and I think on the question whether a club is *bona fide* or not it is an important point that the club did not at all act according to their rules, which are perhaps unobjectionable, but in the loose unguarded manner which is stated in the case, and without any precautions of any kind. I think that the case contains not only a statement as to the manner in which Mitchell was admitted, but also a statement that he was admitted in accordance with the practice of the club, which was not in accordance but at variance with the written constitution. Holding then that the question turns upon the practice of the club, I concur in thinking that that practice was not consistent with the conduct of a *bona fide* club.

As to the second question, whether Mitchell was duly admitted a member of the club, my view is that that is incompetently put, because the Justices have said that he was admitted a member, and have stated the practice according to which he was admitted. I do not see how it can be denied that Mitchell was admitted a member of the club, and duly admitted, when the Justices in the case have stated the fact to be so. It seems to me that the Justices ask us to say whether they were right in a matter of fact, and I think that that is incompetent, but I am quite prepared to say that the club as carried on was not a *bona fide* club.

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LORD STORMONTH-DARLING.—There was here a sale of spirits by persons not having an Excise licence, and they can only take themselves out of the operation of the statute by shewing that the sale was not a transaction between vendor and purchaser, but between club and member. Now, I agree with both your Lordships that there is nothing in the facts stated to lead one to the conclusion that this was anything but a *bona fide* club so long as its rules and regulations were observed. Its purposes were lawful and usual. According to the conditions of membership which are set out in the case, a member could only be admitted by enrolment, subject to a power of rejection by the committee, and payment of entry-money and subscription. It is nothing against the good faith of the institution that the entry-money and subscription are small, but it appears that the rules were, by the act of the respondents, absolutely and habitually disregarded.

In the present case a man was admitted by simply handing 3d. over the counter to the clubkeeper, who knew so little of him that he would not have admitted him if he had known who he was, for he was a supervisor of Inland Revenue. And this was no act of disobedience on the part of the clubkeeper, for the Justices tell us he had authority to admit anybody who presented himself and who was, in his opinion, of respectable appearance, on payment of 3d., 6d., or 1s., according as the period was three months, six months, or a year. In other words, there was to be no consideration of the case by the committee, and no payment of entry-money. I should therefore personally be prepared to hold that Mitchell was not duly admitted a member according to the rules of the club, but I also hold, in agreement with both your Lordships, that whatever may have been the original character of the club, it had, by permitting such a system of admission to exist, ceased to be a *bona fide* club.

THE COURT pronounced this interlocutor:—"Find that the club as carried on was not a *bona fide* club: Find that the sale to the said John Mitchell was a sale for which an Excise licence to retail spirits was required: Therefore sustain the appeal."

SOLICITOR OF INLAND REVENUE—DUNCAN SMITH & MACLAREN, S.S.C.—Agents.

No. 15.

EDWARD SWEENEY, Petitioner.—*A. S. D. Thomson.*
HER MAJESTY'S ADVOCATE, Respondent.

May 21, 1894.
Sweeney v.
Her Majesty's
Advocate.

Process—Petition for recall of sentence of outlawry.—A panel against whom sentence of outlawry had been pronounced in consequence of his failure to appear and answer to an indictment charging him with attempt to murder and murder along with another panel against whom the trial had subsequently proceeded, petitioned the Court to recall the sentence on the ground that at the time of the trial he was furth of Scotland, but was now willing to surrender himself for trial. No appearance was made for the Crown, to whom the petition was duly intimated.

The Court recalled the sentence, and reponed the panel thereagainst.

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Id. Wellwood.

(SEE *H. M. Advocate v. Monson*, Dec. 23, 1893, *supra*, Just. Cases, p. 5.)
Edward Sweeney presented this petition for recall of a sentence of outlawry which had been pronounced against him by the Lord Justice-Clerk on 12th December 1893, upon his failure to appear to answer the diet on an indictment charging him with having along with Alfred John Monson (1) attempted to murder, and (2) murdered Windsor Dudley Cecil Hambrough. The diet had proceeded against Monson alone, and had resulted in a verdict of non-proven.

The petitioner averred,—“The petitioner is not guilty of the charges made against him in the said indictment. He was furth of Scotland at the date of the diet, but he now desires and is prepared to meet the said charges, and for that purpose he will appear in Court at the calling hereof and surrender his person to the end that his trial upon the said charges or either of them may proceed. In order to enable the petitioner to prepare for his defence, and to be relieved from the disabilities consequent upon the foresaid sentence of outlawry, it is necessary that the foresaid sentence should be recalled.”

No. 15.

May 21, 1894.
Sweeney v.
Her Majesty's
Advocate.

The petitioner prayed the Court to appoint “this petition to be intimated to Her Majesty's Advocate for Her Majesty's interest, and thereafter to recall the sentence of outlawry with all that has followed thereon or is competent to follow thereon, and to repon him thereagainst. . . .”

The petition was duly intimated to the Crown, but no answers were lodged and no appearance was made for the Crown, either by minute or at the bar.

Counsel for the petitioner submitted that as the Crown had not appeared to oppose the petition, there was no one interested to oppose it, and moved that the prayer should be granted.

LORD JUSTICE-CLERK.—I think that the Crown representatives here have followed a rather unusual course. I think it is the ordinary and proper course for those representing the Crown, when a petition is presented in which the administration of justice is concerned, to appear and state what is maintained on behalf of the Crown in any such matter. I do not understand the procedure on the part of the representatives of the Crown in making no appearance in a matter of this kind. I think it is their duty, the matter having been duly intimated to them, to appear, and it is not at all satisfactory that the case should be in that position. The actual position before us is this—that a person who has been accused of crime, and been fugitated for non-appearance at the proper diet of the trial, now states that he is within the jurisdiction, and that he is prepared to meet the charge the Crown makes against him, and, as the Crown has not appeared, in the circumstances I think the proper course is that he should be reponed against the sentence of outlawry pronounced against him in respect of his non-appearance.

LORD ADAM.—I am of the same opinion. According to my ideas of the practice in such matters, I think it is usual for the Crown to put in a minute that they do not mean to oppose the application, or at least to appear at the bar and state so; but they have not chosen to follow that course in this case, and that being so, I think we must assume that they do not intend to oppose this application, and that it is not for the public interests that it should be refused. I therefore agree with your Lordship that the only course for us is to recall the sentence of outlawry.

LORD WELLWOOD.—I am of the same opinion.

THE COURT pronounced this interlocutor:—“Having considered the petition and heard counsel for the petitioner (there being no appearance for the Crown), recall the sentence of fugitation mentioned in the petition, and repon the petitioner thereagainst as craved.”

DAVID FORSYTH, Solicitor, Agent.

No. 16.

June 1, 1894.
Bremridge v.
Tomlinson.

RICHARD BREMRIDGE, Complainer (Respondent).—*Salvesen—T. B. Morison.*

WILLIAM TOMLINSON, Respondent (Appellant).—*Guthrie—Ure.*

Public Health—Pharmacy Act, 1868 (31 and 32 Vict. c. 121), secs. 1, 4, 15, and 17—Sale of poisons—Unqualified assistant.—Section 15 of the Pharmacy Act, 1868, enacts that “any person who shall sell or keep open shop for the retailing, dispensing, or compounding poisons . . . not being a duly registered pharmaceutical chemist or chemist and druggist . . . shall, for every such offence be liable to pay a penalty or sum of £5.”

Held (per Lord Justice-General, Lord Justice-Clerk, Lord Adam, and dub. Lord Kincairney, diss. Lord Kyllachy and Lord Stormonth-Darling) that upon a construction of the provisions of the Pharmacy Act, 1868, the penalty imposed by the 15th section is incurred by an unqualified assistant of a duly registered and qualified practitioner, where the assistant, in his master's absence and in his shop, sells any of the poisons scheduled in the Act for behoof of his master.

HIGH COURT.
Lord Justice-
General.
Lord Justice-
Clerk.
Lord Adam.
Ld. Kyllachy.
Lord Kin-
cairney.
Ld. Stormonth-
Darling.

WILLIAM TOMLINSON, residing in Glasgow, was charged in the Sheriff Court of Lanarkshire at Glasgow, at the instance of Richard Bremridge, the Registrar under the Pharmacy Acts, 1852 and 1868, in name and by the authority of the Council of the Pharmaceutical Society of Great Britain, with concurrence of the Procurator-fiscal, upon a complaint which set forth that he had been guilty of an offence within the meaning of the 1st and 15th sections of the Pharmacy Act, 1868,* in so far as on

* The Pharmacy Act, 1868, enacted,—“Whereas it is expedient for the safety of the public that persons keeping open shop for the retailing, dispensing, or compounding of poisons, and persons known as chemists or druggists should possess a competent practical knowledge of their business, and to that end that from and after ‘the 31st of December 1868’ all persons not already engaged in such business should, before commencing such business, be duly examined as to their practical knowledge, and that a register should be kept as herein provided . . .” Section 1.—“ . . . It shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons . . . unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be registered under this Act . . .”

Section 15.—“From and after the 31st day of December 1868, any person who shall sell or keep open shop for the retailing, dispensing, or compounding poisons . . . not being a duly registered pharmaceutical chemist or chemist and druggist . . . or shall fail to conform with any regulation as to the keeping or selling of poisons, made in pursuance of this Act . . . shall for every such offence be liable to pay a penalty or sum of £5.”

Section 4 gave facilities for registration as chemists and druggists to persons who before the passing of the Act had been for three years employed in the dispensing and compounding of prescriptions as assistants to a pharmaceutical chemist, subject to their passing such modified examination as the Council of the Pharmaceutical Society might declare to be sufficient evidence of their skill and competency to conduct the business of a chemist and druggist.

Section 17 rendered it unlawful to “sell” any poison unless certain regulations therein prescribed and intended to facilitate the tracing of poisons were observed. It imposed penalties on “any person selling poison otherwise than is herein provided,” and declared that “for the purposes of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller.”

The Act 32 and 33 Vict. c. 117, was passed in 1869 “to amend the Pharmacy Act, 1868,” and enacted,—“(1) Nothing contained in the first fifteen sections of the recited Act shall affect any person who has been registered as a legally qualified medical practitioner before the passing of this Act, and the said clauses

two separate occasions, he not being a duly registered pharmaceutical chemist, or a chemist and druggist within the meaning of the said recited Act, had, within the premises occupied by his employer, Dr Hugh Kelly, sold to customers certain of the poisons scheduled in the Act. No. 16.
June 1, 1894.
Bremridge v.
Tomlinson.

The accused pleaded not guilty, and, after evidence led, the Sheriff-substitute (Birnie) convicted him of both offences.

He craved a case for the opinion of the High Court.

The Sheriff-substitute stated the following facts as admitted or proved:—"1st. The whole averments of fact contained in the complaint.

"2d. That the shop, 133 West Scotland Street, where the poisons in question were dispensed, belongs to Dr Hugh Kelly, who is a properly qualified and registered medical practitioner, and also a properly qualified and registered chemist and druggist.

"3d. That the appellant is not a duly registered pharmaceutical chemist or chemist and druggist within the meaning of the said Acts.

"That on the two occasions libelled Dr Kelly was not present when the poisons were sold, and the business was being conducted in his absence by the appellant.

"It was before the passing of the Pharmacy Act, 1868, and still is, quite a common thing in Scotland for medical practitioners to keep drug-shops."

The questions of law were,—"(1) Whether in the shop of a duly qualified and registered medical practitioner, his assistant, who is not a duly qualified and registered medical practitioner, nor a registered pharmaceutical chemist, or chemist and druggist, within the meaning of the said Acts, contravenes the 1st and 15th sections of the Act of 1868, if, in the absence of the medical practitioner, he sells any of the poisons included in the schedule annexed to the Act? (2) In the event of the first question being answered in the affirmative, whether the employer or his assistant is liable in the penalty? (3) Whether in the whole circumstances of the case the conviction in question was justifiable?"

On 5th March the case was remitted for hearing before a full bench. The case was heard on 19th March.

Argued for the appellant;—From the preamble of the 1868 Act it seemed clear that the object of the Legislature was in the interest of public safety to prevent the keeping open of shops by unqualified persons for the sale of poisons. The Act was silent as to their assistants, and aimed solely at the sale of poisons by the master, who alone had any interest or profit in the transaction. The word "sell" did not occur in the preamble, and the words of the enacting clause must be read so as not to go beyond it. The alternative implied in the words "sell or keep open shop" in sections 1 and 15 was in harmony with the preamble if it were taken to refer to different acts of one person, *e.g.*, the trader who sold whether in open shop or not, or who kept open shop, and sold by the hands of others. It went beyond the preamble if it were taken to refer to the acts of different persons, *e.g.*, the trader who kept open shop and the assistant who sold on his behalf. The former interpretation was the right one.¹ The seller was the principal in the contract, and not the agent or agents who might be employed in preparing the article for sale and handing it to the customer.² *The Pharmaceutical Society v. Wheel-*

shall not apply to any person who may hereafter be registered as a legally qualified practitioner, and who in order to obtain his diploma for such registration shall have passed an examination in pharmacy."

¹ *Templeman v. Trafford*, 1881, L. R., 8 Q. B. D. 397, per Mr J. Grove, 401.

² *Kerr v. Phyn*, March 21, 1893, 3 White, 480, 20 R. (Just. Cases) 60; *Graham v. Lang*, Dec. 22, 1876, 3 Couper, 366, 4 R. (Just. Cases) 12.

No. 16.

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*don*¹ was badly decided, and of no authority in Scotland. The opinions relied upon by the respondent in *The Pharmaceutical Society v. The London and Provincial Supply Association*² were *obiter*, and not necessary for the decision of the case.

Argued for the respondent ;—The Court would adopt the construction which would most effectually secure the public safety, and that was that the unqualified assistant who handed the poison to the customer must be deemed to have been the seller of the poison. The emphatic declaration in section 17 that for the purposes of that section the person on whose behalf the sale was made by the assistant was to be deemed the seller seemed to shew conclusively that in the other sections the assistant was to be deemed the seller. This interpretation had received judicial effect both in England and Scotland.³

At advising,—

LORD JUSTICE-CLERK.—The conviction which forms the subject of this appeal was pronounced on a complaint which charged the appellant with an offence against sections 1 and 15 of the Pharmacy Act of 1868, in respect that he not being a person qualified according to the requirements of that Act, sold certain poisons and substances to a person named, contrary to that Act, and thereby was liable in the penalty prescribed by it. The first clause makes it unlawful for a person not qualified in the manner set forth to do certain things, and the 15th clause fixes a penalty for the doing of any of these or certain other things. The words in both clauses which require to be considered are the words “any person who shall sell or keep open shop for retailing, dispensing, or compounding poisons,” and the question which arises is whether, if it be proved that an individual who is not qualified has *de facto* sold poison, that is sufficient to justify his conviction under section 1, and his being sentenced to pay a penalty under section 15.

The facts are that the appellant's master is a properly qualified medical practitioner—who is under a later statute declared to be as competent to sell poisonous drugs as if he possessed the qualification set forth in the Act of 1868—and that the appellant, not being himself qualified, sold poison in his master's absence.

The chief argument of the appellant was, that although in point of fact he performed the sale he did not truly sell, that the sale was the sale of his master, who alone had any interest in the transaction, that the statute was not intended to strike against the subordinate, who acted only as a servant, but only against the seller in the sense of the trader in whose interest and to whose profit the sale was made.

When I read the clauses founded on, I find no ground for holding that they do not strike at the person who performs the act of sale. The word “sell” appears to me to apply to the person doing the act of sale in a retail business, whoever may be the person or persons for whose behoof he acts. The words “or keep open shop for the retailing, dispensing, or compounding” set forth an

¹ *The Pharmaceutical Society v. Wheeldon*, 1890, L. R., 24 Q. B. D. 683.

² *The Pharmaceutical Society v. The London and Provincial Supply Association, Limited*, 1880, L. R., 5 App. Cases, 857.

³ *The Pharmaceutical Society v. Wheeldon*, L. R., 24 Q. B. D. 683; *The Pharmaceutical Society v. The London and Provincial Supply Association, Limited*, L. R., 5 App. Cases, 857; *Bremridge v. Gray*, July 20, 1887, 1 White, 445, 14 R. (Just. Cases) 60.

offence by itself, for which the penalty of the Act might be inflicted without proof of an actual sale. But that the word "sell" is intended to strike at the person who does the act of selling I have no doubt. I think that the word must be taken in connection with the statement of non-qualification as applicable to the person who does the act. If it did not, the purpose of the Act, which is declared to be the safety of the public, would be defeated. The purpose is to ensure the public safety in the sale of poisons, and that cannot, as I think, refer to sale in any other sense than the external transaction of giving over by the person carrying out the sale the article which the purchaser demands in the ordinary course of retail business. The meaning of the Act is, in my opinion, that poison shall not reach the hands of members of the public by the transfer of sale, except through the medium of a person possessing a satisfactory qualification, and that any person not possessing that qualification who effects such a sale by giving poison by an act of sale to a member of the public desiring to purchase it offends against the statute.

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June 1, 1894.
Bremridge v.
Tomlinson.

Reference was made in the debate to the preamble of the statute in which the word "sell" does not occur, and it was therefore maintained that the word "sell" in the enacting clause should be read so as not to go beyond the preamble. I do not think that such a course can be justified. If the enacting words of a statute are in themselves distinct, I cannot hold that their going beyond the preamble is a reason for setting them aside or endeavouring so to read them as to take away their meaning, particularly if in doing so the main purpose of the Act as expressed in the same preamble would thereby be practically defeated. That it would be so here there can be no doubt, for if the appellant's contention be sound, then if a person qualified under the Act opens a shop, poisons may be daily sold in that shop by persons having no qualification, and no prosecution can be successful, for the shop is not opened and kept by an unqualified person, and it is the qualified person who by the hand of the unqualified assistant sells to the public. And as a doctor, as in this case, is qualified, he may spend his whole day in visiting his patients, while poisons are hourly dispensed on his premises by an unqualified shop boy, yet no penalty can be inflicted, and therefore no deterrent put in force against such dangerous practice, which it was the very purpose of the statute to prevent.

It is noteworthy that where in another clause of the Act it was deemed desirable to make the act done by the servant to be the act of the employer, this was expressly set forth. For in section 17 it is declared that "for the purposes of this section the person on whose behalf the sale is made by an apprentice or servant shall be deemed to be the seller," thus distinguishing sales under that section from sales made under the sections in question.

I am confirmed in the views I have expressed by the decision in England upon this same question in the case of *The Pharmaceutical Society v. Wheelton*, 24 Q. B. D. 683, and also by what fell from the noble Lords who sat on the appeal case of *The Pharmaceutical Society v. The London and Provincial Supply Association*, 5 App. Cas. 857, and I have therefore come to the conclusion that the first question stated in the case should be answered in the affirmative. As regards the second question, it is only necessary to say that the sentence to pay the penalty can only be imposed upon the person convicted. The third question is merely formal, and if I am right as regards the first, must be answered in the affirmative.

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LORD ADAM.—The appellant, Tomlinson, was not at the date of the conviction in question a person duly qualified to sell or to keep open shop for retailing, dispensing, or compounding poisons under the Pharmacy Act, 1868. He was at the time an assistant or servant in the shop of a Dr Kelly, who was a duly qualified person under the Act.

On the two occasions libelled the appellant, in the absence of Dr Kelly, sold poison to customers. For so doing he was convicted of a contravention of the 1st and 15th sections of the Act.

The question is whether the conviction is right.

The 1st section provides that it shall be unlawful for any person to sell poisons, unless such person shall have one or other of the qualifications therein specified; and the 15th section provides that any person who shall sell poison not being a person duly qualified under the Act, or shall do certain things or shall fail to do certain other things there enumerated, shall for any such offence be liable in a penalty of £5.

Now, it is not disputed that the appellant did in fact sell poison, and that he was not a person duly qualified to sell in terms of the Act.

Prima facie, therefore, it appears to me that he was guilty of the offence of which he has been convicted. But it was maintained that he was not the "seller" of the poison in the sense of the Act; that the "person" referred to and struck at by the Act was not the shopman or assistant who might have merely handed the poison over the counter, but the owner of the shop or business, being the person on whose behalf the sale was made.

I cannot adopt that view. It appears to me that the prohibition to sell is of universal application and applies to all persons, excepting only those persons who are duly qualified to sell poisons in terms of the Act.

That the "person" referred to in the 1st and 15th sections is not the person only on whose behalf the contract or sale is made, appears to me to be clear from the terms of the 17th section.

That section declares that it shall be unlawful to sell poison unless certain regulations therein specified are observed, and that any person selling poison otherwise than is therein provided shall be liable to a penalty, and that "for the purposes of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller." The inference appears to me to be irresistible, that in the other sections of the Act the master of the apprentice or servant who in fact makes the sale of the poison is not to be deemed the seller; and if he is not to be deemed the seller, there is no other person to whom the Act can possibly apply except the assistant, servant, or apprentice who actually makes the sale. For these reasons I am of opinion that the appellant was properly convicted.

The present question was in terms decided in England in the case of the *Pharmaceutical Society v. Wheeldon*, 24 Q. B. D. 683, in the same way in which I propose to decide this case; and the same view of the statute was expressed by Lords Selborne and Blackburn in the case of the *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. 857.

These are not perhaps authorities by which we are technically bound, but I concur in and adopt the reasoning in these cases; and I may say, seeing that this is a question of the construction of a British statute, that if I had doubted as to the proper construction of the Act, I should, without hesitation, have yielded to the authority of these eminent Judges.

LORD KYLLACHY.—I regret that I am not able to concur in your Lordships' judgment. I have, I confess, great difficulty in reading this statute as requiring more than that the seller of these poisons—that is to say, the shopkeeper—the trader—the seller in the ordinary and legal sense as distinguished from the mere salesman—shall possess the requisite qualification. Nor indeed have I been able to see how, if the head of the establishment—the person responsible for its conduct—is duly qualified, it adds anything to the public security that the mere salesman who makes the sale, but may have nothing to do with the compounding of the drug, shall be also qualified.

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At the same time I am not sorry that the majority of your Lordships see your way to a different conclusion. It would certainly be inconvenient that this statute should be differently construed in Scotland and in England, and that would, it appears, be the result if your Lordships took the view of the statute to which my judgment inclines.

LORD KINCAIRNEY.—I concur in the opinion of the Lord Justice-Clerk and Lord Adam that the appeal should be refused, but I cannot say that I adopt that opinion without considerable hesitation. I have found the Pharmacy Act, 1868, exceedingly difficult to construe. Of course its main object is to secure the safety of the public; but the doubtful point is, whether the scheme of the Act is to attain that object by endeavouring to secure that those who carry on the business of selling poisonous drugs in chemists and druggists' shops shall be men of respectability and of adequate scientific knowledge, or by endeavouring to secure that their assistants also who may sell poison on their account shall be equally qualified and instructed; the whole difficulty apparently arising from the ambiguity or possible ambiguity of the words "sale" and "seller." The latter view has been adopted in England, and has been supported in elaborate judgments by Baron Pollock and Justice Hawkins in the case of *Wheeldon*, and in a very important judgment by Lord Selborne—concurred in on that point by Lord Blackburn—delivered in the House of Lords in the case of the *London and Provincial Supply Association*—a case followed in our Courts in *Bremridge v. Gray*, July 20, 1887, 14 R. (Just. Cases) 60.

These are very important judicial opinions on the construction of a British statute, unskillfully and obscurely expressed, and while I do not adopt everything that is said in them, their reasoning seems to me of great weight and force, and not having been able to form a very confident opinion as to the true construction of the statute, I think myself entitled to defer to such weighty authority.

LORD STORMONTH-DARLING.—My view of the statute is the same as Lord Kyllachy's, but there is no question of principle involved, and I have no desire to detain the Court by stating my reasons at length, especially as I am conscious of some advantages in having the statute interpreted as the majority of your Lordships propose to do.

LORD JUSTICE-GENERAL.—My opinion coincides with the opinions of the Lord Justice-Clerk and Lord Adam.

THE COURT pronounced this interlocutor:—"Answer the first question in the case in the affirmative: Find, in answer to the second question, that the person convicted is the person liable in the penalty: Answer the third question in the affirmative: Dismiss the appeal."

P. MORISON, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 17.

June 4, 1894.
Farquharson
v. Gordon.

ROBERT FARQUHARSON, Complainer.—*Salvesen*.

CLEMENT W. R. GORDON, Respondent.—*Comrie Thomson—J. A. Reid*.

Process—Complaint—Limitation of time—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), sec. 24—Prevention of Cruelty to and Protection of Children Act, 1889 (52 and 53 Vict. c. 44), sec. 1.—Section 24 of the Summary Procedure Act, 1864, enacts that in all cases where no time is specially limited for instituting a complaint for summary conviction for a statutory offence in the Act of Parliament relating to each particular case, such complaint shall be brought within six months from the time when the matter of such complaint arose.

A person was on 29th March 1894 served with a complaint which charged him with a contravention of the Prevention of Cruelty to and Protection of Children Act, 1889, in that he "did between the 1st August 1893 and the 28th February 1894 . . . wilfully ill-treat, neglect, and expose" A B, a boy under fourteen years of age, "so as to cause unnecessary suffering and injury to his health by beating him, failing to supply him with necessary food and clothing, and otherwise ill-using him." The Sheriff found the accused "guilty of the contravention charged to the extent of wilfully ill-treating A B so as to cause unnecessary suffering by beating him."

In a suspension the Court *quashed* the conviction, in respect that looking to the terms of the complaint and the terms of the conviction it was impossible to say that the ill-treatment of which the Sheriff had convicted the accused might not have occurred between 1st August 1893 and 29th September 1893, which latter date was six months before the date of the complaint.

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Ld. Wellwood.

ON 29th March 1894, Robert Farquharson, farmer at Bogarrow, Banffshire, was served with a complaint in the Sheriff Court at Banff, brought at the instance of the Procurator-fiscal under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and which set forth that he "having the custody, control, or charge of Robert James Farquharson M'Lauchlan, a boy under the age of fourteen years, did, between the 1st August 1893 and the 28th February 1894 . . . wilfully ill-treat, neglect, and expose the said . . . M'Lauchlan, so as to cause unnecessary suffering and injury to his health, by beating him, failing to supply him with necessary food and clothing, and otherwise ill-using him, contrary to the Act 52 and 53 Vict. cap. 44, section 1."

The accused pleaded not guilty, and thereafter the Sheriff-substitute (Grant) found the accused "guilty of the contravention charged to the extent of wilfully ill-treating" M'Lauchlan "so as to cause unnecessary suffering by beating him. *Quoad ultra*, find the said Robert Farquharson not guilty."

Farquharson brought a bill of suspension, in which he stated that the provisions of the Summary Procedure Act, 1864,* had not been complied with, in that the complaint was served upon him upon the 29th March 1894, and the contravention charged extended over a period beginning eight months prior to that date.

The complainer pleaded;—The conviction is bad in law in respect (1) it does not bear to proceed upon any contravention of the statute within

* The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), sec. 24, enacts,—“In all cases in which no time is already or shall be hereafter specially limited for instituting any complaint for the recovery of any penalty or sum of money, or for conviction for any statutory offence punishable on summary conviction, in the Act of Parliament relating to each particular case, such complaint shall be instituted within six months from the time when the matter of such complaint arose.”

six months from the institution of the complaint, being the limit of No. 17.
time required by the Summary Procedure Act, 1864, sec. 24.

Argued for the complainer;—It might be that had the Sheriff-substitute expressly found the accused guilty of the contravention after 29th September, mentioning specific dates of cruelty, the conviction would have been unassailable. But taking the conviction as it stood it was impossible to say whether it was for contravention of the statute before or after that date. The acts of cruelty might have all been outside the time prescribed by the Summary Procedure Act, or some of them outside that time might have influenced the Sheriff-substitute in pronouncing judgment. It was not the duty of the accused to give the prosecutor an opportunity of amending his libel so as to make it relevant.

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Argued for the respondent;—The charge was one of continuous ill-treatment of the child. The Act did not contemplate particular acts of cruelty, with which the common law was adequate to deal, but a cumulative course of cruelty which in point of fact extended back beyond six months, and which was accordingly so libelled. It was not to be assumed that the matter of complaint arose beyond the six months merely from the circumstance that latitude had been taken in the date set forth in the libel. No objection was taken to the libel before or at the trial, when the objection might have been obviated by restricting the charge to the period subsequent to 29th September 1893.

LORD JUSTICE-CLERK.—The facts in this case are that the suspender was charged with a contravention of the Prevention of Cruelty to Children Act by offending against its provisions between certain dates mentioned, viz., 1st August 1893 and 28th February 1894, and that charge was served on him upon 29th March 1894.

Now, by the 24th section of the Summary Procedure Act, 1864, under which the complaint was brought, it is enacted that no proceedings may be instituted in respect of any statutory offence at a period later than six months from the time when the matter of such complaint arose. If that be so, six months from the time when the complaint was served takes us back to 29th September 1893. The complaint libels acts of cruelty from 1st August 1893, or two months beyond the six months specified in the limiting statute, and we have no explanation of the reason why a period greater than the statute allows has thus been included in the libel. It is unnecessary here for us to decide a question which may afterwards arise,—whether, if a long-continued course of ill-treatment is to be charged as occurring within the statutory six months, it may not be competent to state in the complaint that the ill-treatment was in continuation of a course of ill-treatment lasting more than the six months, and to lead evidence shewing that the condition of the child had been so affected by that treatment prior to the six months as to render the subsequent treatment a contravention of the statute. One can see that the quality of the treatment within the six months' limit might, to some extent, depend upon the treatment prior to that period. What might not be ill-treatment involving penalty under the statute in the case of a healthy well-cared for child, might be such ill-treatment if applied to a child already enfeebled and suffering from previous ill-usage, and it might be only fair to the accused in such a case to give him notice of what was intended to be proved against him, carrying back the history of the case beyond the six months. On that question I give no opinion, as it does not arise in the case now before us.

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In this case what the prosecutor offered to prove was that between 1st August 1893 and 28th February 1894 the accused had done certain things to this child which amounted to an offence under the statute. Now, I think that this libel is on the face of it irrelevant, because it states, as an offence against the accused for which he is to be convicted, that between 1st August and 29th September, when that offence, if any, was prescribed, as well as between 29th September and 28th February, the contravention had been committed. No objection, however, was taken to the relevancy before the Sheriff. I do not think it is incumbent on the accused to make a libel relevant for the prosecutor; on the contrary, I think that it is the prosecutor's duty to bring a relevant libel. Yet the accused having elected to go to trial upon this charge, I think there was undoubtedly in the charge sufficient to make it competent for the Sheriff, if he had found evidence to satisfy him that between 29th September and 28th February an offence had been committed, to have stated that he so found, provided he had specified the time in his verdict. If he had so worded it, we should have been very slow to disturb the conviction. But what he has done is to convict the accused of the offence "charged," without any reference to time. Now, that is quite consistent with the evidence having proved ill-treatment in August and September and no continued ill-treatment in the subsequent months, for the verdict must be taken as only finding that between the first and the last date there was ill-treatment. It is said we must assume that it was a course of ill-treatment continued throughout the period libelled, but we cannot assume anything except what is stated in the conviction, and that is quite consistent with the accused having been found guilty of a crime which had prescribed.

I move your Lordships, therefore, to sustain the suspension and to quash the conviction.

LORD ADAM.—The charge made against the suspender is that he, having the custody, "control, or charge of Robert James Farquharson M'Lauchlan, a boy under the age of fourteen years, did, between the 1st August 1893 and the 28th February 1894, at Bogarrow aforesaid, wilfully ill-treat, neglect, and expose the said Robert James Farquharson M'Lauchlan, so as to cause unnecessary suffering," and so on. Now, the question arises in this way—The Summary Procedure Act, in section 24, requires in all cases libelling a statutory offence, that the complaint be brought within six months from the time when the matter libelled in such complaint occurred. This libel was served on 29th March 1894, and it would have required to have been brought two months earlier if it was competently to have included an offence libelled as having been committed during a period commencing on 1st August 1893. It was not so brought. That necessarily involves that the charge should have been limited to conduct on the part of the accused within a period of six months prior to 28th March. That it was not so limited is said to constitute irrelevancy. To this it is answered that the contravention charged is not any particular act or acts, but a continuous course of conduct, beginning on the 1st August and culminating on the 29th February, and therefore that it was within the six months. It might be, and it is maintained in support of this that the offence is a continuous offence. A continuous offence may be more or less continuous, and it is not said that the Crown would have to prove an offence on each and every day of that period.

Now, I cannot see that the Sheriff under this charge might not have pronounced the conviction in the terms he has, if he had found it proved that the accused gave the boy two or three severe beatings, or even one severe beating between 1st August and 28th of September. That would have entitled the Sheriff to find the accused guilty of the contravention charged to the extent of wilfully ill-treating the child, so as to cause unnecessary suffering by beating him, and that is all the Sheriff has found. Now, how can we tell when the beating took place, whether in August or after 28th September? But even taking it that the Sheriff did find that the ill-treatment continued after 28th September, how can we tell from the charge or the conviction how far the beating prior to that date affected the Sheriff's mind in the sentence which he pronounced? If the Sheriff had said expressly that all the acts proved occurred between 29th September and 28th February, I do not say whether we might or might not have interfered with his sentence. But looking to the fact that we cannot say whether the accused has or has not been convicted of an offence which has prescribed by the statutory limitation, I think we have no course open to us but to quash the conviction.

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LORD WELLWOOD.—I am of the same opinion. Looking to the latitude taken by the prosecutor in the complaint and the terms of the conviction, it is impossible to say that the Sheriff may not have convicted the suspender on the strength of isolated acts or continuous ill-treatment committed between 1st August and 28th September. That being so, the conviction cannot stand.

THE COURT suspended the conviction.

ALEXANDER MORISON, S.S.C.—CROWN AGENT—Agents.

JOHN MARTINE RONALDSON, Complainer (Respondent).—*Sol.-Gen. Shaw*
—*J. A. Reid.*

No. 18.

DAVID MARR MOWAT, Respondent (Appellant).—*Graham Murray—*
Salvesen.

July 13, 1894.
Ronaldson v.
Mowat.

Mines—Wages—Payment by weight of mineral—Special agreement for deductions for stone and dirt—Coal Mines Regulations Act, 1887 (50 and 51 Vict. c. 58), sec. 12.—By section 12 of the Coal Mines Regulation Act, 1887, "where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten"—"provided that nothing in this section shall preclude the . . . manager of the mine from agreeing with the persons employed . . . that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, such deductions being determined in such special mode as may be agreed upon between the owner and the persons employed. . . ."

In 1891 a mine-owner entered into an agreement with his miners that an average uniform deduction of 56 lbs. should be made from the gross contents of each hutch sent up from the pit in respect of stones and substances in the hutch other than coal.

In 1894 the manager was convicted upon a complaint which charged him with a contravention of section 12 of the Coal Mines Regulation Act, 1887, in having failed to pay a miner the full amount of wages corresponding to the actual weight of the coal in a hutch. It was proved that the miner had been paid in terms of the agreement.

In an appeal under section 67 of the Act the Court *quashed* the conviction, holding that the agreement was lawful, and that deductions made in terms

No. 18. thereof did not infer a contravention of the Act in cases where the miner was paid on a smaller amount of coal than he had actually sent up.
 July 13, 1894. *Observations on Bourne v. Netherseal Colliery Company*, 1888, L. R., 20 Q. B. D. 606, and 1889, L. R., 14 App. Cases, 228; *Kearney v. Whitehaven Colliery Company*, 1893, L. R., 1 Q. B. 700.
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HIGH COURT. ON 16th January 1894 David Marr Mowat, residing at Summerlee Iron-works, Coatbridge, Lanarkshire, was charged in the Sheriff Court of Lanarkshire at the instance of John M. Ronaldson, Her Majesty's Inspector of Mines for the Western District of Scotland, upon a complaint which set forth that the accused, "having been on the dates hereinafter libelled, the agent or manager of the Orbiston Colliery, in the parish of Bothwell, Lanarkshire, belonging to the Summerlee Iron and Steel Company, and, as agent or manager foresaid, having been responsible for the due observance of section 12* of the Coal Mines Regulation Act, 1887, and in which mine Robert Knox, Michael M'Guigan, Charles Stewart, and John Rooney . . . were employed as miners, and whose wages depended on the amount of coal gotten by them," the accused "did, as agent or manager foresaid, on or about 4th November 1893, . . . fail to pay" Knox, M'Guigan, Stewart, and Rooney "according to the actual weight of coal contracted to be gotten in so far as," &c. Four separate charges were libelled, one with respect to each of the four men, the charge with respect to Rooney being that he "having on said 25th October 1893, in said mine, filled and despatched to the pithead a hutch containing 8 cwt. 33 lbs. of coal, as weighed at said pithead, the said David Marr Mowat did pay the said John Rooney for only 8 cwts. of coal, being a loss in wages of a halfpenny or thereby to the said Rooney, and this" the accused "did contrary to the Act 50 and 51 Victoria, cap. 58, sec. 12 (1)."

The accused pleaded not guilty, and evidence was led.

The following facts were established:—In April 1891, the company having had some differences with their workmen as to the method of payment and deductions, a meeting was held between the manager and the miners, and an agreement was arrived at between them to the effect that a uniform deduction of half a hundredweight should be made from the ascertained weight of every hutch sent up to the pithead, in name of and

* The Coal Mines Regulation Act, 1887 (50 and 51 Vict. c. 58), sec. 12 (1), enacted,—“ 12 (1) Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit-mouth as is reasonably practicable.

“ Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral, or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any checkweigher is stationed for this purpose, as hereinafter mentioned) by such person and such checkweigher, or in case of difference by a third person, to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or in default of agreement, appointed by a chairman of a Court of Quarter Sessions, within the jurisdiction of which any shaft of the mine is situate.”

for stones, dirt, &c., or other foreign material, with the additional proviso that if 25 lbs. of such stones, dirt, &c., and other foreign material should be found in any hutch when examined, the whole hutch should be deducted, and in effect payment for the entire hutch should be forfeited by the miner who sent it up. Notices embodying this agreement were posted at the pithead, and it was not disputed that the notices, if valid under the statute, constituted a binding contract between the masters and men.

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The inspector examined the hutches in question. The round coal was separated from the dross, and the amount of dirt in it was ascertained. In each case only stones, dirt, &c., which did not pass through the meshes of the riddle used, were separated and weighed, no account being taken of the weight of dirt, &c., in and with the dross, which along with it passed through the riddle. The result obtained in this manner in Rooney's case was 23 lbs. of dirt. The amount of stones and dirt mixed with the dross in specimens analysed by the respondent's head chemist amounted to 25 per cent. Mowat produced a statement shewing that for four weeks in October 1893 the average amount of dirt and stones mixed with the dross was 128 lbs. per hutch.

The Sheriff-substitute (Davidson) convicted the accused.

Mowat appealed under section 67 of the Coal Mines Regulation Act, 1887, and the reasons of the appeal were, *inter alia*, these:—(2) Because the facts proved do not disclose any offence under section 12 of the Coal Mines Regulation Act, 1887. (3) Because the persons mentioned in the complaint were, in fact, paid according to the actual weight gotten by them of mineral contracted to be gotten. (4) Because the deductions complained of were made in terms of an existing agreement between the appellant or the mine-owners and the persons employed in the mine, and were made in respect of stones or substances other than the mineral contracted to be gotten, or in respect of the hutches being improperly filled, and were authorised by the terms of the statute.

At advising,—

LORD WELLWOOD.—We have been told that our opinion is desired on a question of general importance, viz., whether the agreed-on deduction of 56 lbs. per hutch at the appellant's colliery is legal or not. But it must be remembered that this is an appeal against a criminal conviction, and must be so dealt with, whatever our view on the general question may be. In my opinion the conviction is bad apart from the legality or illegality of the deduction; but in the meantime I shall deal with the deduction.

1. The complaint is framed on the footing that the miners' wages depended on the amount of coal gotten by them, that being the mineral contracted to be gotten; that they despatched to the pithead hutches which, after deducting so many pounds for stones and dirt ascertained to be contained in them, were found to contain a certain weight of coal; and that, instead of paying the miners according to the actual weight of coal so ascertained, the appellants in each case deducted 56 lbs. from the gross weight of the contents of the hutch.

Take as an example Rooney's hutch. The gross weight including tare was $12\frac{1}{2}$ cwt.; deducting $4\frac{1}{2}$ cwt. for tare left $8\frac{1}{2}$ cwt. The amount of dirt in the hutch according to the evidence for the complainer was 23 lbs. only. Deducting that from $8\frac{1}{2}$ cwt. left 8 cwt. 33 lbs. Rooney was not paid upon that weight but upon 8 cwt.,—56 lbs. having been deducted from the weight of the total contents of the tub.

The appellants entirely dispute that the hutches in question only contained

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the quantity of stones and dirt spoken to by the complainer's witnesses; and it is proved and admitted that no note was taken of the dirt in the dross. But supposing for the sake of argument that the complainer's figures are correct, the question then arises whether the deduction of 56 lbs., to which these miners amongst others had agreed, was a legal deduction or not. If it was a legal deduction, then that is an end of the case. If it was not a legal deduction, we may have to consider whether the facts proved support and square with the charge in the complaint.

I do not think there is any real difficulty, at least as regards this case, as to the construction of section 12 (1) of the Act of 1887. The first two paragraphs are as follows:—(Reads). Reading the first paragraph in connection with the second, I do not think it doubtful that the "mineral contracted to be gotten" (in this case coal) is contrasted with and does not include stones and dirt. The miners are to be paid according to the weight of the mineral contracted to be gotten, *i.e.*, coal brought up. If no agreement as to deductions is come to in order to ascertain the weight of coal, the stones and dirt in each case would require to be separated from the coal, which, if practicable, would be an inconvenient and expensive process alike to owners and miners.

To avoid this inconvenience the second paragraph provides for owners and miners agreeing on some special mode for fixing deductions to be made "in respect of stones and substances other than the mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted to be gotten."

If deductions for dirt are agreed on, then of course these being deductions from the gross contents of the hutch, the gross contents must in the ordinary case be weighed; the weighing of the actual coal being dispensed with.

It is manifest that any special mode of fixing deductions must dispense with the ascertainment by weighing of the actual amount of coal in each hutch; and, strictly speaking, the owners under such an agreement will not pay the miners in all cases according to the precise amount of coal brought up by each. In a word, such special mode must be based upon the average amount of foreign matter which overhead might be expected to be contained in a hutch according to the experience of practical miners. It is a necessary consequence of taking an average that in some cases the miner may not be paid according to the actual weight of coal brought up. He may be paid for more or less coal than on examination would be found to be contained in his hutch.

In the present case the owners and the miners—the parties best qualified to judge—are agreed that a uniform deduction of 56 lbs. is fair; and we are asked by the complainer to say that this special mode of ascertaining the deduction to be allowed, which seems to have given satisfaction to the men for many years, and of which the complainer never hitherto thought it his duty to complain, is so unfair and so illegal that the appellant must be criminally convicted for having agreed to it.

I have no hesitation in saying that in my opinion the deduction was both legal and fair, based as it was on an average satisfactory to all concerned. I think the Sheriff's judgment proceeds upon grounds which would make it impossible in any case to fix a deduction by way of average; and I think further that he has misapplied the English judgments to which he refers. He says, after referring to the case of *Kearney*—"Here the question is as to the legality of a uniform deduction of $\frac{1}{2}$ cwt. per hutch, no attempt being made to separate and

weigh the dirt. I cannot distinguish this case from *Kearney's*. Unless it can be shewn that the actual amount of dirt does exceed the amount reckoned for deduction, it is clear that the miner is bargaining to have a certain payment deducted which the statute prohibits him from bargaining about." If this were sound, every deduction which depended upon averages would be illegal, and no other practical mode being suggested, the parties would have to revert to weighing the amount in each hutch. The Sheriff proceeds to a certain extent upon the fact that one seam of coal is sometimes cleaner than the others. But the answer seems to be that the miners are not confined to working one seam, and the average is taken for the whole pit with its one pithead. The complainer's witness Barry says:—"We must have the same rate of deductions for the three seams having the same pithead."

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The Sheriff further indicates that an average to be legal must be an average restricted to each miner and his own labour alone. The complainer himself repudiates it,—“You could not have a rate of deduction for each man in a large colliery.” The statute seems to contemplate such a general agreement as here exists, and not a separate agreement with individual miners.

The Sheriff then proceeds,—“If the average is such that it means an average between his own work and the work of other people working in other places and in seams where the coal sent to the surface differs in the amount of dirt it contains, the result must be that in some cases the average means a deduction from the coal produced. In this case no average was struck or attempted to be struck. A rough estimate was made, and made at a time when the cleanest seam at present being worked was not opened.” Here again the Sheriff's view seems to me to make an agreement by average impossible. If an agreement is illegal wherever it can be said that in some cases the average means a deduction from the coal produced, all deductions by average will be illegal.

The cases cited in the Sheriff's note have really no application. The case of *Bourne v. Netherseal Colliery Company, Limited*, 20 Q. B. D. 606, and 14 App. Cas. 228, merely decided under the Act of 1872 that it was illegal to contract that the miners should not be paid for slack, *i.e.*, dross, the reason being that slack is part of the coal, the mineral contracted to be gotten.

In the case of *Kearney v. Whitehaven Colliery Company*, 1 Q. B. [1893], p. 700, the agreement did not proceed on average or provide for a deduction; it involved total forfeiture of the whole of the coal in the hutch tested if it contained 35 lbs. of dirt. Justice A. L. Smith says (1 Q. B. [1893], p. 714),—“What has been done is this—They do not weigh for dirt every tub which comes to the top, but they give the men the benefit of nineteen out of twenty tubs. They test about one tub in twenty, no matter by what man it is sent up. If it contains no more than 25 lbs. of dirt, then no drawback is made. If it contains more than 25 lbs. and not more than 35 lbs., then a drawback of one-half the weight of the coal in the tub is made; and if it contains more than 35 lbs., then no payment at all is made for the coal in the tub. Now, in my judgment, the House of Lords has practically put this construction on the section—A pitman when paid by weight must be paid according to the weight of the coal he actually wins, but by the proviso the master may agree with him to make deductions from the total weight of what is sent up in the tub in respect of stones and substances other than mineral. If all that had been done here was to agree upon some mode of finding out what was the average amount of dirt in a given number of the tubs sent up without weighing every one of them, I do

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not think any difficulty would arise under this section ; but what was done was this—when a certain proportion of dirt was found in the tub selected for testing, the actual coal in that tub was not paid for at all. In face of that can it be said that the provisions of section 12 have not been disregarded? I am of opinion that they have.”

The case is clearly not in point. Deduction based on average implies that the deduction so fixed represents dirt. Open forfeiture of payment for coal, the weight of which has been ascertained by weighing, is a very different thing. The two decisions to which I have referred proceeded on the footing that the so-called deduction was an undisguised agreement that payment should not be made for an ascertained quantity of coal brought up, and therefore illegal.

II. Even if the deduction were illegal, as being made on a wrong basis, it does not follow that the conviction can stand. Looking to the complaint alone, I cannot say that it is irrelevant ; but the facts proved do not support the charge. Reading the complaint, one would assume that the coal was weighed by the appellants in pursuance of their usual system, and that they failed to pay according to the weight so ascertained. But it appears from the evidence that this process was exceptional, and was performed under the instructions of the complainer and according to his directions. It must be remembered that so far as regards the complaint and conviction we have only to do with the cases of the four miners named in the complaint. The coal was weighed under the directions of the prosecutor, and I think it is for him to shew that it was fairly weighed, and that the amount of dirt and stones did not amount to 56 lbs., the deduction made by the appellants. Now, it appears from the proof that the dirt said to have been found in the hutches and weighed was merely the dirt in the round coal, and that no deduction whatever was made for dirt in the dross, and no attempt to discover the quantity of dirt in it. Now, it is proved by analysis that while the average amount of dirt and stones in the round coal is comparatively small, the average amount of dirt and stones among the dross in specimens analysed amounted to no less than 128 lbs. per hutch. It is therefore, in my opinion, not proved that the deduction of 56 lbs. exceeded the amount of dirt in the hutches in question. Suppose it did, is this experiment with four hutches *probatio probata* that the average agreed on was excessive? What took place did not fairly represent the appellant's system. The appellant's system may or may not be legal, but it has not been properly put in issue in this complaint.

Therefore, even if I were of opinion that the deduction was not covered by the statute I should not be prepared to sustain the conviction.

In conclusion, I must observe that I think the concluding part of the agreement as to forfeiture in the event of more than 25 lbs. of dirt being found in round coal is illegal ; but with that we have nothing to do in the present case, and I fancy that in practice it is very seldom that such a case occurs.

LORD ADAM.—I concur in the result of the opinion of Lord Wellwood, but as the case is of importance I think it right also to state shortly the grounds of my opinion.

In the course of the discussion we were referred to two English cases of the highest authority as throwing light on the construction of the clause with which we are concerned.

The first of these cases, the *Netherseal Coal Company*, arose upon the construction of the 17th section of the Coal Mines Regulation Act of 1872, which is the corresponding clause to the 12th section of the present Act, under which the present case arises.

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In that case I think it was established—(1) That the words “mineral gotten by them” meant the contents of the tub or hutch as sent up by the miners, and that it was the contents of the tub or hutch as so sent up that was to be truly weighed. (2) That the owner might lawfully agree with the miners that deductions should be made from the minerals so gotten in respect of stones, &c., other than the mineral contracted to be gotten, viz., coal, but that such deductions must be ascertained in the manner provided by the Act—that is, in that Act—by the banksman and weigher or checkweigher. (3) That any deduction made which involved that the miner was not paid according to the weight of the mineral contracted to be gotten was illegal. But (4) that the whole agreement was not illegal, in respect of an illegal condition, but that such illegal condition was not enforceable.

The second case was that of *Kearney*, which arose under the present Act, and in which it was held (1) that the miner must be paid according to the weight of mineral in the tub or hutch. (2) That deductions might be made from the total weight of mineral in respect of stones, &c.; and (3) that agreements might be made with reference to the deductions to be made from such total weight.

The decisions in these cases may not be binding on us as authorities, but they are cases on the construction of a British statute, and I should have no hesitation in following them, even if I doubted their soundness, which I may respectfully say I do not. I shall therefore give effect to them so far as they apply in considering the present case.

The agreement between the owner and miners is in this case in the following terms,—“One half hundredweight to be deducted from each hutch,—and if any hutch contains 25 lbs. of dirt or foreign material, the whole hutch to be deducted.”

Now, as regards the latter of these conditions, I have no doubt, on the authority of the cases of *Netherseal* and *Kearney* that it is illegal, in respect that it necessarily involves a forfeiture of mineral contracted to be gotten. No question, however, arises in this case under that condition of the agreement, and I think also, under the authority of these cases, that the fact of that condition being illegal does not render the whole agreement illegal. The question, therefore, which we have to consider is whether the first condition is illegal. Now, that condition, as I read it, stipulates that $\frac{1}{2}$ cwt. shall be deducted from each hutch in respect of dirt and foreign material.

The condition, therefore, implies in the first place that each hutch as sent up by the miner shall be weighed. In the next place, that the deduction is to be made in respect of stones, &c., other than the mineral contracted to be gotten, a matter about which it is quite legal to contract.

In the third place, that the deduction is to be ascertained in a manner provided for by the Act, because the Act provides that the deductions may be determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other—a provision, I may remark, which was not contained in the previous Act—and this mode of ascertaining the deductions has been agreed upon between the manager of the pit on the one hand, and the persons em-

No. 18. ployed in the pit on the other. So far I think the case is sufficiently clear and the agreement unobjectionable.

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But it is said that under this condition a miner may not be paid according to the mineral contracted to be gotten by him, and that any condition which involves that contingency is invalid, as the Act requires that the miner shall be paid according to the weight of the mineral contracted to be gotten by him.

Now, it is the fact that under this condition if one particular hutch only is taken into consideration, it may not contain $\frac{1}{2}$ cwt. of dirt or foreign material, and consequently that the miner is not paid for the whole of the mineral contracted to be gotten contained in that hutch. But the condition is founded on the doctrine of average, and if the average is a fair average it follows that the miner is in fact paid for all the mineral contracted to be gotten by him from the pit—the deficiency of one hutch being made up by the surplus of another—which, in my opinion, is all that the Act in any view requires.

It appears to me, therefore, that *ex facie* of the agreement there is nothing illegal about it. It deals with a matter about which the owner and miner were free to contract, and deals with it in a manner authorised by the statute.

No doubt if the prosecutor were able to shew that the average was not a fair average, and that, under pretence of contracting as to deductions for dirt and foreign material, the parties had in fact contracted that the miners were not to be paid for the whole mineral contracted to be gotten by them, the agreement might be illegal.

But I think it lies upon the prosecutor to prove this. He is challenging, and desires to get behind an *ex facie* valid agreement. Has he proved it in this case? I think not, for the reasons stated by Lord Wellwood, which I need not repeat. In fact, I think it is sufficient to set aside this conviction that only the amount of round coal in the several hutches weighed was ascertained, but that no attempt was made to ascertain the amount of dirt which passed through the meshes of the riddle along with the dross, and which the evidence shews is in this pit very considerable. In these circumstances I do not see how it can be maintained that the prosecutor has proved that the miners were not paid on the actual weight of the mineral contracted to be gotten by them, and unless he has proved that, this conviction cannot be sustained.

I concur, therefore, that this conviction should be set aside.

The LORD JUSTICE-CLERK concurred.

THE COURT quashed the conviction.

CROWN AGENT—GILL & PRINGLE, W.S.—Agents.

No. 19. JAMES BOLAND ATKINSON, Complainer (Respondent).—*Comrie Thomson*
—*J. A. Reid.*

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JAMES HASTIE, Respondent (Appellant).—*Ure—Clyde.*

Mines—Wages—Payment by weight of minerals—Agreement—Standard weight system—Improper filling—Checkweigher—Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), secs. 12 and 13.—By section 12 of the Coal Mines Regulation Act, 1887, “where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten . . . provided that nothing in this section shall preclude the owner, agent, or manager of the mine from

agreeing with the persons employed in the mine that deductions shall be made in respect of stones . . . or in respect of any tubs, baskets, or hutches being improperly filled . . . such deduction being determined in such special mode as may be agreed upon." No. 19.
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Sec. 13, subsec. (1) provides for the appointment of a checkweigher "in order that he may on behalf of the persons by whom he is so stationed, take a correct account of the weight of the mineral or determine correctly the deduction as the case may be."

Subsection 2 imposed a penalty upon the owner or manager of the mine in the event of his refusing proper facilities to the checkweigher appointed by the miners to ascertain the true weight of the coal sent up.

A coalowner entered into an agreement with his miners that the "standard weight system" should be adopted in the mine, and that no payment should be made for the excess weight in any hutch beyond 10 cwt., and the practice was when a hutch was found to contain more than 10 cwt. to carry the weighing of it no further.

The manager was served with a complaint, which, proceeding upon the footing that this standard system was illegal, charged him with having contravened section 12 of the Act by having failed on the days libelled to truly weigh certain hutches and to pay the miners who loaded them according to the actual weight of the coal in the hutches (which was in excess of the maximum 10 cwt.). The complaint further charged him with a contravention of section 13, in so far as he "by failing to weigh the actual weight of coal contained" in certain hutches, did prevent the checkweigher "from taking a correct account of the coal contained therein."

The accused was convicted of both offences.

In an appeal, *held* that the conviction of the first offence was bad, in respect that the agreement for deductions was valid, overfilling being one mode of "improper filling" in the sense of sec. 12, and that the failure to weigh or pay for the contents of the hutches beyond the maximum of 10 cwts. was not a contravention of section 12, and that the conviction of the second offence was bad, the Lord Justice-Clerk and Lord Wellwood holding that the checkweigher's duty to see that the agreement as to deductions was properly carried out did not require him to ascertain the exact weight of hutches weighing over 10 cwt., Lord Adam holding that the second charge was not relevant, as the accused was not bound to weigh the coal in the hutches, but the whole mineral therein.

On 2d March 1894 James Hastie, agent or manager of the Fairhill Colliery, Hamilton, was charged in the Sheriff Court of Lanarkshire at the instance of James Boland Atkinson, Her Majesty's Inspector of Mines for the Eastern District of Scotland, upon a complaint which set forth that he having been agent or manager of the coal-mine known as Fairhill Colliery, Hamilton, "did, as agent or manager foresaid, (1) on 27th December 1893, at the pithead . . . fail to weigh truly the hutches of coal after mentioned, and thereafter on or about 13th January 1894, at the pay office at said colliery, fail to pay the said Thomas Chalmers, Robert Syme, William Halliday, and Buchan Littlejohn, according to the actual weight of coal, being the mineral contracted to be gotten by them, in said hutches, in so far as (a) each of the said Thomas Chalmers and Robert Syme having on said 27th December 1893, in said mine, filled and despatched to the said pithead of No. 2 pit of said colliery a hutch, which on being put on the weighing-machine there was ascertained to contain more than 10 cwts., the said James Hastie did fail to weigh the actual weight of coal contained in said hutches, and did on said 13th January 1894 pay each of the said Thomas Chalmers and Robert Syme for only 10 cwts., whereby each of them suffered a loss in wages to the complainer unknown, but not exceeding 2d., or thereby; (b) . . . (c) the said Buchan Littlejohn having on said 27th December 1893 filled and despatched to the pithead a hutch containing 10½ cwts. of coal, the said

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Lord Justice-
Clerk.
Lord Adam.
Ld. Wellwood.

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James Hastie did on said 13th January 1894 fail to pay the said Buchan Littlejohn according to the actual weight of 10 $\frac{1}{4}$ cwts. of coal contained in said hutch, and did only pay him for 10 cwts., whereby he suffered a loss in wages to the amount of 1 $\frac{1}{4}$ d., or thereby."

The charge under the 13th section of the Act was that "on 27th December 1893 at said No. 2 pithead," the accused "as agent or manager foresaid, did fail to afford to David Gilmour, 142 Low Waters, Hamilton, the checkweigher duly appointed and stationed at said No. 2 pithead on behalf of the persons employed in said mine, facilities for enabling him to fulfil his duties as set forth in section 13 (1) of the said Act, 50 and 51 Victoria, chapter 58, in so far as he, the said James Hastie, by failing to weigh the actual weight of coal contained in the hutches of the said Thomas Chalmers and Robert Syme as above libelled, did prevent the said David Gilmour from taking a correct account of the weight of the coal contained therein."

The accused pleaded not guilty, and evidence was led, which was recorded.

The following facts were established :—At the pit in question it was the practice to ascertain the true weight in all hutches not exceeding 10 cwt. and to pay according to the actual weight, but if the weight in a hutch exceeded 10 cwt., payment was only made on 10 cwt. It was thus unnecessary to ascertain the true weight in hutches beyond 10 cwt., and in practice this was not done. This system of a maximum load beyond which no weight was ascertained or paid for was known as the standard weight system, and had been adopted by the miners named in the complaint. It was admitted that in the present case, as soon as it was ascertained that the weight in the hutches exceeded 10 cwt., the actual weight was not ascertained, and payment was only made on the 10 cwt. It was not the practice at the mine to make any deduction in respect of stones and dirt in the hutches, and none was made from the hutches in question. It was also admitted that no opportunity had been given to the checkweigher appointed by the men to ascertain the true weight of the hutches. The evidence which the Court held negatived the view that the standard weight of 10 cwt. was too high is referred to by Lord Wellwood.

The Sheriff-substitute (Davidson) convicted the accused, who thereupon appealed under section 67 of the Act of 1887 to the High Court.

The reasons of appeal were, *inter alia*;—“(1) Because the complaint was irrelevant. (2) Because a valid agreement was made between masters and men in No. 2 pit, Fairhill, for deduction in respect of hutches improperly filled.”

The arguments¹ appear from the opinions of the Judges.

At advising,—

LORD WELLWOOD.—This case also turns upon the construction of section 12, subsection (1), of the Coal Mines Regulation Act, 1887. But the question is not the same.

Under the proviso in section 12 (1) it is competent for mine-owners and miners to agree upon deductions not merely in respect of stones and dirt, but also in respect of “hutches being improperly filled.”

There is no definition in the statute as to what is meant by “improper filling,” but it is sufficient to say that the complainer himself admits—“I think a hutch is improperly filled if it contains too little or too much, or where two different minerals are filled together.”

¹ *Appellant's Authority*.—Kearney v. Whitehaven Colliery Co., 1893, L. R. 1 Q. B. 700, per Lord Esher, 708 and 709.

Now, what was done at the appellant's colliery was that the owners and the men agreed that 10 cwt. of stuff should be the standard contents of a hutch, because in their opinion it was inconvenient and dangerous to put on a greater load. Accordingly, while the contents of all hutches under 10 cwt. were accurately weighed at the pit-head, when it was ascertained that a hutch contained more than 10 cwt. the weighing was not carried further, and the miner was paid on a weight of 10 cwt. But then they were paid on the footing of the 10 cwt. being coal, and no deduction was made in respect of stones or dirt. I see nothing in the evidence or the decisions to lead me, far less to compel me, to hold that overfilling is not improper filling. If it is improper filling, the statute authorises masters and men to agree as to a deduction in respect thereof, and they are the judges of the amount of the deduction and also—what is involved—of what constitutes overfilling. Our opinion is asked whether to deduct or disallow payment for anything beyond 10 cwt. is a proper deduction or not. I doubt whether it is our province to decide that matter. But if it is, I am of opinion that the deduction is both reasonable and valid. To load even 10 cwt. the stuff must be piled up to a height of 10 or 11 inches above the lip of the hutch, and it is plain that a hutch cannot with convenience or safety hold a much greater heap.

As to whether loading beyond 10 cwt. is dangerous or not, I confess I prefer to accept the views of those most interested, viz., the owners of the pit and the miners who worked in it, and I am not disposed to attach much importance to the theoretical views of the witnesses who apparently have, rather unwillingly, supported this prosecution. As in the last case, the complaint seems to have emanated from the checkweigher, the witness Gilmour, a miners' agent whom the complainer held, I think erroneously, to represent the men. Now, I think it is sufficient in this matter to quote the following passage in the cross-examination of the complainer,—“I have known the standard system since I came to Scotland. I know about twelve collieries that use it. To my personal knowledge no individual miner has complained. I had earlier complaints in this district against the standard system. I assumed Mr Gilmour represented the men. I have heard that the men asked for the restoration of the system. I disapprove of fixing a standard for loading hutches in this particular way, but not in a general way. I think the maximum amount in the hutches at Fairhill should be about 12 cwt. There is a certain amount of danger in overloading hutches, both to life and property. To fix 10 cwt. errs on the side of safety. It was explained that safety was the object of the standard. The only other reason I can suggest is that the master gets a little overweight, but I do not suggest that in this case. It is a very good way to let the miner know that if he goes beyond a certain quantity he will lose for it. I would disapprove of paying a man for doing a dangerous thing. If the man knew how much over 10 cwt. he sent up he might remember and restrict the quantity in future. To reach 10 cwt. you need to go considerably beyond the top of the hutch. At a certain height there is danger, but that depends a great deal on the class of coal.” He says further,—“Over 12 inches, unless carefully filled, some coal might fall down the shaft, not if filled square. That requires care. I would leave it to the management to decide what is safe for a hutch to hold. When 10 cwt. is in the hutch filled square, it will be 5 or 6 inches above the lip. The average man might fill it 6 to 12 inches high. My own maximum would be much more than 10 cwt. (Q.) Would it not be unsafe then to fill more? (A.) I do

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No. 19. not think so. A hutch might contain far more than 10 cwt., and squarely filled be only 12 inches high. In fixing the standard of safety I would take the best filled, not the average.”
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In the face of those admissions alone—it being admitted that it is a matter of opinion and degree what constitutes overfilling—how can it be said that it is proved that there was no overfilling, and that this deduction is so excessive as not to be a deduction authorised by the statute?

As to the owners making any profit out of the system, I can only say that if there is any truth in the evidence in the other case to the effect that the deduction of $\frac{1}{2}$ cwt. for stones and dirt per hutch is a fair deduction, the miners will in the long run distinctly benefit by this agreement. They can always avoid overloading a hutch, and if they do not overload they are sure of being paid for the whole of the stuff in the hutch as if it contained pure coal without any deduction for stones and dirt.

The only difficulty in the case arises from the fact that the appellants did not weigh the contents of the hutch beyond 10 cwt. This no doubt seems at first sight a failure to carry out the provisions of the statute; the appellants neither weigh the coal separately where the contents are above 10 cwt., nor do they ascertain the gross weight in those cases. But I do not think that it is sufficient to warrant a conviction, because the result would have been precisely the same if they had weighed the full contents of every hutch. The agreement being that in fixing the amount to be paid for, nothing should be allowed for the weight over 10 cwt., there was no need to ascertain the precise weight of the surplus, which probably seldom exceeded $\frac{1}{4}$ cwt. or $\frac{1}{2}$ cwt., and, I may observe in passing, was not all coal.

In the view which I take of the case it is unnecessary to refer to the English cases mentioned by the Sheriff, as I think they have no direct application to the questions which we have now to decide. With some of the observations made by the learned Judges I cannot say that I agree. But these were *obiter dicta*, and the points really decided in the cases, as to which I do agree, were entirely different from those in this and the other case before us.

I do not agree that the words “the mineral contracted to be gotten” in the first paragraph of section 12 (1) mean the gross contents of the hutch. They certainly do not bear that meaning in the proviso which follows, and they cannot on any reasonable construction bear a different meaning in the first paragraph of the clause.

I do not think, however, that there should be much dispute as to the practical effect of the clause. The leading object of the enactment is that where the miners’ wages depend upon the amount of the mineral contracted to be gotten, the mineral,—in the present case coal,—should be accurately weighed, and that in my opinion must be done if no arrangement is made as to deductions.

If there is an agreement as to deductions in respect of stones or dirt, I agree that as the purpose of the agreement is to avoid weighing the coal, the deduction must necessarily be made from the gross weight of the contents of the hutch, and for this purpose the gross contents of the hutch must be weighed.

Again, in the case of a deduction in respect of improper filling by overloading, the practical way to give effect to such deduction seems to be to disallow or deduct payment for all the stuff brought up beyond the recognised standard weight. In this view it is unnecessary (although to satisfy the precise words

of the statute it might be prudent) to weigh the whole contents of the hutch No. 19.
even beyond the standard weight. The result would be precisely the same. July 13, 1894.

Lastly, if the owner of the colliery neither weighs the coal separately nor Atkinson v. Hastie.
arranges for a deduction, he will either subject himself to a penalty for not
weighing, or possibly be held confessed as liable to pay on the gross weight.

These are the views which I venture to take of the application of this clause,
and I do not think that in substance they much differ from the opinions
expressed by the learned Judges in the English cases.

If the deduction is legal and properly made, it is not necessary to criticise
the terms of the complaint. But it is to be observed that the complainer
speaks of the gross weight of stuff in the hutches as being in every case coal.
Now, it is quite certain that that was not the case. If the charge had been
that the appellants failed to weigh the contents of the hutch, or the amount of
the coal contained in it, and failed to pay on the gross contents of the hutch or
of the coal, the charge might have been relevant, although I think that on the
evidence a conviction would not have been obtained on such a charge, because
I think that practically there was no failure to weigh. But as the charge
stands, the evidence does not square with it, or at least does not prove it,
because it is not proved that the gross contents of the hutches were coal.

As to the charge under section 13 of not giving the checkweigher facilities
—if the miners who appoint the checkweigher agree to certain deductions,
the result of which agreement is to dispense in part with a checkweigher's
duties in seeing the actual coal weighed, I cannot see what right he has to
demand facilities which are inconsistent with the agreement of his constituents.
The statute contemplates this alternative. The checkweigher is to "take a
correct account of the weight, or determine correctly the deductions, as the case
may be," section 13 (1), and for these purposes he is to get facilities.

On the whole matter I think that this conviction also should be quashed.

LORD ADAM.—I concur in the result of Lord Wellwood's opinion, and have
little to add.

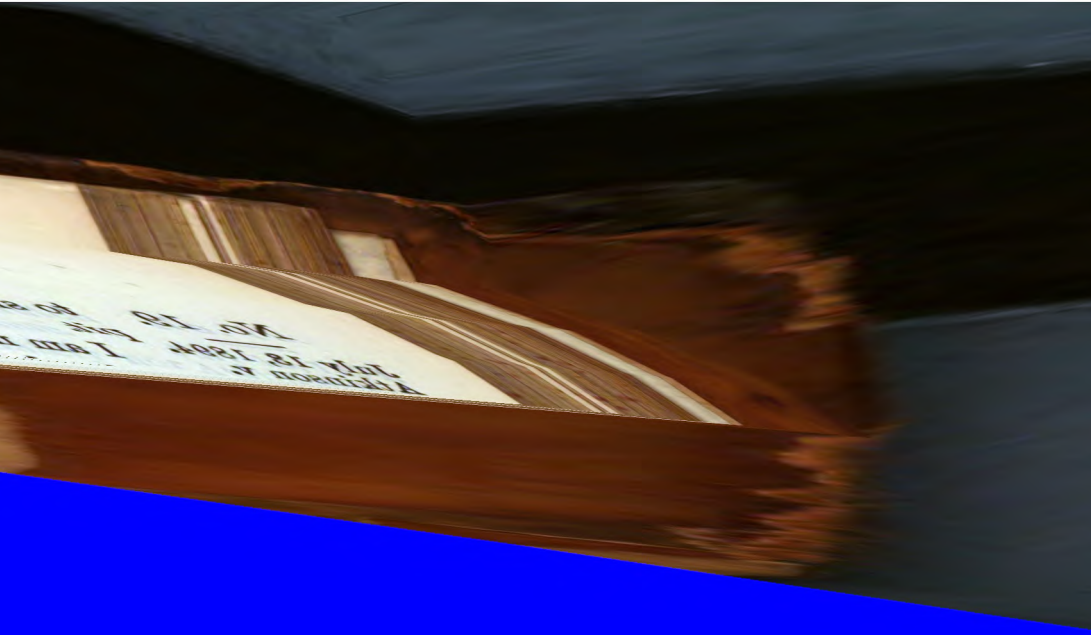
The first question is, whether overloading is improper filling in the sense of
the Act. That overloading may be dangerous is not doubtful, and if a hutch
is filled so as to be dangerous, from the heaping up of the mineral therein, or
otherwise, I cannot see that that hutch is properly filled—or otherwise than
improperly filled. I see no ground for limiting improper filling to the case
where an undue proportion of dross is sent up in the hutch.

Then, if overloading be improper filling, the parties are free to contract as to
deductions being made in respect thereof, and such deductions may be deter-
mined in such special mode as may be agreed upon by the parties.

Now, it will be observed that the deductions agreed on, in the case of im-
proper filling, may result in the miner not being paid for the actual amount of
the mineral contracted to be gotten by him. That would be so, for example,
in the case of a deduction made in respect of an undue proportion of dross in
a hutch—which nobody says is not improper filling—for dross is coal, the
mineral contracted to be gotten.

I see nothing illegal, therefore, in the parties agreeing that 10 cwt. should
be taken to be a full and proper load for a hutch, and that any mineral in the
hutch above that weight should be deducted.

I further agree with Lord Wellwood that there is nothing in the evidence



improper filling, then master and man may agree as to what is to be deducted for improper filling. If it be held, as I think it must be, on the evidence, that overfilling may be improper filling, then I think that there may be an agreement by the master and men that if a hutch contains more than a certain weight such hutch is overfilled, and I see no ground for holding that master and men may not agree that what is over that weight shall be disallowed in respect of the overfilling. The power to them to agree on a "special" mode of ascertaining deduction seems to me to be sufficient to make this mode legal.

It is plain, I think, that deduction for overfilling must include a deduction of coal, for it is of the character of a fine to prevent an improper proceeding, and if agreement be made on that matter, it can only be applied in the case of a working producing pure coal, as workings often do, by a deduction of coal. Further, it would not be a fine unless it applied to coal. For being a fine in kind, it can only apply to what has value. It is a part of what is contracted to be gotten for the master by the miner that is to be deducted in computing what is due to the man for getting it. It is my opinion that the master and men may agree that such a deduction shall be the overplus over the agreed-on weight.

THE COURT quashed the conviction.

CROWN AGENT—GILL & PRINGLE, W.S.—Agents.

JOHN M'GIVERAN, Complainer.—*M'Lennan*.

JAMES AULD (Procurator-Fiscal of Greenock), Respondent.—*Ure*.

No. 20.

Complaint—Relevancy—Causing obstruction in a public street—Greenock Police Act, 1877 (40 and 41 Vict. cap. cxxiii.), sec. 179, subsec. 25.—The Greenock Police Act, 1877, sec. 179, subjects to a penalty every person who is guilty of any of "the following disorderly acts or omissions" in any public street, road, &c., "to the obstruction, annoyance, or danger of the residents or passengers," viz., inter alia, "(25) Every person who occasions any kind of obstruction, nuisance, or annoyance in any road, street, court, passage, close, entry, or common stair, or obstructs or incommodes, hinders, or prevents the free passage along or through the same, or prejudices or annoys in any manner whatsoever any other person using the same."

A summary complaint charging four persons with a contravention of the foregoing enactment set forth that the accused did on the afternoon of a day specified in a street named, and in front of or near the shop occupied by J. P., "which was then open for business purposes, wilfully occasion an obstruction and annoyance in the said street, by standing, loitering, and walking backwards and forwards therein, and by procuring" two men named "to stand, loiter, and walk backwards and forwards in the said street in the vicinity of the said shop or premises, and carrying boards with bills affixed to the same, and having printed thereon in conspicuous characters the words 'Don't shop on Wednesdays after 2 P.M., and support the half-holiday movement,' in consequence of which a crowd of persons was caused to assemble there, and an obstruction and annoyance was occasioned to the said" J. P. "in his business as a grocer, and to others of the lieges using the said street, and whereby the free passage of persons and vehicles along the same was hindered; all to the obstruction, annoyance, or danger of the residents or passengers in said street."

In a suspension by one of the accused, who had been convicted, *held* that the complaint was relevant.

Opinion (per Lord Young and Lord Trayner) that the offence charged would have warranted an indictment at common law.

Proof—Telephone.—Held that the evidence of a person who deposed that he had heard words through a telephone, and thought that he recognised the voice,

No. 19.
July 13, 1894.
Atkinson v. Hastie.

July 20, 1894.
M'Giveran v. Auld.

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was competent evidence as to the identity of the person speaking through the telephone.

July 20, 1894.
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Auld.

Proof—Parole proof of evidence at a previous trial.—Parole proof of evidence given at a former trial is competent.

Procedure—Productions—Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), sec. 16.—In trials under the Summary Procedure Acts articles produced in evidence are properly noted in the record of the proceedings, although the evidence may have failed to connect them with the accused.

Conviction—Alteration of.—The record of a conviction may competently be altered after the accused has left the bar, if the alteration is verbal only and not in substance.

Conviction—General conviction—Alleged alternative charge—Objection to a conviction, that it was a general conviction of an alternative charge, repelled.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Lord Trayner.

ON 29th May 1894 John M'Giveran, tailor in Greenock, was, along with three other persons, charged in the Police Court there upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, setting forth that he and the other accused "did, between the hours of four and six o'clock of the afternoon of the 16th day of May 1894, in Dalrymple Street in Greenock, and in front of or near to the shop or premises there occupied by John Paget, grocer, which was then open for business purposes, wilfully occasion an obstruction and annoyance in the said street, by standing, loitering, and walking backwards and forwards therein, and by procuring" two men named "to stand, loiter, and walk backwards and forwards in the said street in the vicinity of the said shop or premises, and carrying boards with bills affixed to the same, and having printed thereon in conspicuous characters the words 'Don't shop on Wednesdays after two P.M., and support the half-holiday movement,' in consequence of which a crowd of persons was caused to assemble there, and an obstruction and annoyance was occasioned to the said John Paget in his business as a grocer, and to others of the lieges using the said street, and whereby the free passage of persons and vehicles along the same was hindered; all to the obstruction, annoyance, or danger of the residents or passengers in said street, and in contravention of the 25th subsection of the 179th section of the Greenock Police Act, 1877." *

The accused objected to the relevancy of the complaint, but the magistrate repelled the objection, and after hearing evidence convicted M'Giveran "of the offence charged, *being to the obstruction and annoyance of the residents and passengers in Dalrymple Street in Greenock*" (the words

* The Greenock Police Act, 1877 (40 and 41 Vict. cap. cxxiii.), sec. 179, enacts,—“Every person who is guilty of any of the following disorderly acts or omissions on any turnpike road, or in or near any public or private street, court, or close, or on the outside of any building adjoining the same, or in any common stair, to the obstruction, annoyance, or danger of the residents or passengers, shall in respect thereof be liable to a penalty not exceeding the respective amounts, or to imprisonment for a period not exceeding the respective periods hereinafter mentioned, namely.”

“To a penalty of £1 or imprisonment for seven days.”

“(25) Every person who occasions any kind of obstruction, nuisance, or annoyance in any road, street, court, passage, close, entry, or common stair, or obstructs or incommodes, hinders, or prevents the free passage along or through the same, or prejudices or annoys in any manner whatsoever any other person using the same.”

in italics being written on the margin of the record of the conviction), and fined him £1, with the alternative of seven days' imprisonment. The charge against the other accused was found not proven.

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M'Giveran presented a bill of suspension on the grounds—

(1) That the complaint was irrelevant in respect that under the statute libelled it "is not an offence for any person or small number of persons to walk up and down any street or any particular part of a street, or to employ or instruct a small number of persons carrying bills or posters of an innocent description to perambulate the streets in an orderly way. These acts are within the ordinary legal uses of the streets by the community. . . . Being in themselves perfectly innocent and lawful acts, they are not relevantly charged as an offence by being described as 'to the obstruction, annoyance, or danger' of passengers. The mere walking or standing in a street of one or even of three persons cannot obstruct, annoy, or endanger any person." The concluding portion of the complaint "ascribes no further acts to the complainer or the sandwich men, but attributes certain extravagant consequences to their innocent movements." It is "the crowd, not the complainer and sandwich men, that are described as having caused the alleged obstruction and annoyance; and unless the complainer, by conduct not alleged to have been disorderly, is rendered responsible for the assembling of a crowd, not alleged to have been disorderly, . . . no statutory offence can have been committed by him."

(2) That incompetent evidence had been admitted in respect that Paget, the shopkeeper mentioned in the complaint, had been allowed to depone to a conversation by telephone which he had on the morning of the day libelled with a person whom, from the voice, he supposed to be the complainer, in the course of which the person said "that he would make it very obnoxious for him" (Paget) "if he kept his shop open."

(3) That incompetent evidence had also been admitted in respect that a lieutenant of police had been allowed to give evidence to the following effect:—That he was in Court on 17th May 1894, when the two sandwichmen were put on trial, and that at that trial the complainer, as a witness for the defence, had deposed on oath, after being cautioned by the presiding magistrate, that the sandwichmen had on the occasion in question acted under his instructions. The objection to this evidence was that evidence given at a former trial could be proved only by a written official record.

(4) That at the trial a coloured printed leaflet beginning "Shopkeepers' Half Holiday—Do not be too hasty," and setting forth that "a certain shopkeeper" kept his shop open on Wednesday afternoons, was produced by the procurator-fiscal; that no evidence was led to connect the complainer with this leaflet; but that nevertheless the magistrate had entered a reference to the leaflet under the head "List of Productions," the leaflet being described as "produced by the procurator-fiscal."

(5) That the conviction as it originally stood, without the marginal addition, was bad, as being a general conviction on an alternative charge; that the marginal addition was made after the complainer had paid the fine and left the bar, and that, being so made, it vitiated the whole conviction; that even if competently made the addition was meaningless, seeing that it merely amounted to a statement that the offence charged was to the annoyance of the residents and passengers; and that even if the addition was intelligible, the conviction was still open to objection, as being a conviction of two of the three alternative offences of an alternative charge.

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Counsel for the complainer having been heard,¹ and counsel for the respondent not having been called on,

LORD JUSTICE-CLERK.—The first objection taken by the complainer is to the relevancy of the complaint, which is brought under the 179th section of the Greenock Police Act, 1877. In regard to this objection I am of opinion that the charge is relevant, because undoubtedly the things described as having been done,—the standing, loitering, &c.—might constitute an obstruction to the danger and annoyance of persons using the street. In certain circumstances they might cause no obstruction, but if stated to have been done wilfully and with the purpose of obstruction, and to have actually caused obstruction, then in my opinion there is enough in the charge to entitle the magistrates to proceed.

The next objection is that at the trial evidence was incompetently admitted to the effect that the accused had been heard to speak in a threatening manner to Mr Paget through a telephone. This evidence is in my opinion perfectly competent. There is no rule of the law of Scotland making it incompetent to lead evidence of statements made by a particular person through a telephone. Such evidence may be subjected to any amount of cross-examination, and its reliability as a means of identification of a particular voice, and through the voice of a particular individual, may very well be the subject of argument to the Court before which the evidence is led. The evidence is practically the same as that given by a person outside a house who identifies a person inside by his voice, and such evidence has never been held incompetent.

Another objection taken to the conviction is that at the trial a police-officer was allowed to give evidence as to what the complainer had said on oath as a witness in a previous trial in connection with the same occurrences. The ground of this objection is that such evidence cannot be referred to unless a written record of it is kept. I think this is a contention for which there is no authority. On the contrary, it is perfectly common both in civil and criminal cases to bring parole evidence of what has been said in another case. Even where notes of the evidence are taken by the Judge, it is still admissible to prove by parole that statements not appearing in the record of the evidence have been made by the witnesses. In regard to criminal charges it seems an extravagant contention that the evidence of a *particeps criminis* cannot be used against him unless it be taken down in writing.

The next objection is that a certain "coloured leaflet" referred to in the proceedings was improperly included by the magistrate in the "list of productions," and referred to as having been "produced by the procurator-fiscal." It was contended that this leaflet had never been proved to have any connection with the charge against the complainer, and that it ought therefore not to have been included as an article in evidence. I am at a loss to see how the complainer was prejudiced by its inclusion, and how it could possibly be made a ground for quashing the conviction. Under the Summary Procedure Act every article used in the proof must be referred to in the record of the proceedings, and in my opinion the magistrate was only conforming with this rule in the reference

¹ *Authorities cited* (on first question).—Hutton v. Main, Nov. 5, 1891, 19 R. (Just. Cases) 5, 3 White, 41; Shaw v. Bell, June 8, 1891, 3 White, 19; (on fourth question) Strachan v. Watson, July 17, 1894, 20 R. (Just. Cases) 76, 1 Adam, 55.

to the leaflet. It may be that the term "list of productions" is not an appropriate one. In criminal trials the term is used of the productions to be used in evidence, as to which notice must be given to the accused. But in summary prosecutions any articles may be produced by the prosecutor and used in evidence without notice, and it would probably be more correct to refer to such productions as "articles referred to in the evidence."

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The next objection is that after the complainer had paid the fine imposed by the magistrate and left the bar, the magistrate added or caused to be added to the sentence the marginal addition set forth in the bill of suspension. Now, a Judge is entitled to make an alteration in the wording of the sentence to secure greater clearness or accuracy if there is no substantial alteration of the conviction and sentence. The complainer maintains that in this case the addition has the effect of making the sentence ungrammatical and unintelligible, but I cannot accept this view, or hold that the addition was such as to vitiate the proceedings.

The complainers' last objection is that the conviction is a general conviction of alternative offences. He contends that the conviction ought to have set forth whether the acts found proved were to the obstruction or to the annoyance, or to the danger of the public, these being three distinct alternatives. I do not think so. In my opinion these words only indicate various ways in which the statutory offence may be committed, and the conviction as it stands is perfectly valid. It was open to the magistrate to hold that the act in question was to the obstruction, annoyance, and danger of the residents and passengers in the street, or was merely to any one or two of these.

On the whole case I would therefore move your Lordships to dismiss the bill.

LORD YOUNG.—I am of opinion that all the grounds of objection to the conviction are bad. I scarcely think that any of them are reasonably stateable.

I should like to say, however, that the accused may, in my opinion, consider himself very fortunate in the prosecution having decided to bring him to trial under the 179th section of the Greenock Police Act, and not at common law. It was not suggested, and I do not suggest, that that clause of the Police Act does not comprehend this case, but I do not think that a case of this aggravated character is contemplated in a provision in which the penalty is limited to a fine of £1 or seven days' imprisonment. It is impossible to read the clause without seeing that it contemplates obstruction of a very much less aggravated character than that which appears from the complaint to have been committed here. The clause applies to such obstructions as might be caused by the laying down of a box, or a bundle at a shop door, or in a court, entry, close, or common stair, innocently enough done, but thoughtlessly, considering the interests of other people, and a very sufficient punishment for that might be a fine within the limits of £1 or imprisonment within the limits of seven days. But the gravity of this case consists in this, that there was an obstruction of the street of a serious character, wilfully and purposely got up in a particular locality for a most indefensible and illegal purpose, and for this, if it had been tried at common law, and the accused convicted, I should have expected a sentence of a lengthened imprisonment with hard labour. It appears from the complaint that there was a division of opinion in Greenock among shopkeepers as to whether it was expedient upon the whole, in their own interest, and in the public interest, that there should be



GIOVANNI COSTADASI, Appellant.—*Craigie*.

No. 21.

WILLIAM ALEXANDER BOYES (Burgh Prosecutor, Perth), Respondent.—*Dewar*.July 20, 1894.
Costadasi v.
Boyes.

Public-House—Search warrant—Magistrate who is licence holder—Statute—Construction—Home Drummond Act, 1828 (9 Geo. IV. cap. 58)—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35), secs. 20 and 36.—The Home Drummond Act, sec. 13, enacts that “no Justice of the Peace or magistrate in any county or royal burgh who is a brewer, maltster, distiller, or dealer in . . . exciseable liquors . . . shall act as such Justice of the Peace or magistrate respectively in the execution of this Act . . . and everything done by a Justice of the Peace or magistrate respectively in any case in which he is so disqualified to act shall be null and void.”

The Public-Houses Acts Amendment Act, 1862, sec. 20, empowers Justices of the Peace and magistrates of burghs to grant warrants to the police to search for exciseable liquors on any premises within the county or burgh in which there is reasonable ground for believing that such liquors are being trafficked in without a licence, and impose a penalty upon the person occupying or using the premises where such liquor shall be found for the purposes of traffic.

The same Act, sec. 36, enacts that “the provisions and enactments contained in the recited Acts [including the Home Drummond Act] so far as not repealed, shall extend and be construed, deemed, and taken to extend to and form part of this Act, in the same manner and as fully and to all intents and purposes as if the said provisions and enactments were herein repeated and set forth at length.”

Held that section 13 of the Home Drummond Act was not incorporated with the Public-Houses Acts Amendment Act, 1862, except with reference to matters falling within the scope of the Home Drummond Act, and consequently, as the granting of search warrants was not a matter which fell within the scope of that Act, that a magistrate, although a licence holder, might competently grant a search warrant.

On 16th June 1894 Giovanni Costadasi, ice-cream manufacturer, Kirk-gate, Perth, was charged in the Police Court, Perth, with having committed a contravention of section 20 of the Public-Houses Acts Amendment Act, 1862. Before pleading to the charge the accused objected to the legality of the search warrant on which the complaint proceeded, in respect that (as was the fact) the magistrate who granted it was a licence holder. The objection was repelled. The accused then pleaded not guilty, but was convicted and fined £2, with the alternative of fourteen days' imprisonment. He obtained a case, which set forth the foregoing facts and the following question of law:—“Whether the search warrant in question was legal?” The statutory provisions upon which the question depended are sufficiently set forth in the rubric.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Lord Trayner.

LORD JUSTICE-CLERK.—The appellant here raises the objection that the search warrant, which formed the preliminary step in these proceedings, was granted by a magistrate who was a licence holder, and it is, therefore, argued that the warrant itself is illegal, and that the whole proceedings which have followed on it must fall, because by the Home Drummond Act no licensed person is allowed to act as a magistrate under that Act. Now, the Home Drummond Act deals with two things, namely, the granting of licences and the punishment of persons holding licences for any breach of certificate. Neither of these has any application to the granting of search warrants in the case of persons who are suspected of keeping exciseable liquor for sale, without having a licence. That is a matter provided for by the Public-Houses Amendment Act of 1862. No doubt the Home Drummond Act is incorporated into the Act of 1862 by

No. 21. the 36th section of that Act, but I do not think that that incorporation extends beyond the purposes of the Home Drummond Act itself. I think that if it was intended that the prohibitions of the Home Drummond Act as to the magistrates who were to administer that Act should apply to the granting of search warrants, that would require to be stated. I cannot hold that it was illegal for this magistrate to sign the search warrant.

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LORD YOUNG and LORD TRAYNER concurred.

THE COURT answered the question in the affirmative.

MACGREGOR & STEWART, S.S.C.—IRONN, ROBERTS, & Co., S.S.C.—Agents.

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1893-94.

WINTER SESSION.

ALEXANDER YEATS AND OTHERS (James Chivas' Trustees), First Parties.	No. 1.
— <i>Comrie Thomson—Abel.</i>	
MRS JOYCE CHIVAS, Second Party.— <i>Comrie Thomson—Abel.</i>	Oct. 17, 1893.
GEORGE THOMSON AND OTHERS (Alexander J. C. Chivas' Trustees), AND	Chivas' Trustees v. Chivas.
ANOTHER, Third Parties.— <i>Glegg.</i>	
MRS JOYCE CHIVAS AND OTHERS (Huxley's Trustees), AND OTHERS,	
Fourth Parties.— <i>Lees.</i>	

Succession—Testament—Construction—Rent of lands to “form part of” annuity—Additional or in security merely.—A testator by his trust-disposition and settlement directed his trustees to pay an annuity of £500 to his widow, with power to her to bequeath the amount of the annuity to any one or more of the children she might choose, and failing her exercising this power, the sum retained to meet the annuity was to be divided among the children equally. The estate beyond what was retained to meet the annuity was to be realised and divided among the children equally. By holograph codicil the testator directed that the free rental of certain heritage should “form part of the annuity bequeathed to my wife during her life . . . after the death of my wife the free rental to be divided equally among my children.”

In a special case the widow maintained that she was entitled to the free rental of the heritage in addition to the annuity already bequeathed.

Held that the rental of the heritage was not intended to be given in addition to the £500 annuity already bequeathed, but merely that the heritage was to be part of the estate retained to meet the annuity.

JAMES CHIVAS, wine-merchant in Aberdeen, died on 8th July 1886, 2D DIVISION. survived by his widow, and by two sons and two daughters.

By his trust-disposition and settlement, dated 9th March 1881, Mr Chivas directed his trustees in the third place “to pay to my said spouse, free of all deductions, an annuity of £500 sterling . . . with power to my said spouse to bequeath the amount of said annuity to any one or more of our children as she may think fit: In the fourth place, I appoint my said trustees to allow my said spouse to occupy, until the final division of my estate after mentioned, free from rent and feu-duty, my said dwelling-house in King Street, and my said dwelling-house at Thornhill, . . . In the fifth place, I appoint my said trustees to convey and make over my business . . . to my said two sons, Alexander and James, in equal shares, . . . the value of the stock and debts to be ascertained by the valuation of competent persons, and the sum fixed by them to be paid by my said sons to my said trustees in five yearly payments, commencing the first payment thereof one year after the date of

No. 1. the business being conveyed to them, . . . In the eighth place, as it is my wish that the house and land at Thornhill should, if possible, remain with my family, I authorise my said trustees, at any time prior to the final division of my estate after mentioned, in the event of either or both of my said sons wishing to purchase the same, to convey the same to him or them at a fair value, subject to the right of occupancy of the dwelling-house in favour of my said spouse above mentioned: . . . In the tenth place, I appoint my said trustees, as soon as conveniently may be after payment of the fifth and last yearly instalment payable by my sons as aforesaid, and after retaining what is sufficient to provide for the said annuity to my spouse, and a further sum of £75 sterling to be paid to her yearly during her life in lieu of her right of occupancy of said dwelling-houses . . . to pay and divide the whole of my remaining heritable and moveable estate equally among my said four children: . . . Declaring that, on the death of my said spouse, the amount retained to provide for said sum of £75 yearly to her, and also the amount retained to provide for said annuity of £500 to her, in the event of her not having exercised her power of bequeathing the same above mentioned, shall be divided among my said four children equally in the manner above pointed out in regard to the remainder of my estate."

Oct. 17, 1893.
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Mr Chivas also left three holograph codicils, in the form of letters addressed to his trustees, by the last of which, dated 16th April 1885, he directed, *inter alia*, as follows:—"In case it may please God to call me away before I have an opportunity of making the following alterations on my will or settlement, I desire my trustees as follows:—First, That the free rental of Thornhill lands form part of the annuity bequeathed to my wife during her life. Second, That the houses and grounds of Thornhill be kept in my family during their lives and in equal shares Seventh, After the death of my wife, the free rental of Thornhill, after all expenses are paid, to be divided equally amongst my four children; and, when any of my family dies, then their children (if any) to succeed to their share."

On 29th May 1893 a special case was presented by Mr Chivas' trustees as first parties, his widow as second party, and his children, or their representatives as third and fourth parties, for the determination of various questions arising on the construction of his testamentary writings, including:—"1. Is the testator's widow entitled, under the deed of settlement and third codicil, to the liferent of Thornhill House, offices, grounds, and agricultural lands, or to any, and which part thereof, over and above the annuity of £500, and the yearly payment of £75?"

The case stated that the testator's business was taken over by his eldest son alone, as at the date of his father's death, 8th July 1886, and consequently that the period for payment of the last instalment of the price of the business, and the date of the "final division" of the estate in the sense of the settlement was 8th July 1891; that Mrs Chivas occupied Thornhill House, grounds, &c., for the first four years after her husband's death, and that since then it had been let at a rent of £200 per annum, the rent being paid to her; and that the agricultural lands of Thornhill had since the testator's death been let to a neighbouring farmer at a rent of £64 yearly.

Argued for the second party;—The second party was entitled to the rent of Thornhill House, grounds, and lands, in addition to the annuity of £500 and the annual payment of £75. The natural meaning of the language of the codicil led to that result. The codicil assumed an annuity of definite amount already bequeathed, and to say that the rental should "form part of" that annuity meant that the rental was additional. Fur-

ther, the capital retained to meet the annuity under the trust-disposition was to go to the children on the death of their mother, subject to her power of apportionment, while it was the "rental" of Thornhill which under the codicil was to go to the children when their mother died, and there was no power of apportionment. That difference shewed that the rental of Thornhill was additional to the original annuity.¹

Argued for the third and fourth parties;—The testator's obvious intention was to keep Thornhill in his family, and to that end he directed that the rental should form part of his widow's annuity. But it was not to be supposed that he thereby intended to increase the annuity to so considerable an extent. The natural meaning of the first clause of the codicil and the reasonable intention were that the rental was *pro tanto* in substitution of the original annuity. Thereby a larger part of the estate became divisible at "the period of final division." At all events only the rental of Thornhill agricultural lands was additional; if the rental of the house was also additional the widow would be in effect paid twice, the £75 annual payment being given in lieu of the house. [LORD YOUNG referred to Jarman on Wills, 5th edit. vol. i. p. 499.]

LORD JUSTICE-CLERK.—I am unable to read the clause in the codicil which directs that the free rental of Thornhill lands should form part of the annuity bequeathed to the testator's widow as giving her a new legacy of the rents of Thornhill lands. That result can only be reached by implication, and I see no reason for such an implication. I think that the clause means this only, that the trustees are to apply the rents of Thornhill lands, so far as they may go, to payment of the annuity, and in this way to relieve the moveable estate to that extent of the burden of paying the annuity, so that only so much of the moveable estate is to be retained as will be sufficient to meet the balance of the annuity. Therefore I propose to answer the first question in the negative.

LORD YOUNG.—I may say that I am generally of the same opinion. I cannot say, however, that the decision of the first question is to my mind altogether free from difficulty. That question is, whether the widow, Mrs Chivas, is entitled, under her husband's settlement and codicil, to the liferent of Thornhill House, grounds, and lands, in addition to an annuity of £500 and a yearly payment of £75. She is certainly not entitled to any such liferent under the original settlement, for by that she gets only an annuity of £500 and a yearly payment of £75. But it was contended—and I cannot say without plausible grounds for the contention—that she became so entitled under the codicil. This codicil, which is dated 16th April 1885, is really a letter addressed by the testator to his trustees, by which he directs them to give effect to certain alterations on his original settlement, in case he should not find an opportunity of giving a more formal expression to his intentions with the aid of a practised conveyancer. I think that any document of this kind should be read liberally and with a desire to carry out what was the intention of the testator.

Now it is clear that when the testator wrote this codicil he intended his widow to have an annuity of £500, and that his trustees should retain enough of his estates to pay this annuity, and, so intending, he in the codicil directs that "the free rental of Thornhill lands form part of the annuity bequeathed to my wife during her life." Now there are difficulties in the way of holding that

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Chivas' Trustees v. Chivas.

¹ Straton's Trustees v. Cunningham, March 10, 1840, 2 D. 820, 12 Scot. Jur. 421; Horsbrugh v. Horsbrugh, Jan. 12, 1847, 9 D. 329, 19 Scot. Jur. 118.

No. 1. this means merely that he intended Thornhill lands to be part of the estate which the trustees are to retain to meet the annuity, and therefore, as I have said, there is plausibility in the contention that he intended his widow's annuity to be increased by the rental of Thornhill. This view receives some confirmation from the seventh clause of the codicil, in which he directs that after the death of his widow the rental of Thornhill is to be paid to his children; because, when a testator directs an estate or fund to be disposed of after the death of anyone, but says nothing as to what is to be done with the rent or income accruing from the estate or fund in the meantime, there is authority for saying that a gift of the rent or income in favour of the person named is to be implied. But after the best consideration I have been able to give to the matter, I have come to the conclusion that it would be unsafe to read the codicil as giving the rental of Thornhill to the widow in addition to the annuity already provided to her. That would really be to read the codicil as if the words "shall be in addition to" were substituted for the words "form part of" the annuity, and on the whole I am unable so to read the codicil. Then with respect to the argument that the seventh clause is to be construed as containing an implied gift of the liferent of Thornhill in favour of the widow, the implication would, I think, have been very strong if that clause had stood alone; but taken along with the earlier clauses, I think that we can see the reason for delaying payment to the children until the death of the widow. I think that the testator's intention was that as regards part of the annuity which he had already given to his widow, she should be in the position of a landed proprietor. I therefore agree with your Lordship in thinking that the first question should be answered in the negative.

LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT answered the first question in the negative.

AULD & MACDONALD, W.S.—J. DOUGLAS GARDINER & MILL, S.S.C.—
S. GREIG, W.S.—Agents.

No. 2. NATIONAL BANK OF SCOTLAND, LIMITED, Pursuers and Nominal Raisers
(Respondents).—*Dickson.*
Oct. 18, 1893. MRS BETSY COWAN AND JOHN COWAN, Real Raisers and Claimants
National Bank of Scotland, (Reclaimers).—*Crabb Watt.*
Limited, v. DAVID W. KIDSTON (Cowan's Trustee), Claimant (Respondent).—
Cowan. *D. Dundas.*

Husband and Wife—Separate estate—Donation—Deposit-receipt—Bankruptcy—Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), sec. 1, subsecs. 3 and 4.—A married woman claimed, as against the trustee in her husband's sequestration, £70 of the contents of two deposit-receipts for £305 and £145 respectively, which bore that the contents had been received from the spouses, and were payable to either or the survivor. She averred that she was possessed of £70 at her marriage, that she had after her marriage placed it on the deposit-receipts, and that the remaining contents of the deposit-receipts were donations to her by her husband. *Held* that, assuming that she had placed £70 of her own property on the deposit-receipts, her statement shewed that it had not been kept separate from her husband's estates, and consequently that she was not entitled to a proof.

THE estates of John Cowan, sometime cashier and book-keeper, Calder Iron Works, Coatbridge, were sequestrated on 11th October 1892, and David W. Kidston, C.A., Glasgow, was appointed trustee. No. 2.

On 28th November 1892 Mrs Betsy Lawrie or Cowan, wife of the said John Cowan, and Cowan as her administrator-in-law, raised an action of multiplepoinding in name of the National Bank of Scotland, Limited, as nominal raisers, for the determination of the right to the contents of two deposit-receipts, dated respectively 14th September and 12th October 1891, and for £305, 10s. and £145 respectively, with interest, which had been taken from the pursuers' Fauldhouse branch, and were in these terms,—“Received from John and Betsy Cowan, Calder, Coatbridge, payable to either or the survivor,” &c. Oct. 18, 1893.
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Lord Low.

Mrs Cowan lodged a condescendence and claim, in which she stated that she and her husband were married on 1st August 1887; that at the date of her marriage she had £70 at her credit on deposit-receipt with the pursuers' Fauldhouse branch; that it so remained deposited until 20th February 1888, when it was uplifted, and lodged by her on deposit-receipt in the joint names of herself and her husband in the Coatbridge branch; and that on 4th November 1889 it was uplifted and redeposited by her in the pursuers' branch at Fauldhouse. “A deposit-receipt was then taken by her in the name of the claimant and of her husband, and made payable to either or survivor. Said sum was uplifted by the claimant from the said bank on 13th October and 29th December 1890, and on 14th April, 7th August, 14th September, and 12th October 1891, and redeposited by her on each of those dates along with other moneys given to her by her husband, receipts therefor being taken by her in the names of the claimant and her husband, payable to either or survivor, the receipts being retained by the claimant. Said deposit-receipts were taken in her husband's name as well as her own *animo donandi*. . . . Said sum of £70 being part of the claimant's separate estate, and not having been immixed with her husband's estate, has not been attached by said . . . sequestration.”

She therefore claimed “to be ranked and preferred to the said sum of £70, with interest at bank deposit rates since the date of deposit.”

The claimant pleaded;—(1) The said sum of £70 being part of the claimant's separate estate, she ought to be found entitled to payment thereof, and to be ranked and preferred in terms of her claim.

Cowan's trustee claimed the whole contents of the deposit-receipts, averring that they belonged to Cowan, and were deposited by him in the bank, and formed part of his estates at the date of his sequestration.

On 31st May 1893 the Lord Ordinary (Low) sustained the claim for the trustee.

Mrs Cowan reclaimed, and argued;—The claimant desired to prove that she had £70 at the date of her marriage, that it formed part of the contents of the deposit-receipts in question, and that her husband had made a donation to her of the remaining contents. These facts being established, she was entitled to prevail under the Married Women's Property Act, 1881.* She claimed £70 only of the contents of the deposit-

* The Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), sec. 1, enacts,—“ . . . (3) Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband.

“(4) Bankruptcy.—Any money, or other estate of the wife, lent or entrusted

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receipts, because, although she averred that her husband had made a donation to her of the remaining money in the receipts, she admitted that the donation had been revoked by his sequestration. But none the less was it a good donation while it lasted, and consequently the £70 had been mixed, not with her husband's property, but with her own. Possession under a deposit-receipt in the wife's name was sufficient possession to exclude the husband.¹

Argued for the trustee;—Whatever might have been the result had the deposit-receipts been taken in the wife's name only, the destination here was fatal to the wife's claim, for the husband might have withdrawn the money from the bank at any time. It was hopeless therefore to maintain that this £70 had been kept separate from the husband's estate.²

LORD YOUNG.—I do not think that this case is attended with difficulty. My opinion coincides with that which the Lord Ordinary must have had when he pronounced this interlocutor, although we have not been favoured with any note or opinion expressive of his views.

I think that, irrespective of the Act of 1881, it is clear that the wife would have no case, so that her claim must be rested on that statute. She says that she had a sum of £70 at the time of her marriage, that during the marriage her husband gave her certain sums of money, and that she put all these sums—both the £70 and the gifts by her husband—in two deposit-receipts, one for £305 and the other for £145. She admits that any donations by her husband to herself would not interfere with the trustee in her husband's bankruptcy taking the property so gifted, and accordingly her only claim is to the £70 which she says she had at the date of the marriage. She proposes by proof to trace this £70, and to shew that it forms part of the £305 which is lodged on the one deposit-receipt and the £145 which is lodged on the other, and the question is whether such a proof is competent.

Now, undoubtedly this £70, which I will assume belonged to her at the time of her marriage, was mixed up with the other sums in the two deposit-receipts for £305 and £145. But then the statute, which alone gives any substance to the wife's claim, expressly excludes such a claim, unless the wife has kept her estate separate from and unmixed up with her husband's estate. Now, can it be said that the wife here has kept the property which she says she had at the date of the marriage unmixed up with her husband's estate, when she has put the money along with other money which admittedly passes to the husband's trustee on two deposit-receipts, which bear that the money was received from her and her husband, and to be payable to either or the survivor? The case is just the same as if she had lent £70, along with so much money of her husband's, on a bond which acknowledged that the money had been received from him and her, and took the borrower bound to repay to either spouse or

to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. . . ."

¹ Clark v. Clark, May 25, 1881, 8 R. 723, per Lord President Inglis, at p. 725; Gibson v. Hutchison, July 5, 1872, 8 Macph. 923, 44 Scot. Jur. 514; Lord Advocate v. Galloway, Feb. 8, 1884, 11 R. 541.

² Anderson v. Anderson's Trustee, March 18, 1892, 19 R. 684.

the survivor. To represent that £70 as unmixed up with her husband's property would be impossible. My opinion therefore is that the Lord Ordinary is right.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

MACKENZIE, INNES, & LOGAN, W.S.—DOVE & LOCKHART, S.S.C.—W. & J. BURNES, W.S.
—Agents.

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JAMES M'KERCHAR AND ANOTHER (M'Gregor's Executors), Pursuers
(Respondents).—*Dewar—W. L. Mackenzie.*

MRS CATHERINE FERNIE AND ANOTHER (Anderson's Trustees), Defenders
(Reclaimers).—*Shaw—Craigie.*

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Caution—Act 1695, cap. 5—Septennial Limitation—Contract—Proof—Writ.—In an action against a cautioner in a personal bond for payment of a principal sum and interest thereon, raised upwards of seven years after the principal sum became due, the pursuers averred that before the lapse of the seven years they had intimated to the cautioner that they intended to call it up, and that thereupon the cautioner "made application for indulgence, and specially requested that the loan should be allowed to lie over until the children of his son [the principal debtor] were of age. He further informed the executors [pursuers] that if this indulgence were granted he would negotiate a further loan of £500 from the bank, and advance £400 to his son in order that he might make a fresh start in business. . . . Said loan was negotiated and said advance made, and the executors granted the indulgence craved and permitted the bond to lie over." The cautioner's grandchildren were not of age at the date of the action. *Held* that the cautionary obligation had been extinguished by the operation of the Act 1695, cap. 5, and that the pursuers had not relevantly averred a new and independent contract with the cautioner under which he would still be liable for the debt.

In February 1893 James M'Kerchar and Archibald M'Gregor, executors of the late Mrs C. M'Gregor, raised an action in the Court of Session against Mrs Catherine Anderson or Fernie and another, trustees and executors of the late James Anderson senior, Blairgowrie, concluding for payment of £155, 9s. 11d., being one-half of the principal sum and interest alleged to be due to them under a personal bond for £300 and interest.

The pursuers averred;—(Cond. 2) By personal bond, dated May 1882, James Anderson junior, hotel-keeper at Ben Lawers, and his wife granted to have borrowed from the executors of the deceased Mrs Catherine M'Gregor the sum of £300 sterling, which sum they, as principals, and the deceased James Anderson senior and the pursuer Archibald M'Gregor, as cautioners, bound and obliged themselves, conjunctly and severally, to pay to Mrs M'Gregor's executors, and that on the 31st day of December 1882, with interest at the rate of five per centum per annum during the not payment of the principal sum. (Cond. 3) During the year 1888 the said executors resolved to call up said bond, and intimated this resolution to the cautioners. On receipt of this intimation the said deceased James Anderson made application for indulgence, and specially requested that the loan should be allowed to lie over until the children of his said son were of age. He further informed the executors that if this indulgence were granted, he would negotiate a further loan of £500 from the bank, and advance £400 to his said son in order that he might make a fresh

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cairney.

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start in business, and so improve his financial position. Said loan was negotiated and said advance made, and the executors granted the indulgence craved, and permitted the bond to lie over. But for the intervention and actions of the said deceased James Anderson, the executors would have called up the bond in the year 1888.

They further averred that at the date of this action the amount due to them on the bond with interest was the sum sued for. With reference to the averments in cond. 3 it was admitted at the bar that the children of James Anderson junior were not yet of age at the date of the action.

The pursuers pleaded;—(3) Delay having been granted in consequence of the intervention and actings of the deceased James Anderson, as condescended on, defenders are barred from pleading the operation of the Statute 1695, c. 5.

The defenders pleaded, *inter alia*;—(1) No relevant case. (2) The obligation of the said deceased James Anderson senior under said bond having been extinguished by the operation of the Statute 1695, c. 5, the defenders should be assoilzied.

On 17th June 1893 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that the Statute 1695, c. 5, applies to the obligation of the deceased James Anderson senior, as cautioner under the bond libelled: Before answer, and under reservation *quoad ultra* of all the pleas of parties, allows the pursuers a proof of their averments, and to the defenders a conjunct probation, and appoints the same to proceed on a day to be afterwards fixed; reserving expenses."*

* "OPINION.—This is an action by the creditors in a personal bond, dated 25th and 31st May 1882, against the representatives of a party who was bound by the bond expressly as a cautioner; and the question which has been debated is whether the cautionary obligation has been extinguished by operation of the Statute 1695, c. 5, through the lapse of seven years since the date of the bond.

"The pursuers maintained in argument (1) that the statute did not apply, because the bond covered interest as well as principal, and (2) that it did not apply to the obligation for the interest which fell due after the expiry of seven years from the date of the bond. There are no pleas in law for either contention, and I am of opinion that both are totally untenable. The pursuers quoted *Morrison v. Henderson*, March 9, 1892, 19 R. 581, in support of the second contention, but I am of opinion that it has no application. There the question was whether a cautioner, who was bound only for the interest and not for the principal due under a bond, was relieved by operation of the statute after the lapse of seven years from the date of the bond. There was much difference of opinion on the bench, but the majority in the Inner-House held that the cautioner was not relieved. The distinction between that case and the present is too obvious to require comment, and none of the reasons for the judgment apply. I do not think it necessary to say more on this point, which is not open to question, and I am therefore of opinion that the statute applies to the bond libelled. But the pursuers have pleaded (3) that the defenders are barred from pleading the statute, because of the delay granted in consequence of the intervention and actings of the cautioner. This is a plea of bar, not a plea that there has been any alteration on the conditions of the contract in the bond, or any contract other than the bond, and it raises a question of much greater difficulty. The averments on which the plea is based are contained in the third condescendence. It is there averred that, before the expiry of the seven years from the date of the bond, the creditors intimated to the cautioner their resolution to call it up; that the cautioner then 'made application for indulgence, and specially requested that the loan should be allowed to lie over until the children' of the debtor, who was his son, were of age, and he informed them that if this indulgence were granted, he would advance £400 to his son; that he made this advance;

The defenders reclaimed, and argued;—The pursuers had stated no relevant case. The only averments of which proof had been allowed were

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that the creditors granted the indulgence, and permitted the bond to lie over; and that, but for this intervention of the cautioner, the creditors would have called up the bond. The question is whether these averments are relevant, and whether, if they were proved, the defenders' plea on the statute would be excluded. It is to be regretted that these averments are not made with more exactness, distinctness, and precision. The pursuers declined to amend them. But although they are extremely defective, I think they cannot be safely treated as wholly irrelevant.

"If it be true that, when the period of seven years was drawing to a close, the creditors were induced to delay to enforce payment by the solicitations of the cautioner, it seems, *prima facie*, unjust that the cautioner should escape under cover of the statute by reason of a delay which he himself solicited, and in that case that result will not be readily reached.

"It was maintained by the defenders, with much plausibility and force, that the provisions of the statute were peremptory, and that it absolutely extinguished the obligation of the cautioner at the expiry of the seven years; that no conduct of the cautioner could prevent the application of the statute or bar him from pleading it; that his obligation under the bond ceased *vi statuti* when the seven years were completed, and that he could not be liable for the sum in the bond, except by virtue of some separate or additional contract, of which, it was maintained, there was no relevant averment. Reference was made to the somewhat remarkable case of *Carrick v. Carse*, August 5, 1778, M. 2931, where a cautioner was held entitled to repayment of a debt which he had paid in ignorance of the statute on the day after the seven years had expired; and to the cases of *Douglas, Heron, & Co. v. Riddick*, March 1, 1793, M. 11,045, and 4 Paton's Appeals, 133; *Scott v. Yuille*, November 27, 1827, 6 S. 137, February 9, 1830, 8 S. 485, affirmed 5 W. & S., 436; and *Stocks v. M'Lagan*, July 11, 1890, 17 R. 1122.

"The pursuers, if I understood them rightly, rested an argument on the assumption that they had averred a new contract or change on the original contract, and they argued that they were entitled to prove such new contract or change of contract by parole evidence. But I am of opinion that there is no averment in condescendence 3 of any new contract or alteration of contract with the cautioner, and that it is unnecessary to consider whether such an averment could be proved by parole if it had been made. There is, besides, no plea in law bearing on any such ground of defence. I read the averments in condescendence 3 as directed only to support the plea in bar. And it is to be observed that if the pursuers mean to aver that they agreed to delay the enforcement of their claim until the children of their debtor were of age, the result would be that this action would have to be dismissed as altogether premature; but I do not think there is such an averment, and there is no plea by the defenders to the effect that the action is premature. But it appears to me that there is considerable authority to support the proposition that a cautioner may be barred by his actings from pleading the benefit of the statute. Professor Bell says expressly that the obligations of the cautioner will be extended beyond the seven years when there have been 'negotiations for answering the demand of the creditor, carried on with the cautioner, so as to bar him *personal exceptione* from pleading on the Act.' In support of that proposition, he quotes the case of *Douglas, Heron & Co. v. Riddick*, which he considers to have been decided on that ground. There seems some difficulty in affirming that a party can be debarred from pleading that the law is what it has been decided to be, or what has been enacted, and there is room for the contention that the case of *Douglas, Heron & Co.* was not decided on the ground of personal bar, but on the ground of a promise to pay expressed in a correspondence.

"The case of *Carrick v. Carse* does not seem an adverse authority. It raised nothing but a question of *condictio indebiti*, and some doubt seems thrown on it by Lord Eldon in *Douglas, Heron & Co.* The cases of *Scott v. Yuille* and

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those in cond. 3, and they were irrelevant to afford a good plea in bar against the defenders taking the benefit of the Statute 1695, c. 5. Under that statute the obligation of a cautioner was absolutely extinguished at the expiry of seven years, and he could only be made liable under the bond of caution if an entirely new and separate contract was averred. There was no relevant averment of such a new contract here. The only new contract set forth *ex facie* of cond. 3 was an undertaking that the loan should be allowed to lie over till Anderson junior's children were of age, and that event had not yet occurred. If, therefore, the pursuers averred that that was the contract, then the action was premature, and ought to be dismissed. There was no averment on record that the defenders had agreed not to take advantage of the statute, and even assuming that such an undertaking was relevantly stated, and could legitimately be entered into by a cautioner, it would require to be proved by writing, and such proof was not even averred in the present case.*

Argued for the pursuers ;—The statements in cond. 3 amounted to an averment that the defenders had renounced the benefit of the Septennial Limitation Act, and the pursuers had renounced their right of recovering from the cautioner for an indefinite period. It was competent to prove the defenders' waiver by parole.¹ It was quite competent for anyone to abandon his rights under a statute, and in the cases of *Scott v. Yvulle* (4 Pat. App. 133), and *Stocks v. M'Lagan* (17 R. 1122), it was recognised that a person could do so.

LORD PRESIDENT.—The bond of caution on which this action is brought is undoubtedly prescribed, and the legal consequence of that is that no action lies on it. It is said however by the pursuers that their averments in condescendence 3 entitle them to prevail ; but these averments do not in my opinion amount to anything like the representations which the House of Lords, in the case of *Douglas, Heron & Co., v. Riddick*, 4 Paton's App. 133, held to be necessary to enable the creditor in a cautionary obligation to get over the statute. If the averments here could be read as meaning that Mr Anderson on condition of time being granted to him undertook to pay the sum due under the bond after the statutory period had expired, that would have been a sufficient answer to the plea on the statute ; but when cond. 3 is scrutinised we find in it no statement to the effect that such a transaction was entered into ; all that is said is that Mr Anderson "specially requested that the loan should be allowed to lie over until the children of his son were of age," and, further, that he "informed the executors that if this indulgence were granted he would negotiate a further loan of £500 from the bank, and advance £400 to his said son in

Stocks v. M'Lagan seem only to import that the actings there founded on did not give rise to any personal bar or import any new contract.

"Without expressing any more decided opinion at present, I have come to the conclusion that the case cannot be safely decided without inquiry into the averments made by the pursuers in their third condescendence. If the result of that inquiry shall be that it shall be held that nothing has happened which can prevent the application of the statute, then, of course, there can be no other question, and the defenders will be assoilzied ; but if it should appear that the defenders are barred from pleading the statute, then there may be other questions as to the extent of the defenders' liability, and I think that therefore a proof should be allowed in general terms before answer, and under reservation of the pleas of parties."

* The authorities cited are all quoted in the Lord Ordinary's note.

¹ *Wallace v. Campbell*, 1749, M. 11,026 ; *Kirkpatrick v. Allanshaw Coal Co.*, Dec. 17, 1880, 8 R. 327.

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order that he might make a fresh start in business, and so improve his financial position. Said loan was negotiated and said advance made, and the executors granted the indulgence craved, and permitted the bond to lie over." Now, was there, as the result of this agreement, any legal obligation on Anderson to pay after the bond had expired? That is not apparent on the averments, and the case I think accordingly falls short of what according to the decision of the House of Lords in the case I have mentioned was necessary to elide the statute.

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But further, even if the averments in cond. 3 had set out a relevant case, it could only, in my opinion, be proved by writing, and the pursuers are in the position of not having documents to sustain their contention. Accordingly on both grounds I am of opinion that the pursuers must fail.

LORD ADAM.—I concur. The pursuers seem to me to be in a dilemma, because their averment is that Mr Anderson "made application for indulgence," and requested that the loan should be allowed to lie over until the children of his son were of age, and agreed to do certain things if that indulgence were granted, and, further, that the pursuers granted the indulgence craved. I can understand that that is an averment of delay having been granted until these children came of age, but if that was the obligation on the part of the pursuer the answer is that the children are not yet of age, and therefore the action is premature, and must be dismissed on that ground. But the pursuers say that that was not the agreement, and it was said at the bar that the agreement was perfectly indefinite, and that they might have sued the debtor at any time. Now, if the indulgence granted was quite indefinite, how can it be said that there was a definite agreement on the part of the debtor not to take advantage of the Act? I agree, therefore, that the statements made with regard to the alleged agreement are altogether irrelevant, and I further agree with your Lordship in holding that such an agreement could only have been proved by writing, and that none such being produced or averred the pursuers' case fails on this ground also.

LORD M'LAREN.—I agree in thinking that there is no averment on this record relevant to entitle the pursuers to prove an independent contract on the part of the defenders not to take advantage of the Act. The pursuers, therefore, must fail in the action.

LORD KINNEAR.—I concur. It is quite settled that the original cautionary obligation became extinguished on the lapse of seven years from its date, so that the creditor could not sue on it, unless he had obtained a new and independent obligation on which to proceed. It appears to me that what the pursuers on record undertake to prove is a new and distinct obligation by the debtor, for they say that Anderson, when the executors intimated to him that they intended to call up the bond, "made application for indulgence," and requested that the loan should be allowed to lie over until the children of his son came of age, and informed the executors that if the indulgence were granted he would "negotiate a further loan of £500 from the bank, and advance £400 to his son." That is the conditional offer which they say the defenders made, and they further aver that the indulgence was granted, and that in consequence a fresh loan was negotiated and the advance made. If that averment means anything it is that the pursuers undertook to let the loan lie until these children came of age. If such a contract were well alleged and could be proved by competent evidence, it would be an entirely new contract and would be a good

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answer to a demand for payment until the children did come of age. But the pursuers cannot say that that is their case, because the children are not yet of age. Accordingly we are told that the meaning is that Anderson was to negotiate a further loan of £500 from the bank, and advance £400 to his son, but that the pursuers were to be at any time at liberty to enforce the bond, and that Anderson at the same time had agreed to abandon his right to plead the statute if they did not bring their action within seven years. The pursuers are, therefore, as Lord Adam said, in a dilemma; either there was a binding contract that this action should not be brought until the children were of age—and they are not of age yet,—or there was an indefinite arrangement which left the pursuers at liberty to sue on the bond at any time, just as if no new arrangement had been made; and that cannot possibly import a definite contract that the defenders should not take advantage of the Act.

It is not necessary to consider in this case whether it is sound to say that a cautioner cannot be barred from pleading the Septennial Limitation Act,—that is to say, that he cannot be disabled by his conduct from taking the benefits of that Act on the same grounds as would disable him from benefiting by any other legal right. But if a plea in bar is to be taken it must be averred that the person against whom the bar is pleaded has by his representations or conduct induced the other party to believe a certain state of facts to be true, and to alter his position by acting on that belief. There is nothing in this record approaching a relevant averment of that nature, and therefore I concur in thinking that the defenders must be assoilzied from the conclusions of the summons.

THE COURT recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

MENZIES, BRUCE-LOW, & THOMSON, W.S.—ROBERT STEWART, S.S.C.—Agents.

No. 4.

Oct. 19, 1893.
Eastern District Committee of Dumbartonshire County Council v. Police Commissioners of Clydebank.

EASTERN DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF DUMBERTONSHIRE AND OTHERS (Pursuers), Respondents.—*Dickson—Cook.*

POLICE COMMISSIONERS OF CLYDEBANK (Defenders), Reclaimers.—

D.-F. Sir C. Pearson—Mackintosh.

THE SECRETARY FOR SCOTLAND, Defender.

Public Health—County Council—Ultra vires—Secretary for Scotland—Special Water District—Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 81, subsec. 2.—The Local Government Act, 1889, sec. 81, subsec. 2, enacts that “where a special drainage district or special water supply district is partly within a county and partly within a burgh or police burgh,” the management and maintenance of the works shall be charged upon a subcommittee of the County Council “and such number of the town-council or police commissioners (as the case may be) of such burgh or police burgh as failing agreement the Secretary for Scotland may determine having regard to all the circumstances of the case.”

Held that a determination of the Secretary for Scotland under the above section, that a police burgh should be represented on the committee in the proportion of eight members to six members appointed by the County Council was *ultra vires*, and determination *reduced*.

1ST DIVISION.
Ld. Kyllachy.

IN 1873 the special water supply district of Duntocher and Dalmuir was formed under the Public Health Acts by decree of the Sheriff of Dumbartonshire. The district embraced the whole of the burgh of Clydebank and a part of the county of Dumbarton, which formed part of the eastern district of the county.

The Eastern District Committee of the County Council of Dumbartonshire, on 18th June 1890, appointed a subcommittee under section 81, subsection (1), of the Local Government Act 1889.* As the parties could not agree as to the number of police commissioners to be added to the subcommittee, in order to discharge the duties required under subsection 2 of the 81st section, the police commissioners of the burgh applied to the Secretary for Scotland "to determine the respective representations of the burgh and landward parts of the water district." The Secretary, on 18th February 1891, issued the following determination:—"(1) The police burgh of Clydebank shall be represented on the subcommittee charged with the management and maintenance of the water supply works within the Duntocher and Dalmuir special water supply district in the proportion of eight members being police commissioners appointed by the police burgh to six members appointed by a district committee of the County Council of Dumbartonshire."

No. 4.

Oct. 19, 1893.
Eastern District Committee of Dumbartonshire County Council v. Police Commissioners of Clydebank.

In September 1892 the Eastern District Committee of the County Council of Dumbartonshire and three ratepayers raised an action in the Court of Session against (1) Hugh Young and others, police commissioners of the police burgh of Clydebank; and (2) the Secretary for Scotland, concluding, *inter alia*, for reduction of the determination of the Secretary of Scotland, with a relative declaratory conclusion.

The pursuers pleaded, *inter alia*;—(1) The said determination being *ultra vires*, the pursuers are entitled to decree of reduction and declarator to that effect.

The defenders pleaded, *inter alia*;—(2) The said determination being within the powers conferred on the Secretary for Scotland by the Local Government (Scotland) Act, 1889, decree of reduction and declarator should be refused, with expenses.

The Lord Ordinary (Kyllachy), on 18th February 1893, pronounced this interlocutor:—"Reduces, decerns, and declares, in terms of the reductive conclusions of the summons: With regard to the first declaratory conclusion of the summons, finds, decerns, and declares, that the Secretary for Scotland has and had no power to make or issue the determination recited in the first reductive conclusion, and that he has no power to fix or determine the proportion which the members of the body or committee, charged under section 81, subsection 2, of the Local Government (Scotland) Act, 1889, with the management and maintenance of

* Sec. 81 of the Local Government (Scotland) Act, 1889, provides,—“With respect to special drainage districts or special water supply districts, the following provisions shall have effect:—(1) Where a special drainage district or special water supply district has been formed in any parish under the Public Health Acts, the district committee may, subject to regulations to be from time to time made with the consent of the County Council, appoint a subcommittee for the management and maintenance of the drainage or water supply works, and such subcommittee shall in part consist of persons, whether members of the district committee or not, who are resident within the special drainage district or special water supply district. (2) Where a special drainage district or special water supply district is partly within a county and partly within a burgh or police burgh, the subcommittee appointed under the immediately preceding subsection, and such number of the town-council or police commissioners (as the case may be) of such burgh or police burgh as failing agreement the Secretary for Scotland may determine having regard to all the circumstances of the case, shall be charged with the management and maintenance of the drainage or water supply works within such special district, and the determination of the Secretary for Scotland may provide for the regulation of the proceedings and for the allocation and payment of the expenses incurred under this subsection.”

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the water supply district, who are Police Commissioners of the burgh of Clydebank, shall bear to the number of the members of said body or committee who are appointed by the said Eastern District Committee, but that he is only entitled, in virtue of said section 81, subsection 2, of said Act, failing agreement between the said County Council and the said Commissioners, or between the said Eastern District Committee and the said Commissioners, to fix the number of commissioners of the said burgh who are to act along with the members of said body or committee (if any) appointed by the said Eastern District Committee, under section 81, subsection 1, of said Local Government Act, in managing and maintaining the water supply work of the said special water supply district, . . . and decerns.*

* "OPINION.—The leading object of this action is to set aside a certain determination of the Secretary for Scotland, under section 81 of the Local Government Act, 1891, as being disconform to and unauthorised by the statute. The determination complained of has reference to the constitution of the subcommittee, charged under section 81 of the Act with the maintenance and management of the water works within Duntocher and Dalmuir water supply district—a district formed in 1873 out of the landward parish of Old Kilpatrick, in Dumbartonshire, but now comprising within its limits the police burgh of Clydebank, formed in 1886 under the General Police Act of 1862. The complaint is, that the Secretary for Scotland, being empowered to fix the number of Police Commissioners of Clydebank who should sit with the county representatives on the subcommittee, has taken it upon himself to determine that the burgh of Clydebank 'shall be represented on the subcommittee charged with the management and maintenance of the water supply works within the Duntocher and Dalmuir special water supply district, in the proportion of eight members being police commissioners appointed by the police burgh, to six members appointed by a district committee of the County Council of Dumbartonshire.'

"It is maintained by the pursuers, who represent the county district committee, that this is not what the Act authorised. They point out that the total number of police commissioners under the Act of the burgh of Clydebank is twelve, and that, on the other hand, there is no limit to the number of the representatives whom the County Council Committee, from their side, may place on the subcommittee. Under the Act, therefore, they say the county element was secured in a preponderance. It was so, even if the Secretary for Scotland should determine that the whole twelve of the Clydebank Commissioners should be members of the subcommittee. According, however, to the determination, all this has been reversed. The burgh secures the preponderance, and does so by what is in effect a limitation of the number of representatives to be appointed by the county committee. This, it is said, is entirely unauthorised by the Act. What was intended by the Act was, not that the burgh representatives should obtain control of the subcommittee, but that they should be represented upon it; not that the Secretary for Scotland should define the composition of the subcommittee, but that he should fix the number of burgh representatives; not that he should limit the powers of the county subcommittee, but that he should say how many of the twelve Police Commissioners should sit and vote with the county representatives on the subcommittee.

"I have come, somewhat reluctantly, to the conclusion that there is no good answer to this argument. I think the Secretary for Scotland has probably overlooked the very limited character of his powers; or it may be that he has overlooked the fact that there is a maximum number of Police Commissioners, and no similar limit on the other side. In any case, it appears to me that he has gone beyond his powers. He might have determined that the whole twelve of the Police Commissioners might be appointed to the subcommittee, but he was not entitled to determine that whatever number of them were so appointed, the county district committee should appoint a number one-fourth less. In short, he was not, in my opinion, entitled to interfere with the county district committee

The defenders reclaimed, and argued;—The determination was within the powers of the Secretary. What the Act contemplated was, that in the event of disagreement, the Secretary should nominate such a number of members for the committee from the police burgh that the landward district should not have a preponderance of power. Had not some such power been given, the landward district (though it might, as in the present case, be the inferior of the burghal district in population and rateable value) would be in a position to swamp the burgh in the district committee. It was to avoid this result that the Secretary had fixed the number in the way he had done.

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Argued for the pursuers;—The determination was *ultra vires*. The procedure of the Act was that the district committee should, under certain regulations, nominate their contribution to the total number of the subcommittee, and that then the Secretary, with the list of their nominees before him, should say how many members of the Police Commissioners should sit with them. He had no power to regulate for the future the numbers which should sit on the committee for the management of water supply works, but that was what he had attempted to do here, as by naming the proportions in which the two bodies should sit on the committee he was, in effect, interfering with and regulating the number of nominations to be made by the County Council District Committee in the future, and over that the Act gave him no powers.

LORD PRESIDENT.—I am satisfied that the judgment of the Lord Ordinary is right. The question is whether the determination of the Secretary for Scotland set out in condescendence 4 was a due exercise of the statutory power conferred on him by subsection 2 of section 81 of the Local Government Act of 1889. That subsection provides for the constitution of a body to manage a special drainage or water supply district situated partly within a county and partly (to take the present case) within a police burgh. The procedure is quite plainly expressed in the statute. The initiative lies with the district committee of the County Council; they are to nominate their contribution to the subcommittee; then, failing an agreement being come to between the county and the police burgh, the Secretary for Scotland is to have power to say how many are to be added to the subcommittee by the police burgh. That is a very plain and simple procedure, but what the Secretary has done is to elaborate that procedure, and to take a step which appears to me to be distinctly outside his powers.

The Act, confiding largely in the good sense of the two bodies, has simply said that the Secretary shall, in case of disagreement, say how many representatives of the police burgh shall be on the committee. Possibly the fertility of controversy may provide emergencies where the provisions of the Act may not prove exactly fitted completely to meet, in all circumstances and in all tempers, the requirements of exaggerated and eccentric cases; but we have not to do with that. The error in the Secretary's determination here is that it assumes to constitute a code or rule for future nominations by the County Council; but the Act only contemplates that the Secretary, with the list of the nominees of

at all, and it is because he has attempted to do so that the present difficulty has occurred.

"I shall, therefore, so far find for the pursuers, giving decree in terms of the reductive conclusions of the summons, and so much of the declaratory conclusions as properly follow. . . ."

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the County Council before him, shall then determine how many more members of the police commissioners shall be on the subcommittee. I have no doubt of the soundness of the judgment of the Lord Ordinary, and his interlocutor seems to me appropriate to the occasion. With the sequel of the case under the original petition we have not in the meantime to deal; the only question we have to decide is whether the Secretary's determination can be sustained.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—DOUGLAS & MILLER, W.S.—Agents.

No. 5.

Oct. 20, 1893.
Harris v. Howie's Trustee.

MISS MAGGIE HARRIS, Petitioner.—*Clyde.*

JOHN HOWIE JUNIOR (Howie's Trustees), Respondent.—*Shaw—Graham Stewart.*

Trust—Removal of trustee—Judicial factor.—In a petition for removal of a trustee, and appointment of a judicial factor on the trust-estate, the petitioner averred that the trustee had paid out of the trust funds a claim on the trust-estate, without satisfying himself that it was properly vouched. It was not averred that in doing so he had acted in bad faith. The Court *refused* the prayer of the petition, on the ground that no malversation of office had been averred.

1ST DIVISION. BY last will and testament Thomas B. Howie, M.D., Alyth, who died in January 1884, appointed his brother, John Howie junior, builder, Alyth, his sole trustee and executor, and tutor and curator to his children.

By the second purpose of the deed he directed his trustee to apply "the interest, and part or the whole of the capital of his estate" for the support, education, and upbringing of his two daughters, Anne Crichton and Jeannie Harris Howie, in such shares and proportions, less or more, as his trustee might think proper. The daughters were aged at the date of their father's death about two and one years respectively.

In June 1893 Miss Maggie Harris, Alyth, maternal aunt of the children (who lived with her), presented a petition to the Court of Session praying for removal of John Howie junior from the offices of trustee, tutor, and curator, and for sequestration of the estate, and the appointment of a judicial factor thereon.

The petition set forth that the personal estate of the deceased Dr Howie was given up as amounting to £736, 4s. 4d., and that the children were further entitled to a sum of £1500 from the estate of their grandfather.

The petitioner then averred;—"The respondent has persistently refused to carry out the directions and purposes of the trust, and has grossly violated his duties as trustee, and as tutor and curator. In particular, he has, contrary to the terms of the trust, taken no steps to realise the late Dr Howie's estate or to invest the same as directed by the trust-deed, though repeatedly called on to do so. He has allowed a sum of £306 belonging to the trust-estate to lie in bank uninvested ever since Dr Howie's death; . . . Moreover it has been ascertained that, some time after Dr Howie's death, the said John Howie junior paid away to his father, John Howie senior, out of the funds under his charge as trustee and as tutor and curator, a sum of £175 or thereby, in discharge of a pretended claim by the said John Howie senior for expenses of aliment

and education, alleged to have been incurred on behalf of the deceased Dr Howie, his son. The said John Howie senior was taken before a Justice of the Peace, and swore to the correctness of his account which was then paid. The said pupil daughters have ever since Dr Howie's death lived with the petitioner, their maternal aunt. They are of delicate constitution, and the elder of them particularly requires much care and attention. In order to fit them for earning their livelihood by teaching or otherwise, in a manner consistent with their station, it is essential that they should receive as good an education as possible. The income hitherto received from the said John Howie junior, and expended by the petitioner on their behalf, does not exceed £57, 10s. This sum has by the exercise of the strictest economy barely sufficed to pay the expense of their maintenance and education during childhood. It is, however, impossible to continue their upbringing on so small an expenditure any longer, and it is absolutely necessary, not only that the funds belonging to them should be laid out to the best advantage, but also that advances to a certain extent should be made from the capital of their father's trust-estate, as contemplated and directed in his testament. In order to enable the said children to continue their education, the petitioner has taken a house in Montrose, that they may attend the academy there. This will of course increase the expense attending their upbringing, inasmuch as no school fees were payable at the board school in Alyth, where they had hitherto attended school. The said John Howie junior, in spite of repeated representations as to the urgency of the case, has obstinately refused either to realise and invest the said estate, or to expend any part of the capital of the trust-estate, as contemplated in the trust-deed, to assist the education and maintenance of the children. . . ."

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The respondent lodged answers, in which he admitted that "the respondent accepted the office of trustee and tutor and curator, and gave up an inventory of the personal estate, amounting to £736, 4s. 4d., and that the sum of £306 has been allowed to remain in bank on deposit-receipt, and that the sum of £175 or thereby has been paid to the said John Howie senior, the testator's father.

"In his early days Dr Howie, after being educated as pupil teacher, desired to attend college and qualify himself as a doctor of medicine. As he was possessed of no funds, and his father, who was a builder in Alyth, was comparatively a poor man, it was arranged between them that Dr Howie should keep a pass-book, in which he was to enter all the advances made by his father towards his board and college expenses. Dr Howie did so,—the advances, as shewn by the pass-book, amounting to £183, 17s. 6d. When on his deathbed, Dr Howie sent to the respondent, whom he had appointed his sole trustee and executor, exhibited to him the pass-book, and charged him to repay out of his estate to his father the amount of the advances made by him. After the said John Howie senior filed an affidavit and claim before a Justice of the Peace for the above advances, and emitted an oath as to the correctness thereof, the respondent, acting on the instructions given by the deceased, paid the same. The pass-book, affidavit, and claim are herewith produced and referred to. The balance of the estate left by the deceased, after payment of the debts, and amounting to £306, has been kept by the respondent on deposit-receipt, as he found it impossible to get an investment for it without exposing it to risk, and in view of the youth of the children and the smallness of the capital he was desirous that it should be preserved for them, and should be readily available. . . . The interest of the said sum has been regularly paid by the respondent to the petitioner for

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the maintenance and education of the said children. The said children are also entitled to the sum of £1500 from the estate of the said Mr Harris, of Aberbothrie. . . . The trustees of Mr and Mrs Harris have paid the interest on this sum direct to the petitioner and on her own receipt, in order that she might apply the same for the children's maintenance and education. . . . As the respondent considered that the income of the funds belonging to the children was amply sufficient to keep and educate them in a proper manner, he has refused to comply with the persistently expressed desire of the petitioner for payment to her of part of the capital. . . ."

Argued for the petitioner;—The acts alleged by her amounted to a breach of trust on the part of the trustee, particularly the payment of the debt to the truster's father. That debt was not sufficiently vouched,¹ and by payment of it relatively a large portion of the trust-estate was lost. Moral delinquency was not necessary to entitle the Court to remove a trustee; anything done in breach of trust was sufficient.²

Argued for the respondent;—The petition did not set forth a sufficient cause for removal. It might be that when the children came of age they might be able to recover from him the sum of £175 as having been improperly paid away, but the question in these cases always came to be, had there been "decided malversation"? Here there was nothing of the kind averred, and the case was directly ruled by the case of *Gilchrist's Trustees*.³

LORD PRESIDENT.—This petition contains a number of statements as to the administration of the trust by the respondent, but the attention of the Court was from the first concentrated on one act which is specially challenged. I refer to the payment of a sum of £175 made by the trustee in satisfaction of a debt due by the truster to his father. It is important to observe that while the administration of the trust funds has resulted in a small sum being available for the children's maintenance the petitioner does not set out any relevant case for blaming the trustee for refusing to advance a part of their capital for that purpose. Up to this time the children have been receiving yearly a sum of about £57, made up of the interest of £306 belonging to the trust-estate, and of £1500 to which they are otherwise entitled, and considering their youth and condition I cannot doubt that the trustee was entitled to refuse to diminish their capital by advancing any part of it when asked to do so. There is no allegation that the money is in any danger in the hands of the trustee, and there is nothing about his circumstances or condition to suggest any such danger. The only question, then, is whether the trustee's action in paying the debt I have mentioned was such as to warrant us now in suspending him and appointing a judicial factor. Now, the petitioner does not aver that that payment was fraudulently made,—that the trustee was a party along with his father to a fraudulent scheme. The importance of such a statement if it had been made would manifestly be such that the fact that it is not made entitles us to treat the case as one where no fraud can even be suspected. The question merely is whether the lax or possibly too easy satisfaction of a claim on the trust-estate is sufficient to entitle us to grant the prayer of the petition. Certainly, such a payment does not raise a case of decided malversation, for in the case of

¹ *Wink v. Speirs*, March 23, 1868, 6 Macph. 657, 40 Scot. Jur. 340.

² *M'Whirter v. Latta*, Nov. 15, 1889, 17 R. 68.

³ *Gilchrist's Trustees v. Dick*, Oct. 20, 1883, 11 R. 22, Lord President, at p. 24.

Gilchrist (11 R. 22) the Lord President, after saying that the trustees had made an illegal use of the trust funds, but that it was clear that they acted in good faith, goes on to say,—“The remedy suggested is that the trustees should be removed, and a judicial factor appointed; but in order to justify us in adopting so extreme a measure as the removal of a trustee, there must be something more than mere irregularity or illegality. We are not in the habit of removing trustees unless there has been a decided malversation of office, and there is nothing of that kind here.” Applying that rule here I am of opinion that there is no case of decided malversation averred in this petition. The petitioner’s case simply is, that the claim on the trust-estate which the trustee paid was not sufficiently vouched, and that a part of the trust-estate was lost owing to his not taking care to see that it was. Such a case does not entitle us to remove the trustee.

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The alternative is, that we should sequester the estate and appoint a judicial factor. That is a question we must determine on a consideration of the interests of the estate. If we adopt that course, an action would have immediately to be raised with a view to recovering the money. Now, I do not think we should be acting for the benefit of the estate if we were to pledge the remainder of the children’s money with a view to recover this £175. In saying that I am moved largely by the fact that we are not by refusing to take that course in any way prejudicing the question whether, when these children come of age, they may not, if so advised, try to get the money back; we, in short, say nothing as to the propriety or otherwise of the payment in question. I think, therefore, that we should refuse both branches of the prayer of the petition.

LORD ADAM, LORD M’LAREN, and LORD KINNEAR concurred.

THE COURT refused the petition.

JAMES AYTON, S.S.C.—CURROR, COWFER, & CURROR, W.S.—Agents.

JAMES CUNNINGHAM, Pursuer (Appellant).—*Sym—Gunn.*
THE AYRSHIRE FOUNDRY COMPANY, LIMITED, Defenders (Respondents).—*W. Campbell.*

No. 6.

Oct. 21, 1893.
Cunningham
v. Ayrshire
Foundry Co.,
Limited.

Process—Appeal—Proof or jury trial—Reparation—Master and servant—Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 40.—A steelmelter, who had been dismissed from his employment, brought an action in a Sheriff Court against his employers for £220, as the balance of the wages due to him on a yearly engagement, and £30 as the equivalent of a free house, alleging that he had been engaged at £5 a-week for a year, with a free house, and that he had been unjustifiably dismissed after eight weeks’ service. The defenders averred that the engagement was a weekly one, and that the dismissal was justifiable. The pursuer having appealed for jury trial, the defenders moved that the case should be sent back to the Sheriff Court for a proof. The Court (*dub.* the Lord Justice-Clerk) *remitted* the case to the Sheriff Court for a proof.

In April 1893 James Cunningham, steelmelter in Glasgow, brought an action in the Sheriff Court at Kilmarnock against the Ayrshire Foundry Company, Limited, Stevenston, Ayrshire, for £220 and £30, being respectively the balance of salary due to him by the defenders upon an alleged engagement for a year, and the equivalent of a free house.

The pursuer averred that he had been in the defenders’ service at a salary of £4, 10s. a-week, and had left their service on 22d November,

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on receiving an offer of a situation at £5 a-week in Glasgow, where his wife and family lived; that on that day, when on his way to Glasgow, he at Stevenston Station met Mr Cleminson, the defender's director general and over manager, who, after some conversation "on defenders' behalf, requested pursuer to return to their employment, and offered in that event to give him a year's fixed engagement, with a salary of £5 per week of six shifts upstanding, *i.e.*, whether there was work for him or not. Mr Cleminson, at the same time, on defenders' behalf, also offered to pay the rent for twelve months of a house at Stevenston, suitable for pursuer and his family, and likewise the expense of the removal of pursuer and his family, with their furniture, from Glasgow to Stevenston"; that the pursuer accepted this offer, and re-entered the defenders' employment, in which he remained until 10th January 1893, when they wrongously and in breach of their agreement dismissed him without compensation.

In answer the defenders averred that the engagement was a weekly engagement only, and that the pursuer had been justifiably dismissed for gross carelessness in the management of their furnaces.

The Sheriff-substitute (Hall) having allowed a proof, the pursuer appealed for jury trial, and proposed an issue. The defenders also proposed counter issues.

On the motion for the approval of issues, the defenders objected to the case being sent to a jury, and moved that it should be remitted to the Sheriff Court for a proof.

Argued for the defenders;—This was not a case suited for jury trial. It was not a case of the assessment of damages, but was simply a question as to the nature of the pursuer's engagement, and as to whether he had been justifiably dismissed.

Argued for the pursuer;—The rule was that a case, which had come up for jury trial under the 40th section of the Judicature Act, would be sent to a jury or not, according as it would have been sent to a jury or to proof had it originated in the Court of Session.¹ The present case, being an action of damages for breach of contract, was *prima facie* fitted for jury trial,² and there was nothing exceptional in the case. The action was for a substantial sum, and raised issues of fact which a jury could well determine.

LORD YOUNG.—It was formerly an important question whether in appeals from the Sheriff Court under this section with a view to jury trial, the Court has a discretion to refuse to send the individual case to a jury, and may send it back to the Sheriff for a proof if that is thought to be the proper course. That, I think, was an important question. But it has now been settled, by decisions in both divisions of the Court, that the Court has such a discretion, and is bound to exercise it in each particular case. In England, if my memory serves me aright, this matter is expressly provided for by statute. A right is there given by statute of removing a case begun in the County Court to the High Court of Justice, but a discretion is also given to the High Court of Justice to refuse to entertain the particular case if they think it more fitted to be tried in the County Court. Therefore the discretion which we think we have upon a construction of our statute is expedient in itself, and is in accordance with the practice of our brethren in England, although that practice stands upon a special enactment.

We have usually exercised our discretion by sending the case to a jury, but

¹ Crabb v. Fraser, March 8, 1892, 19 R. 580.

² Groom v. Clark, May 18, 1859, 21 D. 831, 31 Scot. Jur. 463.

there have been several instances in which we have used this discretion exceptionally, and have remitted the case to the Sheriff Court, being of opinion that the particular case was well fitted for trial by the Sheriff, and was not well fitted for jury trial. In my opinion we should properly exercise our discretion here by sending the case back to the Sheriff Court for proof. I think that it is not a case that is fitted for jury trial. If we should adopt the other view, then I think that it is plain enough that every butler or housemaid who thinks that he or she has been wrongously dismissed may bring an action of damages in the Sheriff Court and then have the case brought here for jury trial, the question in each case being whether the pursuer had or had not done his or her duty. I do not think that such a mode of trial is expedient in cases of this description. It is said that the sum here sued for is a large one, but I do not think that the case is made exceptional because the pursuer had £5 a-week. It is a larger sum than usual, but that is not sufficient, in my opinion, to make the case different from what it would have been had the sum been smaller. The only questions to be tried are these:—What passed between the parties when the pursuer was engaged? and did the pursuer perform his work in such a manner as to entitle his master to dismiss him? That being so, I think that we should send the case back to the Sheriff Court.

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LORD TRAYNER.—It having been now determined, contrary I admit to what was my opinion, that the Court has a discretion whether to send a case to jury trial or to refuse to do so, I cannot doubt that this is a case which we should refuse to send to a jury. This is not properly an action to assess damages at all, it is really a question of resting owing, as I pointed out during the discussion. The pursuer says he was engaged for a certain time at a certain wage, that his services have been dispensed with, but that his wages are due. The answer is that he was not engaged for that time, and that the wages claimed are not due. That is simply a question whether any money is due the pursuer. In reading this case I do not see what is the question in it appropriate for a jury trial; in fact I see no question that would not be more appropriately tried by the Sheriff.

LORD JUSTICE-CLERK.—I concur in holding that we have the discretion to send this case to jury trial or to proof before the Sheriff. My only doubt is whether we should exercise that discretion by sending this case back to the Sheriff. There may be a very considerable sum found due in certain supposable circumstances, amounting to more than £200, and I have doubts whether such a case should be withheld from a jury, but as your Lordships have a clear view that the case ought to be sent back to the Sheriff I do not dissent.

LORD RUTHERFURD CLARK was absent.

THE COURT remitted the cause to the Sheriff for proof.

ROBERT STEWART, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

JAMES BASIL CRELLIN (Crellin's Trustee), Pursuer (Respondent).—
C. K. Mackenzie—Peggie.

No. 7.

Oct. 21, 1893.
Crellin's Trustee
v. Muirhead's Judicial
Factor.

JOHN LATTA (Muirhead's Judicial Factor), Defender (Reclaimer).—
Wallace.

Process—Reclaiming note—Competency—Expenses—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 53.—In an action for payment of legitim the Lord Ordinary on 22d June pronounced an interlocutor, which decerned

No. 7. against the defender for a certain sum in name of legitim, and found the pursuer entitled to expenses, "reserving till after taxation the question whether any, and if so what, modification should be allowed in respect of the ascertainment of the amount of the legitim fund; allows an account," &c. No reclaiming note was presented against this interlocutor. On 14th July the Lord Ordinary pronounced this interlocutor:—"Approves of the Auditor's report on the pursuer's account of expenses, and having heard counsel on the question of modification, modifies the same to the extent of . . . Decerns against the defender for payment to the pursuer" of the balance of the taxed amount.

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The defender having presented a reclaiming note against this interlocutor within twenty-one days, and the pursuer having objected to the competency of the reclaiming note, on the ground that the interlocutor of 22d June was the final interlocutor in the cause, and that of 14th July merely executorial, *held* by the Second Division, after consultation with the Judges of the First Division, that the reclaiming note was competent, and that it brought up all previous interlocutors.

2D DIVISION. (ANTE, Nov. 16, 1892, 20 R. 51.)
Ld. Wellwood.

In this case, which was an action for payment of legitim by James B. Crellin, Mrs Crellin's testamentary trustee, against the judicial factor on the estate of Charles Muirhead, her father, the Lord Ordinary (Wellwood), on 22d June 1893, pronounced this interlocutor:—"Decerns and ordains the defender to make payment to the pursuer of" a certain sum in name of legitim: "Finds the pursuer entitled to expenses, reserving till after taxation the question whether any, and if so what, modification should be allowed in respect of the ascertainment of the amount of the legitim fund: Allows an account to be lodged, and remits the same to the Auditor to tax and report."

No reclaiming note was presented against this interlocutor.

The Auditor having reported, the Lord Ordinary, on 14th July 1893, pronounced this interlocutor:—"Approves of the Auditor's report on the pursuer's account of expenses, and having heard counsel on the question of modification, modifies the same to the extent of £14, 5s.: Decerns against the defender for payment to the pursuer of the sum of £166, 6s. 2d. sterling, being the balance of the taxed amount of said account."

The defender reclaimed against this interlocutor.

The pursuer objected to the competency of the reclaiming note, and argued;—The interlocutor of 22d June was a final judgment in the sense of the 53d section of the Court of Session Act, 1868,* and if the defender intended to reclaim on the merits, he ought to have reclaimed against that interlocutor within twenty-one days of its date. That was the necessary result of the case of *Stirling-Maxwell*,¹ for there could not be two final

* The Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 53, enacts,—“It shall be held that the whole cause has been decided in the Outer-House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for; and for the purpose of determining the competency of appeals to the Court of Session, this provision shall be applicable to the causes in the Sheriff and other inferior Courts, the name of the Sheriff or other inferior Judge or Court being read instead of the words ‘the Lord Ordinary,’ and the name of the Sheriff Court or other inferior Court being read instead of the words ‘Outer-House.’”

¹ *Stirling-Maxwell's Trustees v. Kirkintilloch Police Commissioners*, Oct. 16, 1883, 11 R. 1; *Tennents v. Romanes*, June 22, 1881, 8 R. 824; *Thomson &*

judgments in one cause. At the utmost, all that could be raised under the present reclaiming note was the question of the modification of expenses; but even that was incompetent, for the Act expressly said that it should not prevent a cause from being held to be finally decided "that expenses if found due have not been taxed, modified, or decerned for." The interlocutor of 14th July was merely executorial, and could not be reclaimed against.

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Argued for the defender;—The reclaiming note was competent. The case fell within the exception which the Lord President reserved in *Stirling-Maxwell*,¹ viz., where there still remained a substantial matter of dispute regarding expenses. A decree for expenses, after the determination of that dispute, could not be said to be merely executorial of the prior interlocutor, for it involved an exercise of discretion and judgment by the Lord Ordinary. If, then, the interlocutor was reclaimable it was a twenty-one days' interlocutor, and it brought up all prior interlocutors. There was no other category of interlocutors into which it could be placed. The case was ruled by *Baird v. Barton*.²

At advising,—

LORD JUSTICE-CLERK.—In this case we have had an opportunity of consulting with our brethren of the other Division. We are of opinion that, without trenching upon the judgment in the case of *Stirling-Maxwell*, the Judge in the Outer-House having applied his mind to a question which had not been previously considered, viz., the modification of expenses, the reclaiming note is competent, and must go to the roll.

LORD YOUNG.—Our decision is put entirely upon the ground of the question of modification, but it must be understood that this reclaiming note brings up all previous interlocutors.

LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

THE cause was sent to the Roll.

GEO. M. WOOD, S.S.C.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

ROBERT BLAIR, Pursuer.—*Salvesen*.

CALEDONIAN RAILWAY COMPANY, Defenders.—*C. J. Guthrie*.

No. 8.

Oct. 26, 1893.
Blair v. Caledonian Rail-
way Co.

Expenses—Fees to counsel—Jury trial.—A jury trial for damages for personal injury lasted for part of a day at the sittings. In taxing the successful party's account of expenses, the Auditor reduced the fee of senior counsel from twenty guineas to thirteen, and that of junior counsel from fifteen guineas to eight. The successful party objected to the reduction, maintaining that it had been fixed by decisions of the Court that twenty guineas and fifteen guineas respectively were the proper fees to be allowed against the losing party in all ordinary jury trials which did not extend beyond a single day, and that this rule ought to be applied in the present case, the Auditor not having reported that there was anything exceptional in the case. The Court refused to interfere with the discretion of the Auditor.

Co. v. King, Jan. 19, 1883, 10 R. 469; Cowper v. Callendar, Jan. 19, 1872, 10 Macph. 353, 44 Scot. Jur. 212; Cruickshank v. Smart, Feb. 1870, 8 Macph. 512, 42 Scot. Jur. 241.

¹ *Stirling-Maxwell*, *supra*, p. 22.

² *Baird v. Barton*, June 22, 1882, 9 R. 970.

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2D DIVISION.

Observed that there is no general rule which requires the Auditor to allow fees of a particular amount in all ordinary jury trials.

THIS case, which was an action of damages for personal injury at the instance of Robert Blair, porter, Grangemouth, against the Caledonian Railway Company, was tried before the Lord Justice-Clerk and a jury at the Summer Sittings 1893. The case lasted for about four hours on the afternoon of 25th July. The jury returned a verdict for the pursuer and assessed the damages at £100. The pursuer was found entitled to expenses. In taxing the pursuer's account of expenses, the Auditor reduced the fees of senior and junior counsel from twenty and fifteen guineas respectively to thirteen and eight guineas. The pursuer lodged a note of objections to the Auditor's report, in which he, *inter alia*, objected to this reduction.

Argued for the pursuer;—This objection raised a question of principle, and not one of mere taxation, for it had been fixed by a series of decisions that the fees charged in the pursuer's account were the proper fees, as in a question with the losing party in all ordinary jury trials which did not extend beyond a single day.¹ It was the duty of the Auditor, therefore, if he thought that this settled rule did not apply to the present case, to have stated the grounds of his opinion in a note to his report. As it was, he had simply arbitrarily taxed off so much without saying whether he did so because he thought the case an exception to the rule, or because he thought that the rule had no existence. On the latter alternative he was clearly wrong, and he had no discretion to disregard the settled rules of Court. In point of fact there was nothing exceptional in this case. It was true that the trial only lasted for about four hours, but it took place at the sittings when counsel were not understood to be in Court except for the trials for which they were retained, and this trial might have come on at any time during the day.

The defenders argued that the question was for the Auditor's discretion, with which the Court would not lightly interfere.

LORD JUSTICE-CLERK.—The Auditor is an officer of Court who necessarily has before him all the decisions of the Court on questions of expenses, and having these decisions before him, he considers whether, in the particular case, the particular fee which is charged ought to be allowed. I should have been surprised if, in any decision, it was laid down that the Auditor must allow a particular fee in any particular class of cases, because I think that it is the duty of the Auditor, in each case, to consider the whole circumstances of the case. This case lasted for about four hours, and the Auditor, no doubt considering that circumstance and all the other circumstances of the case, thought that the fees charged were too high, and in consequence he felt himself justified in cutting them down to a certain extent. For myself, unless in very strong and exceptional circumstances, I should not be inclined to interfere with the Auditor's discretion as to the amount of the fee to be allowed in any particular case, and I can find no such exceptional circumstances here.

LORD YOUNG.—I must admit that I am surprised at this objection. Since I have sat in this Division we have always, as far as I am aware, refused to interfere with the judgment of the Auditor in such a matter as the present, and we

¹ Cooper and Wood v. North British Railway Company, Dec. 10, 1863, 2 Macph. 346, 36 Scot. Jur. 169; Campbell v. Ord & Maddison, Nov. 5, 1873, 1 R. 149; Black v. Mason, March 18, 1881, 8 R. 666.

have hinted pretty emphatically that we never would interfere—not because we had no power to do so, but on the ground that under no ordinary circumstances would we interfere with the Auditor's discretion in such a matter. It may be possible to imagine a case in which we would interfere, but it would, I think, be only a fancy case. It is obvious—most of us know it from experience—that the fees sent to counsel must vary in different cases and for different reasons. But we have now the good fortune to have as Auditor the most experienced man alive in these questions—a gentleman whose sound judgment and good sense we all know, and he knows, or has brought under his notice, all the decisions bearing on the subject. It would require a very exceptional case—one, indeed, that for myself I can hardly figure—to induce me to interfere with his judgment in regard to the proper fees to be allowed in a particular case. Here no ground at all has been stated for our interference except it be this, that either the Court ought to lay down a general rule, or table of fees, for the guidance of the Auditor in all cases, or else that we ought to revise his decision in every case. I do not think that it would be expedient to lay down a general rule which should be binding on the Auditor in every case, and I think that reconsidering the judgment of the Auditor in each particular case is not a kind of work for which this Court is fitted. I am clear that these objections should be repelled.

LORD RUTHERFURD CLARK.—I think that we ought not to interfere with the discretion of the Auditor in this case.

LORD TRAYNER was absent.

THE COURT repelled the objections, and approved of the Auditor's report.

W. B. RAINNIE, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

BENJAMIN WRIGHT, Pursuer (Appellant).—*Strachan—McClure*.
HOWARD, BAKER, & COMPANY, Defenders (Respondents).—*Ure—Salvesen*.

No. 9.

Contract—Notice—Reparation—Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42)—Insurance.—In defence to an action by a workman against his employers for damages for personal injury, at common law and under the Employers Liability Act, 1880, the defenders proved that they had posted at various places in their works, including the pay-box, notices to the effect that from the weekly wages paid to the workmen certain sums would be deducted, to secure certain insurance benefits in case of accident, and that any workman accepting such benefits would be held to have discharged all claims against his employers. It was further proved that the notice was well known to the defenders' workmen generally, and that the pursuer had taken benefit of the insurance.

The Court *assolized* the defenders, holding (1) that the conditions founded on were lawful conditions of the contract of employment; and (2) that on the evidence the pursuer must be held to have known of and assented to the conditions.

In February 1893 Benjamin Wright, labourer, Kirkcaldy, raised an action against Howard, Baker, & Co., contractors, for damages, at common law and under the Employers Liability Act, 1880, on account of injuries sustained by him while in the employment of the defenders in the construction of a railway between Kirkcaldy and Cowdenbeath.

Besides answers on the merits, Howard, Baker, & Company stated:—(Stat. 1) "The pursuer entered the employment of the defenders under

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certain conditions, which are specified in the notice or bill herewith produced,* which notice or bill is posted at the various parts of the defender's works. The pursuer was fully aware of the terms and conditions of this bill or notice. *Quoad ultra*, pursuer's statement in answer is denied." The defenders further averred that the pursuer had taken the benefit of the insurance fund referred to in the notice.

In answer, the pursuer averred;—(Ans. 1) "The said notice or bill is referred to for its terms. Denied that pursuer entered the employment of the defenders under the conditions herein stated. The pursuer's attention was never drawn to these conditions, and he was quite ignorant of their existence; all that he knew was that a small deduction was made from his wages for a sickness fund."

The defenders pleaded, *inter alia*;—(1) The pursuer, having accepted the insurance money, is debarred from raising any action, either at common law or under the Employers Liability Act, 1880; this action is therefore irrelevant, and should be dismissed, and with expenses.

The defenders were allowed a proof of their averments above quoted, and the pursuer a conjunct probation (there being conjoined with the present an action at the instance of another workman named M'Kenna raising the same question, which was not taken to appeal). It appeared from the evidence that 1½d. per week was deducted from the pursuer's wages and placed in the accident fund, and that after the accident he received under the insurance scheme payments at the rate of 6s. a-week, and amounting in all to £5, 17s. His father received this money for him.†

* "Notice to Workmen.—Accident Insurance.—We have effected an accident insurance for the benefit of workmen in our employment. The scale of contributions therefor is as follows, viz.:—Where the wages do not exceed 20s. per week, 1½d. per week. Where the wages are above 20s. and do not exceed 30s. per week, 2d. per week. Where the wages are above 30s. per week, 2½d. per week.

"Contributions at these rates will, for the convenience of contributors, be deducted from their wages at the weekly or fortnightly pays. The following are the benefits to be derived from the insurance:—(1) If any workman in our employment, paying the above contributions, shall sustain personal injury caused by accidental external and visible means, while engaged in our work, and the direct effect of such injury shall occasion his death within three months after he has sustained such injury, the legal representatives of such workmen shall (providing no claim is made under the 'Employers Liability Act, 1880,' or at common law) be entitled to receive one year's wages, with a limit of £60, which sum shall be in full satisfaction of all claims in respect of such injury. (2) If the injury so sustained be not fatal, compensation shall (providing no claim be made, as aforesaid, under the 'Employers Liability Act, 1880,' or at common law) be paid to such workman at the rate per week of one-third of the week's wage being earned by him at the date of disablement, so long as he remains totally and absolutely incapacitated from attending to work of any kind in consequence of such injury; but the period during which such compensation is payable shall not exceed twenty-six consecutive weeks for any single accident.

"*Note*.—The above benefits are payable only when the workman has no claim against the employer, either at common law, or under the Act of 1880, and his acceptance of the benefits hereby provided for shall be equivalent to a discharge of these and any other claims against the employer. The workman has no direct claim against the insurance company.

"No claim for compensation or aliment will be recognised unless these rules are strictly complied with.

"14th February 1890.

HOWARD & Co.,
Seafield Dock and Railway Works."

† Alexander Clark, civil engineer and manager to the defenders, deposed,—"When men are engaged, the conditions of employment are not mentioned.

On 8th April 1893 the Sheriff (Gillespie) pronounced this interlocutor:—"Finds in fact that the defenders effected an insurance against

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They merely ask for a job and get one. The conditions of public works are always mentioned in regulations set forth in handbills and posters. We do not bring any conditions under the notice of the workmen. We leave them to find them out for themselves. The reason is you cannot bring every man that you engage and discuss with him the various conditions of the employment. I may explain how the men are engaged. They are not engaged by us personally, but the gaffer in the particular gang engages the men that he requires. Even the wages are seldom mentioned at the time of the engagement. At the commencement of this undertaking, the defenders effected an accident insurance policy with the General Accident Assurance Corporation, Limited. The premium is paid partly by the defenders, and partly by the workmen. It is a mutual insurance. . . . Any sums recovered from the Insurance Company are handed to the workmen, so that the defenders are not interested in the settlement made with the workmen. When the policy was taken out, the insurance company sent us a number of bills. . . . They were posted up at different places all over the works. We presently have one at the pay-office at Inveriel, . . . I understand there are some contractors who don't insure against accidents in this way. In consequence of this the workmen, when they come to a particular work, make a point of ascertaining the conditions of that work. They are always very particular about that. They are also particular about seeing that they are correctly paid. A man would very soon detect if there was a deduction taken off that he did not know of. If there was anything taken off his wages, the workmen would make a point of knowing why it was taken off. He would ascertain the cause of the deduction, and this would lead him to know about the bills if he did not know about them before."

M'Kinlay, the defender's cashier, in substance corroborated this evidence.

Hector M'Donald, a foreman with the defenders, gave this evidence:—"The men who work at a particular section are paid at the same office. They are all paid at the same time . . . Many is the time that we have been kept waiting for our pay, in consequence of Mr M'Kinlay not being forward. (Q.) What did you do when you were kept waiting? (A.) I always got into argument about this insurance money. That was a common thing to put off the time, not only for me, but for other men. We used just to talk through one another. (Q.) Does that mean, that whatever subject was discussed, was discussed by the whole lot of you? (A.) Yes. We have often had discussions about the insurance money. (Shewn No. 6 of process)—I have seen bills like that ever since I started in the work. I have seen them at Seafeld Docks, and I have seen them along the works at the pay-box. Sometimes in the course of the discussions we had to refer to the bill to see who was right. In that case a man would often read out a piece of a bill. I know that the pursuers belonged to the same section as myself, and they were bound to be at the pay-box at the same time. (Q.) If these discussions were going on at the pay-box, is it possible that they could not have heard them? (A.) They should have heard them. I cannot say whether I heard the pursuers themselves taking part in these discussions."

Others of the defenders' workmen gave similar evidence.

The pursuer, as a witness for himself, deponed,—“I asked M'Kinlay about my wages at the first pay. He told me 3s. 8d. a-day, and a penny off. He did not tell me what the penny off was for. I had no idea myself what this penny was for. I was just like the rest of the men. I understood it was a sick or an accident fund, and that I would get medical attendance in the case of sickness or accident. I knew also the amount that I was to receive—an allowance of a third of my pay. I was never given to understand how long this third of my pay would continue. I never saw the bill No. 6 of process before. I first saw it in the hands of my agent. I never saw that bill posted about the works. If it had been there I would have seen it. My attention was never drawn to that bill. I was always paid my wages on the line. M'Kinlay paid me. He came to me with the money. . . . I have heard what the witnesses said about

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accidents for their workmen, the premium being paid partly by sums deducted from the workmen's wages, and partly by a contribution from the defenders themselves; that printed posters, headed in large type 'Notice to Workmen: Accident Insurance,' were posted on the pay-box and other conspicuous places about the works, one of the benefits set forth in the notice being a weekly allowance payable to a workman injured in the work; that acceptance by a workman of the benefits thereby provided was declared to be equivalent to a discharge of his claims against the employers, either at common law or under the Employers Liability Act; that the contents of the notice were well known to the men employed by the defenders, and the subject of frequent discussion; that on 26th September the pursuers were injured by an accident while in the defenders' employment; that the pursuers, in the knowledge of the conditions of the insurance scheme above mentioned, accepted the weekly allowance under it, and received sums amounting, in the case of Wright, to £5, 17s., and in the case of M'Kenna to £6: Finds in law that they thereby discharged the claims sued for; assoilzies the defenders, and decerns: Finds them entitled to expenses."

The pursuer Wright appealed.

The arguments sufficiently appear from the opinions of the Court.¹

LORD JUSTICE-CLERK.—It has already been settled by decision, and there is now no dispute about the matter, that when employers and employed agree to do so they are entitled to contract themselves out of the operation of the Employers Liability Act. Therefore the question here is whether upon the proof the pursuer and the defenders had so contracted, that the pursuer could not accept payments of money from the defenders under the insurance arrangements, and at the same time keep up his claim against them either under the Act or at common law. The case presented to us on behalf of the defenders is that they entered into an accident insurance arrangement with an insurance company; that in order to meet the premium upon this insurance they themselves contributed so much, and also deducted so much from the pay of the workmen employed by them; and that in respect of these deductions the workmen became entitled to certain allowances in the event of their meeting with accident in the employment. The defenders say that they put up at different parts of their works bills containing a sufficient notice of the conditions of this arrangement, and undoubtedly the bill before the Court, if put up in the works in a fairly prominent position, was sufficient notice. It sets forth very clearly, and in my opinion quite unambiguously, the whole terms of the contract. It brings into strong relief, in a manner capable of being understood by an ordinary workman on the one hand the benefits to be derived by the workman from this insurance scheme, and on the other hand the conditions that no claim

the discussions going on at the pays. I have been present at discussions going on at the pays. The nature of these discussions was, that the men understood that it was their own money that they were getting back,—that it was a sick and accident fund. . . . Sometimes I got my pay at the pay-box. I have seen the witnesses for the pursuer there. I have seen them all. During the discussions that I have spoken of I never saw any of the men reading out of the bill. There was no bill at all posted up on the pay-box that I saw. If it had been there I would have seen it, and I could have read it too."

Other workmen in the employment of the defenders deposed that they never saw the bills in question posted up at the works.

¹ *Defender's Authority*.—Griffiths v. Earl of Dudley, 1882, L. R., 9 Q. B. Div. 257.

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for compensation would be recognised unless the rules were complied with, and that acceptance of the benefits by the workman discharged any claim which he might have against the employer either under the Act or at common law. The Sheriff-substitute holds, and I agree with him, that it is proved that these notices were sufficiently posted. The only evidence to the contrary is the evidence of people who say that they did not see them. I have the gravest doubt about the truth of that evidence. It is quite probable that many of the workmen did not read the notice, knowing that such conditions existed. But that these bills were posted in such a manner as to constitute a sufficient notice, I have no doubt. That being so, and deductions having been made from the pursuer's pay in conformity with the notice, I think it must be taken that he knew the terms of the contract. If then that is so, I can see no ground for interfering with the judgment of the Sheriff-substitute. By receiving the allowances after the accident the pursuer completed the contract by accepting the benefits of the insurance scheme. No doubt it was the pursuer's father who received the payments from the defenders' cashier and granted the receipts, but it cannot be disputed that the defender got the money, and that he knew that the payments were made out of the accident fund. In these circumstances, I am of opinion that the pursuer has come under the condition of the notice, which excludes him from making any claim against his employers either at common law or under the Act. I move your Lordships, therefore, to adhere to the judgment of the Sheriff-substitute, and the only alteration I have to suggest on his interlocutor is to add to the finding "that the contents of the notice were well known to the men employed by the defenders," the words "including the pursuer."

LORD YOUNG.—I only desire to add a word or two in order that my judgment may be put distinctly on what I conceive to be the right ground. The pursuer here was in the service of the defenders for eleven months prior to the accident, and it is not disputed that during that period he was insured against accidents when engaged in the defenders' work. That must be taken as certain, because every week during these eleven months 1½d. per week was deducted from his pay as a premium of insurance, and after he met with the accident he drew compensation under the insurance at the rate of six shillings a-week for four months. There is no dispute in regard to either of these facts. Now, anyone who is insured against accident must be insured under a contract, because there is no insurance in this country except insurance by contract. What then was the contract under which the pursuer was insured? He says that he does not know—that he knows nothing at all about it. I am not disposed to take that answer off his hands. The defenders, on the other hand, say that there was a contract under which the pursuer and all the other workmen employed at these works were insured, and that bills setting forth the terms of this contract were posted up in conspicuous places in the works under the headings "Notice to Workmen—Accident Insurance." By these notices it was provided that certain deductions should be made from the workmen's wages, in return for which, in the event of a workman's death while engaged in the work, his representatives are to receive a certain sum in full satisfaction of all claims, and in the event of the injury not proving fatal, the workman himself is to receive a certain sum weekly. The notice then bears distinctly that "the above benefits are payable only when the workman has no claim against the employer, either at common law or under the Act of 1880, and his acceptance of the benefits hereby pro-

No. 9. vided for shall be equivalent to a discharge of these and any other claims against the employer." That is quite intelligible, and it is the contract upon which the defenders found in answer to the pursuer, who says that he has not a conception of the contract under which he paid the premiums and received the compensation. Now, I think with the Sheriff-substitute that these notices were posted up as the defenders say they were, and that the contract which the notices set forth was known to the pursuer, and was the contract under which he paid the premiums and received the compensation. Accordingly, I think that he must be bound by its terms, and must be held to have discharged all claims which he might otherwise have had against the defenders, either at common law or under the Employers Liability Act. I have only to add that if I had entertained any doubt on this question of fact, I would not have been for altering the judgment of the Sheriff-substitute, proceeding on the rule that if we, sitting as a Court of Appeal on a question of fact, think that the Sheriff has reached a wrong conclusion, we ought to alter his judgment, but if we have any doubt we ought to let it alone. Here, however, I think that the Sheriff-substitute arrived at the right conclusion.

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LORD RUTHERFURD CLARK.—I am of the same opinion. I am quite satisfied that the pursuer knew the terms of the contract.

LORD TRAYNER was absent.

THE COURT adhered, pronouncing the same findings as the Sheriff-substitute, with the exception that, after the finding "that the contents of the notice were well known to the men employed by the defenders," there were added the words "including the pursuer."

DAVID MURRAY, Solicitor—SIMPSON & MARWICK, W.S.—Agents.

No. 10. **WILLIAM THOMSON GALBRAITH AND OTHERS, First Parties.—Macphail.**
REV. HENRY ROBERTSON FULLARTON (Minister of Bo'ness), Second Party.
—*John Wilson.*
REV. ANDREW ROSS TAYLOR AND ANOTHER, Third Parties.—Macphail.

Oct. 27, 1893.
Galbraith v.
Minister of
Bo'ness.

Church—Lands held in trust for use and benefit of minister—Mines and minerals.—In 1676 certain lands were conveyed in trust "for the use and benefit of the minister of the gospel serving the cure at the Kirk of Bo'ness." In 1888 minerals in the lands were opened and leased for twenty years at a yearly rent of £25 or royalties. In a special case between the trustees and the minister of the parish, *held* that the mineral rents or royalties were not to be paid to the minister as part of the income of the benefice, but were to be accumulated as capital, the income of the accumulated fund only being paid to the minister for the time.

2D DIVISION

In 1638 the inhabitants of Bo'ness, which then formed part of the parish of Kinneil, having resolved that the town should be disjoined and erected into a separate parish, built a church and proceeded, by means of voluntary contributions, to create a permanent fund for the endowment of the minister. As the interest of the fund so raised, and the other sources of income, did not amount to 800 merks per annum, which, under the Act 1633, cap. 8, was the lowest stipend competent to be given to a clergyman of the Church of Scotland, it became necessary, in order to the erection of Bo'ness into a separate parish, to obtain statutory authority for raising the required sum by annual assessment; and accordingly, by an Act passed in 1649, Bo'ness was erected into a separate

parish, and power was given "to those whom the supplicants have chosen to be assisting to the kirk-session according to the Act of Parliament, or some other who shall be nominate be commont consent of town and session to stent yearly every inhabitant and indweller within the said parochin, bounded as said is, according to their abilities for making up the yearly stipend of 800 merks." No. 10.

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In 1648 a sum of 5000 merks, part of the permanent fund, was lent out on wadset over the lands of Muirhouse, and in 1653 the lands of Muirhouse were appraised for this debt. In 1676 a charter was obtained from King Charles II., proceeding upon the decree of appraising, conveying the lands of Muirhouse to certain parties as representatives of the inhabitants of Bo'ness "for the use and benefit of the minister of the gospel serving the cure at the kirk of Bo'ness." Under this charter and the infetment following thereon, the lands of Muirhouse were thereafter possessed and managed by the representatives for the time of the inhabitants of Bo'ness, for behoof of the minister.

In 1888 the minerals in the lands of Muirhouse were leased by the representatives, under a lease for twenty years for payment of a fixed rent or of royalties.

In 1893 a special case was presented by W. T. Galbraith and others, the representatives, as first parties, the minister, as second party, and the moderator and the clerk of the Presbytery of Linlithgow, as representing the presbytery for their interest, as third parties.

The questions of law were,—“Do the mineral rents or royalties paid in respect of the Muirhouse minerals, under the foresaid lease, fall to be accumulated with the capital or stock? Or are the said mineral rents to be dealt with as revenue or income of the estate administered by the first parties?”

The first parties maintained that the mineral rents or royalties paid and to be paid under the lease formed part and portion of stock or capital, and therefore fell to be accumulated yearly, and that only the interest or annual proceeds of the mineral rents were to be treated as revenue, and paid to the minister of the parish.

The second party maintained that the mineral rents or royalties ought not to be dealt with as capital sums, but must be treated as ordinary rents or revenue in a question with the second party.

The case set forth the foregoing facts, and further stated that the rents or royalties paid under the lease, amounting at the date of the case to £187, 12s. 6d. *in cumulo*, had not been made over to the minister, but had been accumulated by the representatives. The case also stated that in 1806 it was found by the House of Lords, reversing the judgment of the Court of Session, that the minister for the time being was not restricted to a yearly stipend of 800 merks, but was entitled to the whole income (subject to certain deductions) provided and raised as already mentioned—*Rennie v. Tod*, July 21, 1806, 5 Pat. App. 114.

Argued for the first parties;—The general rule with reference to persons having a limited interest in heritable subjects was that such persons were entitled to the benefit of the subjects only under the qualification *salva rei substantia*. That rule was not an absolute one. It had been held, for example, that a liferenter was entitled to the rents or royalties drawn from mineral fields which had been opened before the commencement of the liferent.¹ But with respect to glebes, the qualification *salva rei substantia* was absolute. It had been so held with refer-

¹ *Campbell's Trustees v. Campbell*, July 6, 1883, 10 R. (H. L.) 65; *Baillie's Trustees v. Baillie*, Dec. 8, 1891, 19 R. 220.

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Bo'ness.

ence to timber,¹ marl,² coal,³ peats,⁴ the price or produce of which was to be accumulated, and the income thereof only paid to the minister and his successor in office. The lands here were in the same position as a glebe,⁵ and therefore the first parties were bound to accumulate the rent or royalties and pay the income thereof only to the second party.

Argued for the second party;—The lands here, as the title shewed, were not in the same position as a glebe, which was not intended to be a source of commercial profit to the minister,⁶ nor was the case analogous to that of an ordinary liferent; it was nearer to the case of an heir of entail in possession. The presbytery made no objection, and the fee of the property was not appreciably affected. The Court therefore ought to construe the rights of the second party liberally.

LORD YOUNG.—It seems to me clear that the present incumbent is not entitled to the mineral rents or lordships, and that the trustees have acted with perfect propriety in laying aside the income for behoof of the benefice. I think that they should continue to do so, the minister receiving annually the income only of the accumulated fund.

LORD RUTHERFURD CLARK.—I am of the same opinion. To my mind there is no doubt about the matter.

LORD JUSTICE-CLERK.—I agree.

LORD TRAYNER was absent.

THE COURT answered the first question in the affirmative, and the second in the negative.

TODD, MURRAY, & JAMIESON, W.S., Agents for the Parties.

No. 11.

Oct. 28, 1893.
Leask v. Burt.

MATTHEW LEASK, Pursuer (Respondent).—*Salvesen*—James Mackintosh.
ALEXANDER BURT, Defender (Reclaimer).—*Comrie Thomson*—D. Dundas.

Reparation—Illegal apprehension—Apprehension without a warrant.—In an action of damages for illegal apprehension brought by a seaman against a sergeant of police, the pursuer averred that while he was engaged in regular employment on board a trading steamer he had been arrested by the defender, without a warrant, on a charge of having received 10s. 7d. six months previously by false representations; and that the defender, having handcuffed the pursuer, took him from Leith (where he had been arrested) to Edinburgh and thence to Falkirk, where he was tried and acquitted. *Held* that the action was relevant.

2D DIVISION.
Ld. Wellwood.

IN May 1893 Matthew Leask, seaman, 25 Market Street, Lerwick, raised an action against Alexander Burt, sergeant in the Stirlingshire Constabulary, concluding for £500 as damages for wrongous apprehension.*

The pursuer stated that in 1891 he was a member of the National

¹ Logan v. Reid, May 16, 1899, F. C.

² Minister of Madderty v. The Heritors, 1794, M. 5153.

³ Minister of Newton v. The Heritors, 1807, M. App. "Glebe," No. 7.

⁴ Mercer v. Minister of Lethendy, 1795, see note to M. App. "Glebe," No. 1.

⁵ Glebe Lands (Scotland) Act (29 and 30 Vict. cap. 71), sec. 2.

⁶ Stewart v. Lord Glenlyon, May 20, 1835, 13 S. 798; Duncan's Parochial Law, p. 537.

* There were certain other persons called as defenders, but the Lord Ordinary found that the action as regarded them was irrelevant, and this judgment was acquiesced in.

Amalgamated Sailors and Firemen's Union of Great Britain and Ireland, No. 11.
 by the rules of which he was entitled to an allowance not exceeding £2, on account of the loss of clothes, through shipwreck or fire on board ship; that in June 1892 (not having had an opportunity of doing so earlier) he applied to Mr Cowie, the secretary of the Grangemouth branch of the Union, being the branch at which he paid his subscriptions, for an allowance in respect of the loss of clothes through shipwreck in March 1891; that in July 1892 Mr Cowie admitted the claim to the extent of £1, 10s., but deducted from that the sum of 19s. 5d., as being arrears due by the pursuer to the Union, leaving 10s. 7d., which was remitted to the pursuer. (Cond. 5) "The pursuer was thereafter employed as a seaman on board the new steamship 'Durward,' belonging to Leith. During the month of October 1892 the defender T. D. Rennie, who acts as organising secretary for the defenders the Sailors and Firemen's Union, accompanied by the defender James Black, secretary of the said Union at Leith, called upon the pursuer at the said ship, then lying in the Albert Dock, Leith. Mr Rennie stated to the pursuer that he had received a shipwreck allowance on false statements, and that he would require to pay it back. The pursuer denied the charge, and declined to pay back the allowance . . . Mr Rennie returned in about ten days afterwards, and again asked pursuer if he did not intend to pay back the money. The pursuer again declined, whereupon the defender Rennie stated he had the authority of the officials of the Union to prosecute the pursuer, which he threatened would now be done. The pursuer still declined to make any payment to the Union, and Mr Rennie then left." (Cond. 6) "On or about Tuesday, 15th November, the pursuer was engaged at his duties on board the 'Durward,' then lying in Leith Docks, when he was called on shore by a man whom he afterwards found to be the defender Alexander Burt. The said defender was dressed in plain clothes, and was accompanied by the said defender Black. The defender Alexander Burt asked the pursuer to accompany him to the Union Office, which the pursuer refused to do unless one of the ship's officers was made aware of the fact that he was leaving his duties. The defender Black then informed the second officer of the vessel that the pursuer was being taken to the Union Office on a charge of receiving money on false representations, and that he would return in an hour and a-half and let him know whether the pursuer would be detained or not." (Cond. 7) "The pursuer accordingly accompanied the parties above mentioned to the Union Office, where some conversation took place as to matters in respect of which the charge was made. The pursuer objected to being kept waiting in the office an indefinite time, and asked the said defenders whether they had a warrant for his apprehension. To this the defender Burt replied, 'I am the warrant.' During the time that the pursuer was being detained at the said office, the first officer of the vessel arrived and inquired what they were going to do with the pursuer, as he would require to ship another man if the pursuer was not promptly released. The pursuer is unable to say what passed between the first officer and the defenders Burt, Black, and Cowie; but the result of it was that the first officer left the office, and, as the pursuer afterwards learned, engaged a man to take his place. Pursuer was detained a considerable time in the said office until after the arrival of the defender Mr Cowie, who stated his version of what took place in June 1892 when the pursuer made his claim, which the pursuer contradicted upon every material point." (Cond. 8) "The pursuer was then taken in charge by the defender Burt. As he wanted his clothes out of the ship, he was accompanied to the 'Durward' by the defenders Burt and Cowie, where he got his clothes, which were left at the Union Office.

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No. 11. He was then taken by the defenders Burt and Cowie to the police-office at Leith, and, on the instructions of the said defender Burt, was locked up in a cell by one of the Leith police. On the defender Burt's return several hours afterwards, the pursuer was taken out of the cell, handcuffed by the said defender Burt, and taken by him on a tramcar to Edinburgh, and thence by rail to Falkirk, where he was locked up for the night in the police-office, without food and without bed or covering of any description." The pursuer then averred that on the following morning he was charged, in the Sheriff Court at Falkirk, with fraud, on the allegation that he had obtained 10s. 7d. from Cowie on false pretences; that he pleaded not guilty, and was admitted to bail; and that he was tried on 18th November, when the Sheriff-substitute found the charge not proven. (Cond. 12) "The whole of the said proceedings were wrongous, irregular, nimious, and oppressive. The pursuer was apprehended on 15th November without a warrant of any kind, and was subjected to the indignity of being taken through the public streets in Leith and Edinburgh in custody, and of being detained in the police cells, both at Leith and at Falkirk, without a warrant of any kind having been first obtained from the proper authorities. The said Alexander Burt, in apprehending and detaining the pursuer in the manner above mentioned without legal warrant, and in treating him in the manner before described, acted wrongously and oppressively." The pursuer pleaded;—The defenders having apprehended the pursuer, or caused him to be apprehended illegally and without warrant, are liable for the loss that he has sustained through the said apprehension.

The defender Burt admitted the substantial accuracy of the pursuer's statements in conds. 6, 7, and 8, "subject to the explanations that the pursuer was only handcuffed for a short part of the journey, viz., between Leith and Edinburgh, and that he was supplied with food and drink by this defender at Edinburgh station. Denied that in Falkirk police-office the pursuer was without food, bed, or covering of any description." The defender further stated, that on 14th November he was instructed by his superior officer, Superintendent M'Donald, to go to Leith next morning, and, if *prima facie* evidence of the alleged charge of fraud against the pursuer (which had been intimated to the defender) was forthcoming, to arrest the pursuer. "It was known to this defender and his superior officer that the pursuer's ship was to leave Leith on 15th November. This defender accordingly went to Leith on the morning of the 15th and saw Mr Black and Mr Cowie, and the latter having distinctly stated the said charge of fraud against the pursuer, and the detailed grounds thereof, this defender, after having seen the pursuer, and having had a *prima facie* case of fraud disclosed against him, arrested him in conformity with the instructions he had received from his superior officer as above explained, and conveyed him to Falkirk. This defender acted throughout upon the instructions of his superior officer, and in good faith, and he had reasonable grounds for apprehending the pursuer."

The defender pleaded;—(1) The action is irrelevant as against this defender. (2) This defender's whole actings having been legal and proper, he should be assolizied. (3) This defender having acted throughout under the instructions of his superior officer, and in good faith, and with reasonable grounds for his proceedings, ought to be assolizied.

On 16th October 1893 the Lord Ordinary (Wellwood) repelled the first plea in law for the defender, and appointed a day for the adjustment of issues.*

* "OPINION.—In my opinion the pursuer has set forth on record a relevant

The defender Burt reclaimed, and argued;—The arrest here, although without a warrant, was legal. A policeman was entitled to arrest without a warrant if the circumstances justified that course.¹ Here the defender was justified. He acted in good faith and on the instructions of his superior officer; and he did not apprehend until he had investigated the case, and found that the pursuer was on the point of leaving the country. In any case the pursuer must aver malice and want of probable cause.

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The pursuer was not called on.

LORD JUSTICE-CLERK.—There is no doubt that it is established law, as stated by Hume II. 76, that a police-constable, if he has witnessed a felony being committed, or has immediate information from others who are sure of the fact, may arrest without a warrant. But this case does not resemble those mentioned by Hume in the least. There was here an allegation against the pursuer of having committed a fraud six months before by receiving ten shillings and sevenpence by false representations, and the case stated by Mr Dundas amounted to this that a police-constable, acting on the instruction of his superior officer, is entitled to leave his own county and go into another county, and there practically take precognitions, and if satisfied in his own mind that there are good grounds for doing so, arrest the suspected person. That seems to me an extremely inadvisable method of proceeding even if it fell within the letter of the law, which I cannot hold that it does.

The authorities referred to by Mr Dundas do not seem to me to bear upon the present case. In the case of *Peggie*, 7 Macph. 89, the pursuer had collected some money on behalf of another person, and in place of handing it over to its owner he admitted to the police-constable who apprehended him that he had appropriated part of it to his own purposes, and merely alleged that he intended to refund it if he was allowed time. In such a case it was reasonable to assume that more of the money would have been spent if the constable had not apprehended the man. Besides it is to be observed that the decision in that case was not a decision upon relevancy, but was pronounced after all the facts had been ascertained. In the case of *Young*, 18 R. 825, the police-constables had direct authority under the Local Police Act to make the arrest, and what was complained of was not so much the fact of the arrest as the harsh way in which it was said to have been carried out. Neither of these cases therefore has any bearing on the present.

The only other ground taken up on behalf of the defender was that the pursuer when he was arrested intended to abscond from justice. That is a defence which cannot well be considered on a question of relevancy, for it almost of necessity arises on the defender's statement, since a man is hardly likely to state facts which involve the inference that he intended to abscond from justice. Here, we have nothing beyond this that the pursuer was a seaman who for some months before the arrest had been regularly employed on trading voyages between this country and the Continent, and to say that a seaman who is on

case against the defender Burt, who is a sergeant of police in the Stirlingshire constabulary. The case stated against Burt is not merely that he apprehended the pursuer without a warrant in circumstances which, *prima facie*, do not seem to justify such a proceeding, but that he apprehended him in Leith, which is in another jurisdiction than that in which he was entitled to act, without any authority from a magistrate of that jurisdiction. . . ."

¹ *Peggie v. Clark*, Nov. 10, 1868, 7 Macph. 89, 41 Scot. Jur. 52; *Young v. Magistrates of Glasgow*, May 16, 1891, 18 R. 825.

No. 11. the eve of starting on one of his regular trips is on that account to be assumed to have the intention of absconding from justice, is absurd. But even if he had been going away on that voyage without any intention of returning, I can find nothing to shew that there was no time to get a regular warrant before the ship sailed. It is, however, quite plain that with reference to this six months old offence the only person whose authority was considered to be of any importance was this police-constable, who took the precognition, and after he had satisfied himself with the result of his investigations, proceeded to arrest the pursuer. On the whole matter I think that the pursuer has stated a relevant case.

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LORD YOUNG.—I must own that I think this a very clear and indeed gross case. It is a general rule of our law that no one in this country, man or woman, is to be deprived of his or her liberty without a warrant from a magistrate. That is the general rule, which no doubt is subject to certain pretty well defined exceptions. One clear exception occurs where the Police Acts of large towns give wide powers to police-constables to apprehend although they may have no warrant from a magistrate, and of this we have an example in one of the cases which were cited to us, where the police-constables were empowered to apprehend and take into custody, although without a warrant, women who are known to be of bad fame and are importuning men on the street. Another example of the same sort is to be found where the Police Act of a town empowers the police-constables to apprehend without a warrant persons whom they suspect of an intention to commit crime. But the exceptions to the general rule, that no one shall be apprehended without a warrant, are by no means confined to police-officers or to statutory exceptions. A very familiar class of exceptions—and one not at all confined to police-officers—is exemplified in the right to apprehend anyone who is found in the act of committing an offence against one's self. A man who is attacked on the street, or who even without any violence being used towards himself finds the hands of another man in his pocket, is entitled to seize and detain the aggressor although he has no written warrant from a magistrate for doing so. That is an exception which the common law recognises, and any police-constable, on being informed of the occurrence is entitled to give what aid he can in securing the apprehension of the offender, and that right is not confined to police-constables but extends to any citizen. The cases are familiar to the Court both here and in Glasgow, or in any other large town, of passers-by interfering, as they are entitled to do, and assisting and taking into custody persons who have been caught in the act of robbing a man, or in the commission of any similar crime. These are all exceptions which are recognised because they commend themselves to the common-sense of mankind. But the proposition here is that a sailor, who is suspected of having obtained ten shillings and sevenpence upon false representations six months before, may be seized without a warrant by a sergeant of police, when on board the ship which has been his ordinary place of business for the intervening six months, may be handcuffed, taken by this policeman first to Edinburgh and then on to Falkirk, and there locked up for the night in the police-office without food, or bed, or covering of any description. This last statement is said not to be true, but it is averred. The suggestion that it is not necessary in such circumstances to go before a magistrate and state a case, and ask him for a warrant to apprehend and lock up—that all this may be done by a policeman of his own authority or upon the instructions of one of

his superior officers—is one of the most extravagant that I have heard submitted to this Court for a long time. The thing is utterly and absolutely illegal. Of the relevancy of this case, therefore, I have no doubt.

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LORD RUTHERFURD CLARK.—*Prima facie*, the apprehension of the pursuer was illegal. He is therefore entitled to an issue. It may be that the defender can prove that the apprehension was legal, but I think that he will have great difficulty in doing so.

LORD JUSTICE-CLERK.—I purposely said nothing on the question whether a police-constable belonging to one county is entitled to arrest a person in another county.

LORD TRAYNER was absent.

THE COURT adhered.

SNODY & ASHER, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

WILLIAM DUNCAN, Pursuer (Respondent).—*Strachan—Craigie*.
JOHN MITCHELL & COMPANY, Defenders (Reclaimers).—*Graham Stewart*.

No. 12.

Nov. 8, 1898.
Duncan v.
Mitchell & Co.

Right in Security—Ex facie absolute disposition and recorded back-letter—Sale by creditor—Sale by private bargain.—B was infeft in heritable subjects on an *ex facie* absolute disposition granted by A. Subsequently a minute of agreement between A and B was recorded, which provided that on repayment of an advance made by B to A, the former should be bound to reconvey the subjects to A, but that in the meanwhile B's right to sell the subjects should "remain as entire as if this minute of agreement had not been entered into and as if the absolute right of proprietorship and beneficial interest of the said B had been in no way qualified by this minute of agreement; and further, that in the event of the creditor selling the said subjects, or any part or portion thereof, which he is specially authorised to do as aforesaid, and that at any time or times, by public roup or private bargain," he should be bound to account to the debtor for any balance in his hands after repayment of his advances.

The creditor sold the subjects by private bargain and tendered a conveyance granted by himself alone. The buyer objected to the title offered.

In an action by the seller for implement of the contract of sale, *held* that the conveyance offered was sufficient, the seller being entitled to sell by private bargain.

By disposition, *ex facie* absolute but in reality in security only, dated 2d Division. 30th April and recorded with warrant of registration in favour of the dis-
pensee on 2d May 1881, William Stewart, wood-merchant, Burgh Saw Mills, Leith, disposed certain subjects in Springfield, Leith, to William Duncan, S.S.C., Edinburgh. In connection with this disposition a minute of agreement was entered into between Stewart and Duncan, which was dated 2d May 1881, and was recorded with warrant of registration in favour of both on 28th January 1887. This minute contained, *inter alia*, the clauses quoted below.*

Ld. Kyllachy.

* The minute of agreement set forth, *inter alia* :—"Third, It is also specially conditioned and agreed that, on said William Duncan being repaid the various sums due and to become due to him under the first article of this agreement . . . then the said William Duncan shall be bound, at the expense of the said William Stewart, to reconvey to him the said subjects, superiorities, and others, contained in the said disposition, in exchange for a discharge by the said William Stewart of all his actings and intrusions in the premises, but that, meanwhile, the said William Duncan shall have the full and absolute power and control of letting the subjects to tenants, and granting leases of such

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In April 1893 Duncan, who had held the properties since the date of the disposition, and had transacted with them as authorised by the minute, sold them by private bargain to William Mitchell & Company, wood-merchants, Leith, and as the title tendered a conveyance granted by himself only. Mitchell & Company declined to accept the conveyance offered, maintaining that the deed should be granted not only by Duncan but by the trustee on Stewart's sequestrated estates, with the consent of the commissioners thereon, the consent and concurrence of a majority in number and value of Stewart's ordinary creditors and of the Accountant of Court having also been obtained.

Duncan then raised this action against Mitchell & Company for decree ordaining the defenders to implement the contract of sale by accepting a valid disposition executed by the pursuer, and alternatively for £500 as damages for breach of contract.

The pursuer pleaded, *inter alia*;—(1) In respect of said contract of sale contained in said letters, and the disposition tendered by the pursuer to the defenders, the pursuer is entitled to decree in terms of the first conclusion of the summons. (2) On a sound construction of the disposition in favour of the pursuer, and relative minute, the pursuer is entitled to dispense to a purchaser the subjects described in the summons without the consent of any other party.

The defenders pleaded;—(1) On a sound construction of the disposition in favour of the pursuer, and relative minute of agreement, the pursuer is not entitled by himself to sell the said subjects by private bargain. (2) The pursuer being only a security-holder of said subjects, a private sale by him thereof can only be effected under the conditions imposed by the Bankruptcy Acts.

On 14th July 1893 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Decerns against the defenders in terms of the first conclusion of the summons: Finds the pursuer entitled to expenses."

The defenders reclaimed, and argued;—The minute of agreement did not give the creditor here direct and express power of sale by private bargain, and by recording the minute of agreement he lost the position of *ex facie* absolute proprietor, and became a mere security-holder, who had no power of sale by private bargain without his debtor's consent.¹

duration, and at such rents as he shall agree to, collecting by himself, or any factor or parties appointed by him, and intromitting with the whole rents, feu-duties, and casualties, and other profits of said subjects, feuing out to such person or persons, and at such rate or rates of feu-duty as he shall fix and determine, to be held of himself and his foresaids, the whole or any part or parts, of the said subjects and others still unfeued, and otherwise managing the said subjects and others, and that the execution of this minute of agreement by the said William Duncan shall not in any way affect or prejudice his right to lease, feu, or sell said subjects, or any part thereof, all which powers shall remain as entire as if this minute of agreement had not been entered into, and as if the absolute right of proprietorship and beneficial interest of the said William Duncan, constituted by the said disposition in his favour, had been in no way qualified by this minute of agreement." "Sixth, In the event of the said William Duncan selling the said subjects and others, or any part or portion thereof, which he is specially authorised to do as aforesaid, and that at any time or times, by public roup or private bargain, and with or without advertisement, he shall be bound to account for and pay over to the said William Stewart any balance of the price of said subjects which may remain in his hands after repayment of all advances made and to be made, and of all sums due and to become due, under the various heads specified in the first article hereof. . . ."

¹ Gardyne v. Royal Bank of Scotland, March 8, 1851, 13 D. 912, 23 Scot. Jur. 410; Baillie v. Drew, Dec. 2, 1884, 12 R. 199; Bell's Comm. ii. 272.

LORD JUSTICE-CLERK.—I think that this case is disposed of by the documents before us. The pursuer, Duncan, got an *ex facie* absolute disposition to the subjects mentioned in the summons, and under that disposition there is no doubt that he could have sold them by private bargain. But his debtor Stewart and he entered into a minute of agreement, which was recorded, and it is said that his position has been so altered by it that he cannot sell these subjects by private bargain. I find, however, that, according to this minute, Duncan is to have full power over the subjects, and that its execution is not in any way "to affect or prejudice his right to lease, feu, or sell said subjects or any part thereof," that is to say, he is to sell them under the title he has as an *ex facie* absolute proprietor, because the minute goes on, "all which powers shall remain as entire as if this minute of agreement had not been entered into, and as if the absolute right of proprietorship and beneficial interest of the said William Duncan constituted by the disposition in his favour had been in no way qualified by this minute of agreement." Then the sixth article of the agreement assumes that the pursuer is specially authorised to sell the subjects either by public roup or private bargain. These provisions seem to me to leave the pursuer's position as to selling the subjects as if nothing had been done to affect his position as proprietor. The Lord Ordinary's interlocutor is, in my opinion, right, and I move that we adhere to it.

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LORD YOUNG.—It is sufficient for the decision of this case for us to hold that the title offered by the pursuer is a good title, and is sufficient implement of the contract of sale between him and the buyer. I have no objection, however, to saying that the minute of agreement, in my opinion, rightly assumes that a creditor whose security is an *ex facie* absolute disposition qualified by a recorded back-letter—which this agreement really is—has an absolute power of sale. I do not doubt that the law laid down by Mr Bell is right when he says that the holder of an absolute disposition with a recorded back-bond is in a different position from one whose back-bond is not recorded, but I think that he has a power of sale. If he sells he must, of course, account for the balance of the price after satisfying his debt. But with that the purchaser has no concern, for I repeat, it is sufficient for the decision of this case that the title offered is good *ex facie*.

LORD RUTHERFURD CLARK.—I am of opinion that under this minute of agreement the pursuer is entitled to sell by private bargain.

LORD TRAYNER was absent.

THE COURT adhered.

WILLIAM DUNCAN, S.S.C.—CURROR, COWFER, & CURROR, W.S.—Agents.

MRS JANE ARMSTRONG OR BURNS, Pursuer.—*Guy.*
THE STEEL COMPANY OF SCOTLAND, LIMITED, Defenders.—*Fleming.*

No. 13.

Nov. 7, 1893.
Burns v. Steel
Co. of Scot-
land, Limited.

Process—Jury trial—Verdict—Reparation.—In an action by a widow for damages on account of the death of her husband, which had been caused by a large gate belonging to the defenders falling on him, the defence was that the gate had been nailed up by order of the defenders, they not intending that it should thereafter be used as a gate, and that it had been opened without their knowledge and consent. The presiding Judge told the jury that even if they found that the gate when used as a gate was unsafe, the defenders would not be liable for the accident, if it was proved that it had been shut up by order of the defenders, and had not thereafter been used as a gate with their knowledge and

No. 13. consent. The jury returned an unanimous verdict for the defenders, but added this rider, as noted by the presiding Judge, "while accepting unanimously the law as laid down by your Lordship, we do not think that a due measure of supervision and care over the gate in question had been exercised by" the defenders. The verdict having been entered for the defenders, the pursuer moved for a rule to shew cause why a new trial should not be granted. The Court *refused* the motion, holding that the rider was not inconsistent with the verdict.

2D DIVISION.
L. Wellwood.

MRS JANE ARMSTRONG or **BURNS**, widow of Michael Burns, labourer, Glasgow, raised an action against The Steel Company of Scotland, Limited, for £400 as damages on account of the death of her husband. The action was tried before Lord Wellwood and a jury on the issue, whether the pursuer's husband was killed "through the fault of the defenders"?

The evidence led at the trial was to the following effect:—On the north side of the defenders' Blochairn Iron Works in Glasgow was a piece of ground belonging to the defenders on which stood two cottages which they let to persons in their employment. The ground was surrounded by a high sleeper fence, in which was a large wooden gate for carts, which was opened and shut by means of overhead pulleys. About two years before the date of the accident, this gate was nailed up, so that it could not be opened without removing the nails. The occupants of the cottages after that gained entrance to the ground only by means of a wicket-gate at the side of the larger gate. On 26th January 1893 Henry Healy, the defenders' foreman, to whom one of the cottages had been let, brought his furniture in a lorry to the larger gate, and its fastenings having been in some manner removed, he and Burns, the pursuer's husband, shoved the gate open, and admitted the lorry. After the lorry had been taken out again, Healy and Burns tried to pull the gate close, but it fell down and killed Burns. There was evidence that the gate was unsafe if it was to be used as a gate, but there was also evidence that the defenders did not intend it to be so used, and that, as fastened up, it was in a safe condition. There was no evidence that the defenders were aware that the fastenings had been removed on the day in question.

The presiding Judge told the jury that even if they found that the gate, when used as a gate on the occasion in question, was unsafe, the defenders would not be liable if it was proved that they ordered the gate to be nailed up, that it was in fact nailed up, and that it had not been thereafter used as a gate with the knowledge and consent of the defenders. No exception was taken to this direction.

The jury returned this verdict,—“The jury unanimously find for the defenders,” but added this rider to their verdict, as noted by the presiding Judge: “The foreman added that he had been asked to state by the jury that while accepting unanimously the law as laid down by your Lordship, we do not think that a due measure of supervision and care over the gate in question had been exercised by the Steel Company.”

The presiding Judge asked the jury if they understood the direction. They replied that they did. The verdict was then entered for the defenders.

The pursuer moved for a rule to shew cause why a new trial should not be granted, and argued;—The verdict and the rider were inconsistent, the verdict being for the defenders and the rider affirming that they had been in fault. A new trial ought therefore to be granted.¹

LORD WELLWOOD.—In this case there was evidence adduced at the trial that this gate, the fall of which caused the death of the pursuer's husband, was in

¹ Florence v. Mann, Dec. 17, 1890, 18 R. 247.

a defective condition if it was to be used as a gate, but there was also evidence that by the order of the defenders, the Steel Company, the large gate had been nailed up some time before, leaving a wicket-gate for the use of the tenants of the cottages. There was evidence for the defenders also that it was their intention that their tenants should use the wicket-gate as the only means of going to and from their houses, and that the large gate should be kept shut and used as a fence, and that if it had been left in that condition it would have been quite safe.

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land, Limited.

I told the jury that even if they found that the gate when used as a gate on the occasion in question was unsafe, the defenders would not be liable for the accident caused by its unfitness if it was proved that they ordered it to be shut up, that it was as a matter of fact shut up, and that it had not thereafter been opened and used as a gate with their knowledge and consent.

I think that the jury quite understood the directions I gave them, and I was not asked to give any other direction, either on matters of fact or on the law.

When the jury returned their verdict, and added the rider to it which has been read to your Lordships, I asked them again if they had understood the directions I gave them. They said that they did, and I then entered the verdict as a verdict for the defenders.

My own impression is that what the jury meant to express by the rider to their verdict was this, that although, according to the law laid down, the defenders were not under any legal obligation to do so, they should, in the opinion of the jury, have kept a closer watch on their tenants, and prevented them from using the gate. Although I cannot say that I agree in this view, there is nothing in the rider inconsistent with the verdict of the jury, which proceeds on this, that no fault inferring legal liability had been proved against the defenders.

I am therefore of opinion that the motion for a rule should be refused.

LORD YOUNG.—I see no cause for granting a rule.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

THE COURT refused the motion.

CLARK & MACDONALD, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

JAMES RICHARDSON BLACK, Complainer (Reclaimer).—*Comrie Thomson—Salvesen.* No. 14.

JOHN CLAY, Respondent (Respondent).—*Sol-Gen. Asher—Dickson—Cook.* Nov. 7, 1893.
Black v. Clay.

Lease—Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), sec. 7—Compensation for improvements—Notice—Determination of tenancy.—The Agricultural Holdings (Scotland) Act, sec. 7, provides that "a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act." Held that in the case of a lease under which the terms of removal were from the houses and grass at Whitsunday, and from the arable land at the separation of the crop from the ground, that the separation of the crop is equivalent to the term of Martinmas, and that a notice given four months before Martinmas is a sufficient notice.

Strang v. Stuart, 14 R. 637, approved; *Earl of Hopetoun v. Wight*, 1 Macph. 1097, distinguished.

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Black v. Clay.1ST DIVISION.
Lord Low.

JOHN CLAY was tenant of the farm of Winfield, belonging to John Richardson Black, under a lease for nineteen years "from and after the entry of the said John Clay, which is hereby declared to be to the houses (with the exceptions after mentioned), grass, and fallow land on the 26th day of May in the year 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barnyard and two cothouses at Whitsunday 1861, from these periods respectively to be possessed by the said John Clay and his foresaids during the space above written."

The subjects let were described as "All and Whole the farm and lands of Winfield, with the houses thereupon, and pertinents thereof." The stipulated rent was £765, payable at Whitsunday and Martinmas, by equal portions, beginning the first term's payment at Martinmas 1861, and the second term's payment at Whitsunday 1862, and that for the first year's possession of houses, grass, and fallow land from Whitsunday 1860 to Whitsunday 1861, and for corn crop 1861, and so forth yearly and termly thereafter during the currency of this lease.*

The lease was extended by tacit relocation until 1891, and on 29th May in that year the landlord obtained a decree of removing ordaining the defender to remove "from the farm and lands and pertinents of Winfield, that is to say, from the houses (with the exception after mentioned), grass, and fallow land at the term of Whitsunday 1892; from the arable land in corn crop at the separation of the crop of the same year from the ground; and from the barns and barnyard and two cothouses at Whitsunday 1893, and then to leave the said farm and others at the periods respectively before specified void and redd."

The tenant continued to occupy the subjects of his tenancy up to the respective periods specified in the decree.

On 6th June 1892 the tenant sent the landlord a notice of claim under the Agricultural Holdings (Scotland) Act, 1883, for compensation for unexhausted improvements,† in which he stated that it was his intention to claim certain sums on the determination of his tenancy of Winfield, "as to

* The lease contained, *inter alia*, the following stipulations:—"And in the last year of this lease the landlord or entering tenant shall have power to sow grass seeds with the said John Clay's waygoing crop on that part of the lands which had been summer fallow, turnips, or other drilled green crop in the preceding year, the said John Clay harrowing or rolling in the same in a proper manner, all without charge: And moreover, in the last year of this lease, the said John Clay or his foresaids shall, without any claim or compensation, leave to the landlord or entering tenant land for fallow equal to one-third part of the whole land which shall be in tillage in that year, and that in whole fields as near as the size thereof will admit, which fallow land the landlord or entering tenant shall have power to enter to and plough any time after the Martinmas preceding the said John Clay's removal from the pasture lands as aforesaid: . . . And whereas the outgoing tenant is to be allowed the necessary accommodation for threshing and carrying his last crop to market, the said John Clay and his foresaids shall, in addition to the barns, barnyard, and two cothouses before referred to, have stable room allowed them for two pair of horses, with the straw required for fodder and litter, without any charge, and that until the term of Whitsunday after their removal from the arable land as aforesaid."

† Section 7 of the Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), is as follows:—"Notwithstanding anything in this Act a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act."

Section 42 " . . . 'Determination of tenancy' means the termination of a lease by reason of effluxion of time or from any other cause. . . ."

the houses, grass, and fallow land at the term of Whitsunday 1892, as to the arable land in corn crop at the separation of the crop of the same year from the ground, and as to the barns and barnyard and two cothouses at Whitsunday 1893." No. 14.
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On 22d June 1892 the tenant served a petition on the landlord, in which he set forth that he occupied the farm of Winfield under a tenancy which expired at Whitsunday 1893, and that he had presented the notice of claim of 6th June 1892, and craved the appointment of a referee in terms of section 2 of the Agricultural Holdings Act, 1889.

The landlord then presented a note of suspension and interdict against the tenant proceeding with the petition.

He averred that the notice of claim was inept "on the ground of its not having been given 'four months at least before the determination of the tenancy' in terms of the statute. The determination of the tenancy in the present case was the term of Whitsunday 1892, then past, at which term the farm was let to a new tenant. The determination of the tenancy was not postponed in any way by the respondent's occupation of the barns, barnyard, and two cothouses. These were let to him for a limited purpose, viz., the storing and manufacturing of his waygoing crop, and in so far as not required for that purpose have been available to the incoming tenant, and such limited privilege of use is not tenancy in the sense of the statute."

The tenant lodged answers, and pleaded that proper notice had been given.

On 20th July 1893 the Lord Ordinary (Low) refused the note and found the complainer liable in expenses.*

* "OPINION.—The question in this case is, whether the notice of claim for compensation under the Agricultural Holdings Act, which was given by the respondent on the 6th June 1892, was given timeously,—that is to say, four months before the determination of the tenancy.

"The complainer does not now maintain that the notice required to be given four months before the term of Whitsunday 1892, but he argued that it required to be given four months before the actual separation of the crop of that year. X

"It was held in the case of *Strang v. Stuart* (14 R. 637) that for the purposes of the Agricultural Holdings Act the determination of the tenancy is when a total determination of the tenancy takes place, and no further possession can be had by the tenant in terms of the lease.

"In the present case the respondent was, in terms of the lease, entitled to retain possession of the barn and cothouses until Whitsunday 1893, and the respondent argued that the determination of the tenancy did not take place until that term. There is force in the argument, but I am not prepared to express an opinion on the point, as I think the notice was timeously given in view of the termination of the respondent's possession under the lease of the arable land.

"I have already said that it was conceded by the complainer that the termination of the possession of the arable land was the point of time to be regarded, but he argued that as the respondent was only entitled to hold the land until the separation of the crop, the actual date when the crop was separated must be ascertained.

"The tenant's claim for compensation under the Act is absolutely lost if he does not give notice four months before the termination of the tenancy, and it must be an anomalous result if the four months fell to be calculated from a date which cannot be ascertained beforehand, but which depended upon the character of the particular season. Thus a tenant might give notice four months before the ordinary time when the crop was secured, and an unusually early harvest might cut him out of his claim. Again, a claim which would be lost if the

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The complainer reclaimed, and argued;—The position maintained before the Lord Ordinary was not insisted in. The lease terminated at Whitsunday 1892, and the notice should have been given four months before that date. The old tenant then removed from the houses, &c., and the incoming tenant took his place. There could not be two tenants at the same time of the same farm. Besides, the outgoing tenant would have no opportunity after Whitsunday of spending money on, or otherwise executing, improvements, in respect of which he could claim compensation, and no object would be served by postponing the date of giving notice. His tenancy therefore had determined. He still had a right to come on the land for the purpose of reaping his waygoing crop. But he had that at common law,¹ and the fact that it was also expressed in the lease made no difference. So the right to occupy the barns, &c., was a mere incident. Had he sold the waygoing crop he would have ceased to have these rights. They did not therefore prolong the legal period of the lease. In any view it was idle to say that the lease, in any reasonable sense of that term, was extended till Whitsunday 1893, for the barns, &c., were an infinitesimal part of the whole subjects, and of no real importance. But the question was already decided in favour of the landlord's contentions in *Wight v. Earl of Hopetoun*²; for there it was conclusively settled that the earlier of two terms of removal was to be taken as the expiry or termination of the lease. The terms of the lease in that case and this were practically identical. *Strang v. Stuart*³ was distinguishable, for there it was impossible for the tenant to make out his claim before the later term.

Argued for the respondent;—The Court had to interpret the statute, not the lease. The scheme or policy of the statute was in favour of the respondent's contention. It pointed to there being only one point of time with reference to which the claim fell to be made. That was when

tenant gathered his harvest expeditiously might be saved if he was dilatory in the work.

"I think that an ish at the separation of the crop is practically a Martinmas ish. The rent of a farm is due for the crop and possession of each year separately, and the term of Martinmas is regarded as the end of one crop year and the beginning of another. It is assumed on the one hand, that the crop will be secured by Martinmas, and, on the other hand, the tenant has up till Martinmas to secure the crop. No doubt if the crop is secured before Martinmas the incoming tenant could not be refused access to the land for the purpose of ploughing, but the outgoing tenant is entitled to exercise his discretion as to the most suitable time for gathering the harvest. And accordingly, it is not uncommon that the ish and entry of the arable land is made at 'the separation of the crop, or Martinmas,' the two terms being used as synonymous.

"The question, therefore, is whether, it being admitted that the tenancy did not determine until the separation of the crop, notice was timeously given upon the 6th of June? I think that the question must be answered in the affirmative:—(1) Because if there was no specific point of time from which the four months fell to be calculated, but if in every case of this sort the actual date of the separation of the crop had to be ascertained, the statute would be practically inextricable; and (2) because under the lease the respondent had, in my opinion, a title to possess the lands until Martinmas, if he found it necessary or expedient to do so, for the purpose of gathering the crop.

"I am therefore of opinion that the note falls to be refused, with expenses to the respondent."

¹ Fullarton v. Craufurd, March 4, 1814, F.C.

² Earl of Hopetoun v. Wight, July 10, 1863, 1 Macph. 1074, at p. 1097, 35 Scot. Jur. 623, May 27, 1864, 2 Macph. (H. L.) 35, 36 Scot. Jur. 542.

³ Strang v. Stuart, March 16, 1887, 14 R. 637.

the tenant was yielding possession of the subjects, for both parties could then best approximately estimate the merits of the claim. It was not too soon for the tenant to include all particulars, and not too late for the landlord to have an opportunity of testing and examining them for himself. "Determination of tenancy" meant when the landlord could call upon the tenant to remove from the whole subjects. The lease could not be said to have terminated by effluxion of time so long as the tenant had a right under it to occupy any portion of the subjects; and it was to be noted in this connection that the whole subjects here were let as a *unum quid* for one inclusive rent. The terms of the decree of removing obtained by the landlord recognised the subsistence of the lease till Whitsunday 1893, and it was idle, in the face of the plain language of the contract, to say that the rights of the tenant after Whitsunday 1892 were merely incidental, and independent of the lease. Notice, therefore, four months before Whitsunday 1893 would have been sufficient; *multo magis*, the notice actually given was timeous. According to the complainer's view of the Act, if the landlord were to give notice of a claim fourteen days after Whitsunday 1893, in respect of the buildings occupied by the tenant up to that date being dilapidated, the latter would be entitled to say that notice should have been given twelve months sooner, which was absurd, for the buildings at Whitsunday 1892 might have been in excellent preservation. *Strang v. Stuart*¹ was exactly in point, and should be followed. It was in accord with the view taken by the English Court of a similar clause.² *Wight's case*³ was totally irrelevant in construing the statute, for it decided only the construction of a particular clause in a particular contract. Besides, the words under construction there were entirely different, and fell to be interpreted in the light of the whole lease, which very clearly shewed that they pointed to the earliest possible termination of the lease. Had the lease and the present statute fallen to be construed together, the decision would have been different.

At advising,—

LORD M'LAREN.—This is a reclaiming note against the judgment of the Lord Ordinary in a process of suspension and interdict instituted in this Court for the purpose of restraining the respondent John Clay, lately tenant on the suspender's farm of Winfield, Berwickshire, from proceeding with a petition to the Sheriff for the appointment of a referee under the Agricultural Holdings (Scotland) Act, 1883. The suspender maintains that the respondent is not in a position to enforce his claims for the value of unexhausted improvements, in respect that the notice of claim given to the suspender was not given four months before the "determination of the tenancy," and the validity of the objection depends on the ascertainment of the point of time at which the lease is, within the meaning of the Act of Parliament, determined.

In the argument addressed to us the complainer relied mainly on the authority of the decision in *Wight v. Earl of Hopetoun*, a decision depending on the construction of a written contract, and which was said to be capable of application to the cognate question which arises on the construction of this statute. It may be convenient to consider, first, what would be the true principle of construction to be applied to the statute, supposing there were no decisions to guide us in this matter.

¹ *Strang v. Stuart*, March 16, 1887, 14 R. 637.

² *In re Paul*, 1889, L. R., 24 Q. B. D. 247, Matthew J. at p. 251.

³ *Earl of Hopetoun v. Wight*, July 10, 1863, 1 Macph. 1074, at p. 1097, 35 Scot. Jur. 623, May 27, 1864, 2 Macph. (H. L.) 35, 36 Scot. Jur. 542.

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No. 14. The respondent's holding is, or was, a lease for nineteen years of a farm which is partly arable and partly pastoral, and which is therefore, as regards tenure and entry, to be classed as an arable farm. According to universal custom there is for such farms a duplicate entry, which results from this, that entry to arable land can only be given at or after the separation of the crop from the ground, while considerations of convenience have led to the term of Whitsunday being generally chosen for the entry to houses and pasture. We know that there are differences of local custom as to which of these entries shall precede the other. We are familiar with leases which fix the entries to the houses and to the arable land respectively as at Whitsunday and separation of the crop of the same year; and we know that it is usual in certain localities to give entry first to the arable land, the occupation of the house being deferred to the Whitsunday following. The lease in question is peculiar in this respect, that it contains three distinct entries—that is, an entry to the houses (with the exceptions after mentioned), grass, and fallow lands on the 26th of May 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barnyard and two cothouses at Whitsunday 1861. It is declared that the location for nineteen years is to be “from these periods respectively,” and again in a later clause, under the head of accommodation for the outgoing tenant, it is provided that Mr Clay and his forebears “shall, in addition to the barns, barnyard, and two cothouses before referred to, have stable room allowed them for two pairs of horses, with the straw required for fodder and litter, without any charge, and that until the term of Whitsunday after their removal from the arable land as aforesaid.”

The question then is, which of these three terms is to be taken as the “determination of tenancy” from which the time for giving notice is to be reckoned? The statute says (sec. 42), that “determination of tenancy” means the termination of the lease “by reason of effluxion of time or from any other cause,” but as has been before observed, this definition does not make the matter any clearer, because the possession under the lease terminates at different times. But in construing the statute it is important to observe (1) that there is no limit fixed as to the time within which improvements may be made for which the tenant shall have a claim; and (2) if we assume that the last term of removal is the one most probably intended, we must follow this construction consistently in all cases, and irrespective of whether the latter term be Whitsunday or Martinmas, or any other date. The statute contemplates that the notice to be given by the tenant to the landlord should embrace (if the tenant desired it), all improvements which had been made by the tenant within the currency of the lease; but this object could not very well be attained under a lease in which the successive terms of removal extend over a whole year, if the tenant were put under the obligation to give notice four months prior to the first of these terms, or sixteen months before the actual termination of the lease according to the ordinary use of language.

It was objected that where the last of the prescribed terms of removal is the separation of the crop from the ground, this could not be the term from which notice is to be reckoned, because it is an indefinite time, and represents the end of a series of agricultural operations rather than a term certain. But it seems to me that this objection is directed not so much against one particular construction of the statute as against the statute itself, because if the alternative view were taken that notice must be given four months before the earliest period of

removal then the objection would apply to the ascertainment of the period in leases like that in *Strang v. Stuart*, where the entry is to the arable land at Martinmas, and to the houses and grass at the Whitsunday following. The answer is, and there is authority for the proposition, that the tenant is understood to have until Martinmas to reap and ingather the crop of the arable land, and that the second legal term for payment of rent is Martinmas, because according to all the authorities that is the term at which the crop is supposed to be fully reaped. The reason why the expression "separation of the crop" is used in the clauses relating to entry and removal is that the incoming tenant may have access to each field as soon as its crop has been ingathered, and shall not be liable to be kept out of possession by a troublesome outgoing tenant in the assertion of a theoretical right to retain possession until Martinmas. But this construction is quite consistent with Martinmas being the autumnal term wherever it is necessary that something to be done in fulfilment of the lease should be referred to a definite day, payment of rent being a clear case in point. I have therefore no difficulty in holding that where notice has to be given four months before the autumnal term the term of Martinmas is the time from which the period of four months is to be reckoned.

It has already been found by a decision of the Second Division of the Court that where a lease prescribes two terms of removal the later term is the one from which the period of notice is to be reckoned. I refer to the case of *Strang v. Stuart*, where the principle is distinctly announced in the opening sentences of the Lord Justice-Clerk's opinion. His Lordship there observes,—“The statute says that the notice must be given four months at least before the determination of the tenancy, and it seems to me that the statute would be entirely inextricable unless there were a specific point. It can only mean one point, and I think that the just and reasonable interpretation to put upon the words ‘determination of the tenancy’ is the period after which no possession can be had by the tenant in terms of the lease.” The same construction has been put upon the corresponding provision of the English statute, passed for the same purpose, in the English case—*In re Paul*, 24 Q. B. Div. Now in the case of *Strang v. Stuart* the tenant's possession of the houses and grass terminated as usual at Whitsunday, and his possession of the arable land terminated at the separation of the crop preceding that term, and I think that in the present case, where the possession of the arable land ceases at a period subsequent to the term of removal from the houses and grass, the Lord Ordinary has rightly applied the decision by holding that the notice which was given four months before Martinmas is a sufficient notice under the statute.

There remains for consideration the argument that was maintained to us, founded on the concurring decisions of the Court of Session and the House of Lords in *Wight v. Earl of Hopetoun*. That was a decision on the construction of a lease for nineteen years, renewable in perpetuity on notice of renewal being given by the tenant to the landlord. The notice was to be given “at least twelve months before the expiry of the above term of nineteen years,” and by the terms of the lease the entry to the arable lands was at the separation of the crop subsequent to the Whitsunday entry for houses and pasture. The notice given was held to be insufficient, because it was not given twelve months before the Whitsunday term, when the tenant's possession of the houses and pasture came to an end. The construction there put upon the obligation to give notice was therefore different from the construction which I suggest as the true

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construction of the statutory obligation in the Agricultural Holdings Act, and it is proper to notice that amongst the reasons given by the Lord Chancellor for the judgment, his Lordship refers to the difficulty of determining what precise time is meant by the separation of the crop from the ground in the alternative view of the case of notice being reckoned from the term of entry to the arable lands. But Lord Wensleydale, as I read his Lordship's opinion, construed the obligation as meaning that notice must be given at the earlier term, because the intention was that the landlord should have a year to look out for another tenant in the event of the lease not being renewed, and in this view the other Judges of the Appellate Court concurred. Now, if this be the true ground of judgment, the case of *Wight v. Earl of Hopetoun* is an authority entirely consistent with the judgment which I propose, because the principle suggested by Lord Wensleydale is this, that when there are two terms of entry or removal, and the words of the obligation are indifferently applicable to either of these, we are to look to the purpose and motive of the obligation to ascertain which view is the more consistent with the intention of the parties. This is also the principle announced in the passage which I have quoted from the Lord Justice-Clerk's judgment in *Strang v. Stuart*, but as the motive of the statutory requirement of notice was altogether dissimilar to that of the contract in *Wight v. Earl of Hopetoun*, it follows quite legitimately that the last term or last "determination of the tenancy" is to be taken as the term to which notice is referred in accordance with the policy and intention of the statute.

I have only to add that in my apprehension this is a very unfavourable case for maintaining the argument that the notice ought to have relation to the Whitsunday entry, because not only is the tenant to remain six months longer in possession of the arable lands, but as I have shewn, he is to have possession of a substantial part of the subject for a whole year subsequent to his surrender of the house and pasture, which accordingly cannot in any real sense be regarded as the termination or determination of his right under the contract of location.

LORD KINNEAR.—The ground on which this reclaiming note was supported was not maintained before the Lord Ordinary in the Outer-House, because his Lordship says that "the complainer does not now maintain that the notice required to be given four months before the term of Whitsunday 1892." But the point which was not maintained in the Outer-House was the only point which was seriously argued here. On that point I agree with Lord M'Laren that the case is ruled by the case of *Strang v. Stuart* in the other Division, 14 R. 637, and I think also that the decision of the Queen's Bench Division in the case of *In re Paul*, 24 Q. B. D. 247, is very much in point. The observations of Mr Justice Matthew in that case appear to me to have a very direct application to the circumstances of the present case, because if the construction which the reclaimer proposes were to be adopted, a tenant would be in a position to deteriorate the lands for a period of twelve months, and the landlord would be altogether precluded from claiming compensation.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT refused the reclaiming note.

H. & H. TOD, W.S.—PRINGLE, DALLAS, & Co., W.S.—Agents.

JOHN ALFRED HOPE (Pursuer), Respondent.—*M' Watt.*

No. 15.

ROBERT MACDOUGALL (Defender), Reclaiming.—*Craigie—W. Thomson.*

Nov. 7, 1893.

Bankruptcy—Sequestration—Proof on question of jurisdiction—Sheriff—Ultra vires—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), secs. 26 and 30.—*Held* that it is *ultra vires* of a Sheriff to consider the question of jurisdiction in a petition for sequestration until the diet to which the debtor is cited, under sec. 26 of the Bankruptcy Act, 1856, to shew cause why sequestration should not be awarded.

In a petition for sequestration a Sheriff, before granting warrant to cite the debtor, who lodged a caveat with objections to the jurisdiction, allowed a proof on that point. Thereafter he pronounced an interlocutor in which he repelled the plea of no jurisdiction, and *quoad ultra* granted the usual warrant to cite the debtor. In an appeal *held* that the interlocutors of the Sheriff, in so far as they dealt with the question of jurisdiction, were incompetent, and fell to be recalled, but that the last interlocutor *quoad ultra* should be affirmed.

ON 5th September 1893 John Alfred Hope, Carlisle, presented a petition in the Sheriff Court, Glasgow, under the Bankruptcy Act, 1856, for warrant to cite Robert Macdougall, "property-agent, Glasgow," to shew cause why his estates should not be sequestrated, and for diligence "to recover evidence of notour bankruptcy and other facts necessary to be established."

Bill-Chamber.
1st Division.
Lord Trayner.

The petitioner pleaded;—The defender being notour bankrupt and unable to pay his debts, and having carried on business for a year before the date hereof in Glasgow, in the county of Lanark, the pursuer, who is his creditor to the extent foresaid [£615, 9s.], is entitled to apply for sequestration of his estates.

Macdougall lodged a caveat, and on 5th September the Sheriff-substitute (Murray) appointed 7th September as a diet for disposing thereof. Thereafter Macdougall lodged a note of objections objecting to the jurisdiction of the Sheriff of Lanarkshire, "on the ground that he [Macdougall] is not subject thereto in terms of the Bankruptcy Statutes."

On 7th September the Sheriff allowed the note of objections to be received, and allowed parties a proof as to the jurisdiction.

On 11th September the Sheriff (Spens) pronounced this interlocutor:—*"Having heard evidence, finds respondent has been carrying on business in Glasgow within the twelve months preceding the date of presentation of this petition, therefore repels the plea of no jurisdiction: Quoad ultra, having considered the foregoing petition, with the writs produced, grants warrant to cite, in terms of the statutes, the therein designed Robert Macdougall to appear in Court on an inducia of seven days from the date of such citation, to shew cause why sequestration of his estates should not be awarded: Directs intimation of this warrant, and of the diet of appearance on the said inducia, to be forthwith made in the Edinburgh Gazette in terms of the statute; and grants diligence against witnesses and havers to recover evidence of the notour bankruptcy of the said Robert Macdougall, and of the other facts necessary to be established for obtaining the sequestration."*

On the same day Macdougall appealed to the First Division, and on 29th September the Lord Ordinary on the Bills (Trayner) dismissed the appeal, and affirmed the deliverance of the Sheriff.

Macdougall reclaimed to the First Division.

The respondent objected to the competency of the proceedings in the Sheriff Court, on the ground that the Sheriff was bound, under sec. 26 of the Act of 1856,* to grant warrant to cite and to recover documents

* Quoted, so far as necessary, in Lord Adam's opinion.

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when the petition was first before him, and it was not until the stage of the sequestration set forth in sec. 30, *i.e.*, when the debtor had to appear before the Sheriff to shew cause why sequestration should not be awarded that the question of jurisdiction could be considered by the Sheriff, and a proof on the question allowed. On the merits he maintained that the Sheriff was right.

The appellant maintained that the procedure taken by the Sheriff was competent. The Sheriff, before he took any action in a petition for sequestration, was bound to satisfy himself that he had jurisdiction to entertain the cause at all. He was right in proceeding to do this at the earliest possible stage after he knew that there was a doubt on the question.

At advising,—

LORD ADAM.—In this case a petition was presented in the Sheriff Court of Lanarkshire by John Hope against Robert Macdougall praying for sequestration of the estates of the latter under the Bankruptcy Act of 1856. The prayer of the petition was in the usual form, *viz.*, for warrant to cite Macdougall, and to grant diligence to recover evidence of the defender's notour bankruptcy, and "other facts necessary to be established." The defender, it appears, had lodged a caveat in the Sheriff Court, and in consideration of that the Sheriff, on 5th September last, appointed the 7th September "as a diet for disposing of the caveat." The parties met on the 7th, and the defender apparently produced a note of objections in which he objected to the jurisdiction of the Sheriff. On that date the Sheriff-substitute allowed the note of objections to be received, and allowed parties "a proof on the question of jurisdiction." Proof was accordingly led, and on 11th September the Sheriff-substitute pronounced this interlocutor:—"Having heard evidence, finds respondent has been carrying on business in Glasgow, within the twelve months preceding the date of presentation of this petition, therefore repels the plea of no jurisdiction: *Quoad ultra*, having considered the foregoing petition with the writs produced, grants warrant to cite, in terms of the statutes, the therein designed Robert Macdougall to appear in Court on an *induciae* of seven days from the date of such citation, to shew cause why sequestration of his estates should not be awarded: Directs intimation of this warrant, and of the diet of appearance on the said *induciae*, to be forthwith made in the *Edinburgh Gazette* in terms of the statute; and grants diligence against witnesses and havers to recover evidence of the notour bankruptcy of the said Robert Macdougall, and of the other facts necessary to be established for obtaining the sequestration." Now, it appears to me that the proceedings of the Sheriff in pronouncing the interlocutors of the 5th and 7th September, and the first part of the interlocutor of the 11th, were quite incompetent and *ultra vires*. The jurisdiction of a Sheriff in bankruptcy cases is entirely statutory, he has no common law jurisdiction in such proceedings. He must therefore walk strictly in the path laid down by the Act. Now, it appears to me that the statute very clearly points out what the Sheriff should do when a petition for sequestration is first before him. The procedure is regulated by sec. 26 of the Act, which provides that when, as here, a petition for sequestration is presented without the consent of the debtor the Lord Ordinary or Sheriff "shall grant warrant to cite the debtor . . . to shew cause why sequestration should not be awarded, and the Lord Ordinary or Sheriff shall, if desired, grant diligence to recover evidence of the notour bankruptcy or other facts necessary to be established." Now, one of the

"other facts necessary to be established" is the fact that the alleged debtor is subject to the jurisdiction of the Court in which the petition is presented. No. 15.

The further procedure is provided by sec. 30 of the Act,—“Where the petition is not by or with the concurrence of the debtor, . . . and if the debtor . . . do not appear at the diet of appearance . . . and shew cause why the sequestration cannot be competently awarded, . . . the Lord Ordinary or Sheriff, on production of evidence of the citation and of the foresaid requisites for sequestration, shall award sequestration in manner and to the effect before mentioned.” That is the opportunity given by the statute for such objections being taken as we have here. The petitioner cannot succeed in getting sequestration of his debtor's estates unless he produces evidence of the citation and of the “foresaid requisites for sequestration.” Now, if the debtor says at that time,—I am not subject to the jurisdiction of the Court, and if the petitioner has not ready evidence to prove the jurisdiction, then proof may be required, but that—and not the earlier stage—is the time for producing it. What the Sheriff has done here is to divide the matter into two parts, and he has taken a separate proof at the first stage of the sequestration, which the statute does not allow. I am therefore of opinion that the interlocutors to which I have already referred were incompetent and *ultra vires*. Nov. 7, 1893.
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That being so, the question comes to be, what are we to do now? Your Lordships will observe that of the last interlocutor of the Sheriff one part, the first, is incompetent, and the rest competent. In these circumstances, I find authority in the case of *Reid v. Strathie*, June 29, 1887, 14 R. 847, for the course which I propose should be pursued. There objection was taken to certain votes given for the election of the trustee. The Sheriff-substitute sustained or repelled some of the objections, but with regard to one objection taken by a Mr Reid he allowed a proof at large. That interlocutor was appealed to this Court, and the Court were of opinion that the Sheriff's interlocutor was final as regarded the objections repelled or sustained, but incompetent so far as it allowed a proof at large. Now there, though the stage of the sequestration was different from the present, we had an interlocutor which was partly competent and partly incompetent. The Lord President (Ingles) there said of the interlocutor under appeal,—“That interlocutor disposes of various objections which were stated, and it is in the usual form and in terms of the statute down to and including that part which repels the objection to the vote of Ross Robertson Auld and others. But then it deals with one objection stated by Reid to the vote of Thomas Anderson, merchant, Glasgow, which he was not in the position instantly to verify. In these circumstances the Sheriff-substitute, instead of repelling the objection as he ought to have done, allows Mr Robert Reid a proof of his averments, and to Mr David Strathie a conjunct probation. Now, it has been decided in several cases, to which I need not separately refer, that such allowance of proof is incompetent, and, having in view these authorities, that part of the interlocutor is beyond the power and jurisdiction of the Sheriff, and is not within the statute. That error being thus before us, I think our course is to quash that part of the interlocutor *ante omnia*. It is obvious that if the Sheriff-substitute had not fallen into the mistake of allowing a proof, he would have proceeded in ordinary course to declare one of the candidates duly elected, and we ought therefore to send back the case to the Sheriff-substitute to complete the interlocutor.” I am of opinion that we ought to follow that course here. I accordingly propose that we should recall as incompetent the

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interlocutors of 5th and 7th September, and that part of the interlocutor of the 11th which deals with the question of jurisdiction, and *quoad ultra* affirm that interlocutor. I may add that, while I propose that, I do not indicate that we differ in the least from the result arrived at by the Sheriff on the jurisdiction. On the contrary, if it had been competent for us or the Sheriff to consider the question at that stage, I should have concurred, but as that is *ultra vires*, so much of the interlocutor must be recalled.

LORD M'LAREN, LORD KINNAR, and the LORD PRESIDENT concurred.

THE COURT pronounced this interlocutor:—"Having considered the reclaiming note for the pursuer against the interlocutor of Lord Trayner, dated 29th September 1893, and heard counsel for the parties, Recall the said interlocutor: Further recall as incompetent the interlocutors of the Sheriff-substitute, dated 5th and 7th September 1893, and also the interlocutor of the Sheriff-substitute, dated 11th September 1893, in so far as it 'finds respondent has been carrying on business in Glasgow within the twelve months preceding the date of presentation of this petition'; and 'repels the plea of no jurisdiction': *Quoad ultra* adhere to said last-mentioned interlocutor, and decern: Find the respondent (petitioner) entitled to expenses, and remit the account thereof to the Auditor to tax and to report to the Sheriff; and remit to the Sheriff to proceed, with power to decern for the taxed amount of said expenses."

W. KINNIBURGH MORTON, S.S.C.—THOMAS M'NAUGHT, S.S.C.—Agents.

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MAGISTRATES OF GLASGOW, Petitioners (Respondents).—*Lees—Ure*.
GLASGOW DISTRICT SUBWAY COMPANY, Defenders (Appellants).—*R. V. Campbell—W. Thomson*.

Sheriff—Appeal—Competency—Arbitration—Nomination of arbiter—Glasgow District Subway Act, 1890 (53 and 54 Vict. c. clxii.), sec. 56.—Under a private Act of Parliament all differences arising with regard to the carrying out of certain operations in a city were to be referred to an arbiter mutually agreed on by the promoters of the Act and the Corporation, and "failing such agreement" to an arbiter appointed "by the Sheriff of the county of Lanark." The Corporation presented a petition to the Sheriff, praying him to appoint an arbiter, which he did by an interlocutor in the ordinary form. *Held* that in doing so he was not acting in his judicial capacity, and that, therefore, an appeal to the Court of Session was incompetent.

1ST DIVISION.
Sheriff of
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BY the Glasgow District Subway Act, 1890 (53 and 54 Vict. cap. clxii.), the Glasgow District Subway Company were authorised to make certain subways, &c. in Glasgow.

Section 56 of the Act provides that "if the Corporation and the company shall differ upon or with reference to any plans, elevations, sections, or other particulars which under the provisions of the Act are to be delivered by the company to the Corporation, or as to the mode of carrying out the same, or as to any other matter or thing arising out of the said plans, elevations, sections, or other particulars, or any of the provisions of the Act, every such difference shall, on the application of the company or of the Corporation, be referred to the determination of an arbitrator, to be mutually agreed upon before the construction of the subways and works thereby authorised is commenced, and failing such agreement, as may be appointed on the requisition of any of the parties named in said section by the Sheriff of the county of Lanark; and such arbitrator shall

have power to determine the matter in difference, and the costs of and incident to the reference shall be paid by the company." No. 16.

On 14th July 1893 the Corporation presented an application "to the Honourable the Sheriff of the county of Lanark," in which they stated "That no arbitrator was mutually agreed upon by the Corporation and the company before the construction of the said subways and works authorised by the said Act was commenced. That as certain differences are on the eve of arising between the Corporation and the company with reference to the implement by the latter of the obligations imposed upon them by the before-recited sections of their said Act, it is necessary that an arbitrator should now be appointed in terms of the said Act for the purpose of deciding such differences, and any other differences which may arise between the Corporation and the company with reference to any of the other provisions of the said Act in which the Corporation are interested."

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The prayer of the application was,—“May it therefore please your Lordship, upon considering this application, to appoint an arbitrator in terms of the said Act, for the purpose of determining all and any differences which may arise between the Corporation and the company under the same.”

On 8th August the Sheriff pronounced this order,—“Having heard the agents for the Corporation of Glasgow and the Glasgow District Subway Company, and considered the foregoing petition, appoints Professor Archibald Barr, of the University, Glasgow, as arbitrator, in terms of the Act referred to in the petition.”

The company appealed to the First Division of the Court of Session, and the note of appeal was marked as lodged by the Sheriff-clerk-depute of the county.

At the hearing of the cause it was admitted that the petition did not pass through the Sheriff-clerk's office when it was originally presented.

The respondents objected to the competency of the appeal, and argued ; The proper form of review of the Sheriff's deliverance was either a reduction or suspension. The Sheriff when acting under the 56th section was not acting in his judicial capacity ; it was a mere matter of chance that he was chosen under the Act as the person to appoint an arbiter ; it might equally have been any other person, *e.g.*, the chairman of the Chamber of Commerce. Had it been provided that any such person was to appoint the arbiter, an appeal could clearly not have been taken. There was no record kept of the proceedings before the Sheriff, and the finding could not be extracted. The petition was not brought in the ordinary Sheriff Court form, and all the Sheriff had done was to exercise a discretion given him by the statute. An appeal from a Sheriff was only competent where in former days advocacy was competent, and advocacy was never competent in such circumstances as the present, where the Sheriff was exercising his discretion, and where no extractable judgment had been pronounced.¹ There was no instance of appeal in such cases ; all such findings had been reviewed by suspension or reduction.²

Argued for the appellants ;—The appeal was competent. Under the Act the Sheriff could only exercise the power of appointing an arbiter on certain contingencies arising, *viz.*, on differences arising between the parties before the works commenced, and on the parties failing to agree upon an arbiter. Now, the company had never been asked to agree upon an arbiter, and therefore the Sheriff had no power to pronounce any find-

¹ Strain v. Strain, June 26, 1886, 13 R. 1029.

² Sinclair v. Clyne's Trustees, Dec. 17, 1887, 15 R. 185.

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ing. This was not a case of the Court interfering with the Sheriff's discretion, it was a case of the Court stepping in where a Sheriff had acted without having jurisdiction. The Legislature had invoked a well-known judicature in giving the Sheriff of the county the power of nomination, and it was therefore presumed that the ordinary forms in use in the Courts of that judicature would be used. In such cases advocacy would formerly have been competent.¹

At advising,—

LORD PRESIDENT.—In my opinion this appeal is incompetent.

The duty imposed on the Sheriff by the statute is that of nominating an arbitrator; and the question is whether, in the intention of the Legislature, this was to be a judicial proceeding, to take place in the Sheriff Court, and with a consequent right of appeal to the Court of Session. In its nature the nomination of an arbitrator does not seem a piece of business requiring or suitable to such procedure. Nor does the selection of the Sheriff, as the person vested with the choice, at all imply that he is to act in a judicial character. The Sheriff is an administrative as well as a judicial officer, and there are incumbent upon him numerous duties which are not performed in his Court. It seems to me that the matter now in question is not a piece of Sheriff Court business, and the mere circumstances that the party asking the Sheriff to name an arbitrator approached him in a petition, and that his nomination is expressed in the style of an interlocutor, cannot invest with a judicial character an act which has not that legal quality.

It is hardly necessary to say that if the Sheriff, as the donee of this power of nomination, has acted *ultra vires*, the parties have the same remedies as if the nomination had been with any other public officer or any individual. All that we have now to decide is whether the challenge of the nomination can be made by appeal, and in my judgment it cannot.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT dismissed the appeal, with expenses.

CAMPBELL & SMITH, S.S.C.—W. & J. BURNES, W.S.—Agents.

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WILLIAM POLLOK AND ANOTHER (Clerks to and as representing the Police Commissioners of Hamilton), Pursuers (Respondents).—

Shaw—Cullen.

JOHN FINLAY, Defender (Appellant).—*R. V. Campbell—W. C. Smith.*

Police—Public health—Assessment—Special sewer-rate—Jurisdiction—Ultra vires—General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), secs. 75 and 96 to 100.—In 1886 the police commissioners of a burgh imposed a special sewer-rate, under secs. 96 to 100 of the General Police and Improvement Act, 1862, on the owners of heritages within a district of the burgh. In 1891 a ratepayer within the district, who had paid the special sewer-rate for the previous years without objection, declined to pay the rate for 1891-2 (being the last year of the special sewer-rate). The police commissioners brought an action in the Sheriff Court against him for payment of the amount. The defender pleaded that the rate for 1891-2 was *ultra vires* because unnecessary, in respect that if the commissioners had not in previous years debited the

¹ Magistrates of Portobello v. Magistrates of Edinburgh, Nov. 9, 1882, 10 R. 130.

special sewer-fund with certain expenditure which was not a proper charge against the special fund, and had credited that fund with certain income which had been improperly paid into the general burgh funds, the commissioners would have raised enough money during the previous years, in name of special sewer-rate, to satisfy the purposes for which the assessment had been imposed. *Held* that this plea was not relevant as a defence to an action for payment of the rate. No. 17.
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Opinions (per the Lord Justice-Clerk, Lord Young, and Lord Trayner) that the questions raised could only be determined by a petition, under sec. 75 of the Act, to the Sheriff, whose decision under that section was final.

By the Hamilton Burgh Act, 1878 (41 and 42 Vict. cap. cxxxvii.), sec. 136, 2D DIVISION. it was enacted that the burgh should, from and after 1st January 1879, be divided into two drainage districts, one of which—district No. 2—should consist of the district annexed to the burgh by the Act, and that the police commissioners should take the necessary steps for the efficient drainage of the annexed district, and for carrying out therein the provisions of clauses 96 to 100 of the General Police and Improvement (Scotland) Act, 1862,* which Act was, by section 3 of the Burgh Act, declared, Sheriff of
Lanarkshire.

* The General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), clause 75, occurring in Part I. of the Act, enacts,—“Accounts of all property, heritable and moveable, vested in the commissioners, shewing the nature of such property and of all money received and disbursed, shall be kept in books by the treasurer or collector as the commissioners may appoint, and all such books of accounts may at all seasonable times be inspected and perused without fee or reward by any person assessed, and also by any person entitled to any money due and owing on the credit of such assessment, and such persons may take copies of or extracts from any such books and accounts without fee or reward, . . . and in case any person who shall be assessed shall be dissatisfied with any accounts which shall have been made up as aforesaid, or with any of the items or articles contained in such accounts, such person may complain against the same by petition to the Sheriff, in which complaint shall be specified the grounds of objection to such accounts, items, or articles; and the Sheriff shall proceed to hear and determine the matter of such complaint, and his decision shall be final.”

Clause 96 (clauses 96 to 100 constituting subdivision 1 of section II. of Part II. of the Act) authorised the police commissioners to charge and assess rates on the owners of all lands and premises liable to contribute to rates for making new sewers special sewer-rates over and above any other assessments or rates, and such rates were to be called the ‘special sewer-rate.’

Clause 99 enacts,—“The commissioners . . . shall cause separate and distinct accounts to be kept of all moneys collected and received under any rate in each distinct district, and of all payments and disbursements in respect thereof, and they shall apply the moneys to be collected and received from each distinct district under any such rate as aforesaid for the several purposes to which the same may be lawfully applied under the authority of this Act, but so nevertheless that each district shall as near as may be bear its own expenses; and in case any such expenses shall apply to or be incurred in respect of two or more districts, the same shall be apportioned and divided between such districts in such manner as the commissioners shall consider fair and equitable.”

Clause 106 (occurring in subdivision 4 of section II. of Part II.) enacts,—“The said rates or assessments may be imposed and levied yearly, half-yearly, or at such other periods as the commissioners may think fit, and shall be payable at such times as they appoint; and at the meeting imposing the same the commissioners shall appoint a day on which such rates or assessments shall be payable, and another day on which appeals by any parties complaining that they have been improperly rated or assessed may be lodged with the clerk or collector, and another day or days on which appeals in reference to such rates or assessments shall be heard by the commissioners, and notice to each party intended

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except in so far as inconsistent with or varied by the Burgh Act, to be held to have been adopted in and to apply to the whole burgh.

Thereafter the police commissioners constructed a drainage system for district No. 2, and imposed a special sewer-rate on owners of 1s. per £1 per annum on the rental of all properties within the district. The special sewer-rate was first imposed in 1886.

In 1891 John Finlay, who, as factor, drew the rents of certain properties in district No. 2, and as such was the owner of these properties within the meaning of the General Police Act, 1862, declined to pay the special sewer-rate imposed on these properties for the year 1891-2—in all £54, 14s.

William Pollok and P. M. Kirkpatrick, the clerks to and as representing the police commissioners, thereupon raised an action in the Sheriff Court of Hamilton for payment of the amount of the rate.

Finlay, in defence, stated,—(Stat. 9) “ . . . The whole costs and charges of and connected with” the drainage of district No. 2 “ have already been paid and discharged by the special sewer-rates levied on and recovered from the owners of lands and premises within said district (including the defender) prior to the period to which the rate or assessment now sued for is applicable.” (Stat. 10) “ A considerable portion of the moneys entered and charged by the police commissioners as applicable to drainage district No. 2 does not apply to that district at all, but has been expended on drainage and other works executed by them outwith the bounds of that district, and for the expense of which the owners of lands and premises in said district (including the defender) are not liable.” (Stat. 13) “ Numerous other sums for payment of which the commissioners have no authority under the Burgh Act or the General Police Act to impose special sewer-rates on owners of lands or premises in district No. 2 have been entered and charged by them in the general drainage account applicable to said drainage district. A copy of said ‘ No. 2 Drainage Account ’ (annexed district) is herewith produced.” (Stat. 14) “ Further, since the commissioners constructed the new sewer or sewers in district No. 2, a large number of houses and other buildings have been erected in said district, and the commissioners have exacted and recovered from the owners thereof a very considerable amount in name of ‘ a reasonable sum of money for the use of the sewers,’ in conformity with section 190 of the General Police Act. These sums of money ought to have been credited to the drainage account of said district, thereby reducing the amount of the special sewer-rates, but instead of so doing the commissioners have applied the same to other purposes, contrary to the meaning and intent of the said General Police Act.” (Stat. 16) “ On a fair and equitable application of the sewer-rates, and the reasonable sums above mentioned, paid by the owners of lands or premises within the district in question, the defender avers that the whole expense of making and constructing new sewers in said district has not only been fully paid and extinguished by the special sewer-rates or assessments levied on them prior to the year 1889-1890, but that a considerable sum has been exacted from such owners, including the de-

to be so rated or assessed stating the particulars of the intended rate or assessment as regards such party, and specifying the several days fixed by the commissioners as aforesaid, shall be sent by the clerk or collector through the post-office at least two weeks preceding the day which may be fixed for hearing the appeal of such party, and the decision of the commissioners upon all such appeals shall be final, but the commissioners may rectify such rate or assessment so appealed against.”

fender, in excess of the amount which the commissioners were entitled by the statute to recover from them for that purpose." No. 17.

In answer, the pursuers, in substance, pleaded that these averments were irrelevant, at least as a defence to the present action. They stated that 1891-92 would be the last year of the special sewer-rate. Nov. 8, 1893.
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On 4th April 1893 the Sheriff-substitute (Davidson) pronounced this interlocutor:—(After certain findings not necessary to be quoted) "(4) *Quoad ultra*, finds that the charges made by the pursuers are proper, and within the powers conferred upon them by the said statutes: Therefore finds them entitled to the sums sued for in the prayer of the petition."

On appeal, the Sheriff (Berry), on 10th July, adhered.

The defender appealed, and argued;—Section 75 of the General Police Act, 1862, did not apply to special sewer-rates, but only to the general rates leviable under the Act. It was true that special sewer-rates were not expressly excluded from the operation of section 75, but it was the fair inference from the relative position of the two sections in the Act. In any event, the question raised here did not belong to the class of questions contemplated by section 75, which, fairly construed, referred to ordinary objections as to the statement of the accounts, nor did it belong to the objections referred to in section 106, which related to objections to particular assessments upon individuals. The question here belonged to neither category, for it truly was this, whether the assessment for 1891-92 ought to have been imposed at all? If the defender's averments were well founded it ought not, and the pursuers in imposing it had acted *ultra vires*. Such a question was competently raised in an action for payment of the assessment.¹

The argument for the pursuers sufficiently appears from the opinions of the Court.

LORD JUSTICE-CLERK.—This case must be dealt with here on the same footing as in the Court below, and on the record as stated there. What might have been the result as regards the rights of ratepayers who say that an assessment has been laid on without statutory authority, either because there is no authority at all to impose the particular assessment, or because it has been imposed on the wrong people, we are not here called on to determine. It may be that the question of the validity of such an assessment may be brought here by an action of reduction or otherwise. But I do not find any case of that description on this record. Going over the defender's statements step by step, I think that they amount to no more than a series of objections to the use made of the money raised by the assessments. It appears on the face of the Act of Parliament that as regards all the revenues of the burgh accounts are to be kept which are open to the inspection of the ratepayers, who may state objections to them in the manner provided by the statute. Mr Campbell attempted to draw a distinction between the present special assessment and the general revenue of the burgh, but he candidly admitted that there was no express provision excluding the application of clause 75 from assessments collected under clause 106, and I am unable to find anything from which by reasonable implication such an exclusion is to be implied. These assessments are just part of the burgh revenue, and objections stated to the accounts kept of them fall within the operation of clause 75, just like the accounts kept with reference to the other

¹ M'Callum v. Barrie, Feb. 26, 1878, 5 R. 683; Hillhead Police Commissioners v. Renwick, June 21, 1890, 17 R. 1042; Kirkintilloch Police Commissioners v. M'Donald, Oct. 31, 1890, 18 R. 67.

No. 17. assessments. I think that the Sheriff is right, and that his judgment should be adhered to.

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LORD YOUNG.—I am of opinion that there is no ground for interfering with the judgment of the Sheriff here. The case relates to a special sewer-rate which has been imposed by the Police Commissioners of Hamilton upon the proprietors in district No. 2 of the two rating districts into which Hamilton is divided. That rate has been imposed by the commissioners since 1886, and we are informed that the rate for the year 1891-92, and payable on 15th December 1891, is the last that is to be imposed on district No. 2. The defender is a house-factor, who represents several owners of property in district No. 2, and he objects on their account to pay this last instalment. He paid the previous instalments without objection, but he now objects to the last, and generally on the ground that if the accounts were properly made up, so as to shew the works upon which the produce of the rates was expended, and also so as to give credit for certain special rates upon houses newly erected, it would be found that there was no balance due, with regard to which the commissioners are empowered under the statute to impose the special rate. Now, I do not think that, in answer to an action for recovery of a rate imposed in December 1891, this defence can be allowed. It is clear enough that a rate-raising and rate-spending body like the Commissioners of Police of Hamilton may be called upon to account for the employment of money which they have raised by assessment, and that any error which they may have committed, by applying the money to improper purposes, or by not crediting a particular district with money which ought to have been put to the credit of that special district, or any other error, may be rectified; and if the Act of Parliament does not make special provision for such rectification, I do not doubt that the common law will provide the means of correcting the error. In the present instance, I rather think that section 75 of the General Police Act of 1862 does provide a special method of rectification, by enacting that a person who has any objection to the accounts may appeal to the Sheriff, whose decision is to be final. That is a very reasonable and expedient provision, because it is certainly undesirable to have actions of count, reckoning, and payment, or of declarator in the Supreme Court, concerning such a matter.

Now, the accounts of these commissioners have been kept in the manner provided by the statute, and are open to the inspection of all persons assessed, and this particular defender could, in an application to the Sheriff under section 75, have stated any objections to the accounts that he thought fitting, so as to affect the balance which the commissioners are entitled to raise by means of assessment. He did not take that course. Then there is this further provision in the Act, that if any person objects to an assessment his objection is to be made the subject of an appeal to the commissioners whose decision is also declared to be final, but there was no such appeal by the defender. I am disposed, therefore, to hold that if his objections are to be taken as being objections to the accounts of the commissioners they cannot be considered in this Court, but only in an application to the Sheriff under section 75 of the Act; and that if the objections are objections to the assessment levied upon the defender, then they can be made only in the expedient and economical manner, both in time and in money, provided by the Act of Parliament.

Mr Campbell used the expression that the commissioners had acted *ultra*

vires. Well, if the proper body to expend money expend it in an improper manner, by devoting it to an improper object, which they, in the exercise of an erroneous judgment consider to be a matter to which they may fairly devote the money, or if they make erroneous entries in their accounts, that is wrong, and you may say that it is *ultra vires*, but then if their action is wrong it is, I think, a wrong of precisely that character which, under this statute, if objection is taken, is to be the subject of litigation before the Sheriff, or of precisely that character which may be the subject of an appeal to the commissioners. I cannot hold that upon the mere use of the expression *ultra vires* we can entertain a defence of this character to an action for payment of this assessment. The inexpediency of such a course is obvious. The defender here is in no different position from all the other, I suppose numerous, ratepayers in this district No. 2 who are liable for this special sewer-rate. Their legal position is just the same as his, and if it is open to him to do so, they may all, by using the expression *ultra vires*, become defenders in an action for recovery of the assessment. Now, I do not think that could be allowed. If there had been no special remedy provided by the statute, then the common law would provide the means of calling the commissioners to account for their expenditure. But in this case I think that the statute has provided a special remedy.

No. 17.
Nov. 8, 1893.
Hamilton
Police Com-
missioners v.
Finlay.

LORD RUTHERFURD CLARK.—As I read the record, I understand that it is not maintained that the assessment in question is illegal,—that is to say, it is not disputed that the commissioners have power to impose it. The only ground which the appellant puts forward as exempting him from payment I understand to be this—that if the commissioners had properly applied the money in their hands, there would have been no need of an assessment. I think that that is not a good defence to an action for payment of an assessment. If the statement is true, it may possibly give the defender a right to repetition from the commissioners of the sums improperly paid by him, but it is not a ground which entitles him to refuse payment of the assessment in the first instance. I go no further than this.

LORD TRAYNER.—I think that the objections stated by the defender to the demand upon him resolve themselves into objections to the manner in which the commissioners have stated their accounts. I have gone over the statements of the defender, and I can find no other grounds for his defence than this, that if sums improperly inserted in the debit side of the accounts were deducted, and that if sums already paid were credited to the account, the assessment has been sufficiently provided for. I think that such objections to items of or omissions from the accounts are preeminently objections of the class contemplated by section 75 of the General Police Act, and under that section the judgment of anybody but the Sheriff is excluded.

THE COURT adhered.

CARMICHAEL & MILLER, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

JAMES GLEN EDGAR, Petitioner.—*Dickson—Christie*.
JOHN M'KILLOP AND ANOTHER (Fisher's Trustees), Minuters.—*Murray—Lees*.

No. 18.
Nov. 10, 1893.
Edgar v.
Fisher's Trust-
tees.

Parent and Child—Petition for custody of child—Bill—Chamber—Jurisdiction.—Held by Lord Kinnear that a petition by a father for the custody of

No. 18. his child was competently presented in vacation to the Lord Ordinary on the Bills, and order for delivery *granted*.

Nov. 10, 1893.
Edgar v.
Fisher's Trustees.

Administration of justice—Custody of child—Contempt of Court—Sequestration of estate—Judicial factor.—A father presented a petition for the custody of his child, and obtained decree against A B, ordaining her to deliver the child to him. A B having failed to obey the decree, the father presented a second petition praying the Court to ordain A B to appear personally at the bar, and in the event of her failing so to do to sequester her estate, to appoint a judicial factor thereon, and to interdict the trustees on a trust-estate in which she had an interest from paying to or on behalf of A B any of the trust funds otherwise than to the judicial factor. A B having failed to appear at the bar, the Court, being of opinion that she was acting in contempt of Court, *granted* the petition.

1st Division. In September 1893 James Glen Edgar, plumber, Glasgow, presented a petition in the Bill-Chamber against Margaret Fisher, the child's maternal aunt, for the custody of his daughter Everina Burns Edgar.

Intimation and service were ordered by the Lord Ordinary on the Bills, and on 7th September the petition was served personally on Margaret Fisher. No answers were lodged, and on 21st September the Lord Ordinary on the Bills (Kinnear), after hearing counsel for the petitioner on the question whether the Lord Ordinary on the Bills had power to entertain the application,¹ granted an order for delivery of the child to the petitioner.

On 20th October Mr Edgar presented a second petition to the Court in which he stated that, after service of the petition upon her, Margaret Fisher had left her home in Glasgow with the child, and that the petitioner had reason to believe that they had gone to England. The pursuer further stated that Margaret Fisher had a large interest in the trust-estate of her father, the late George Fisher.

The petitioner craved the Court to order intimation and service upon Margaret Fisher, and to ordain her to appear personally at the bar, and to bring with her and deliver up the petitioner's child; and in the event of her failing to appear on the day appointed, to sequester her whole property in Scotland, and to interdict George Fisher's trustees from making payment to her.

On 21st October, the Court ordered intimation and service as craved. As Margaret Fisher could not be found, personal service upon her was not effected. No answers were lodged.

On 4th November counsel for the petitioner moved the Court to conjoin the two petitions, and without ordaining Margaret Fisher to appear at the bar at once to grant sequestration as craved.² This course he stated was adopted in England in similar circumstances.³

The Court pronounced an interlocutor ordaining Margaret Fisher to appear personally at the bar on 10th November, and interdicting Mr Fisher's trustees from making any payment to her out of the trust funds until the further order of the Court.

Owing to Margaret Fisher's residence remaining unknown, it was found impossible to intimate this order to her personally. It was, however, intimated to her agent and to M'Killop and Dunbar, her co-trustees, and a copy was left at her usual residence in Glasgow. She made no appear-

¹ *Petitioner's Authorities.*—Fraser on Parent and Child, p. 222; Buchan v. Cardross, May 27, 1842, 4 D. 1268, 14 Scot. Jur. 415.

² Ross v. Ross, July 18, 1885, 12 R. 1351.

³ Miller v. Miller, 1869, L. R., 2 Prob. and Div. 13; Daniel's Chancery Practice, i. 908.

ance, and on 10th November counsel for the petitioner renewed his previous motion for the sequestration of her estate. No. 18.

Nov. 10, 1893.
Edgar v.
Fisher's Trus-
tees.

LORD PRESIDENT.—I think the respondent in this petition is in manifest contempt of Court, and she appears to have gone away for the purpose of avoiding the orders of Court. In those circumstances, I think the Court has power to sequester her estate.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced the following order:—" . . . The respondent Margaret Fisher having failed to appear in obedience to the order of the Court contained in the interlocutor of 4th November 1893, on the motion of counsel for the petitioner conjoin therewith the petition at the instance of the present petitioner dated 5th September 1893; sequester the whole property, means, estate, and effects situate in Scotland belonging to the respondent Margaret Fisher in terms of the prayer of the petition of date 20th October 1893, and the rents, income, or proceeds thereof, and nominate and appoint J. M. M'Leod, chartered accountant, Glasgow, to be judicial factor on the said sequestered estates, with power to him to receive said rents and income of the said property, means, estate, and effects, and so much of the capital or proceeds thereof as may from time to time become due and payable by parties indebted therein, with power to discharge the parties liable in payment thereof, and to retain the same until the further orders of Court, the said judicial factor always finding caution before extract, but with special power to the said judicial factor to advance to the said Margaret Fisher on her request in writing such sum out of the said estate coming into his hands as may be necessary to bring her and the petitioner's child, Everina Burns Edgar, from their present place of abode to Edinburgh: Further of new interdict and prohibit the said Margaret Fisher, John M'Killop, and Michael Dunbar, trustees acting under the mutual settlement of the late George Fisher and Mrs Everina Burns or Fisher, his wife, from making any payment out of the trust funds in their hands to or on behalf of the said Margaret Fisher, except to the said judicial factor; and interdict and prohibit the said Margaret Fisher, John M'Killop, and Michael Dunbar, as trustees foresaid, and all other parties in possession of estate in Scotland belonging to the said Margaret Fisher, from carrying away or otherwise parting with any of the said property, means, estate, or effects, or the rents, means, income, or proceeds thereof, otherwise than to the said J. M. M'Leod, as judicial factor foresaid until the further order of Court, and decern: Find the said Margaret Fisher liable to the petitioner in the expenses of both petitions now conjoined, and authorise the said J. M. M'Leod, as judicial factor foresaid, to make payment of the taxed amount thereof to the petitioner: Find the said Margaret Fisher also liable to the said John M'Killop and Michael Dunbar in the expenses incurred by them, and authorise them to retain the amount thereof out of the share of the estate in their hands falling to her," &c.

SIMPSON & MARWICK, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 19.

ROBERT EASTON AITKEN, Petitioner (Reclaimers).—*Tait.*Nov. 10, 1893.
Aitken.

Judicial Factor—Petition for delivery of bond of caution—Remit to Accountant of Court—Procedure—Judicial Factors (Scotland) Act, 1889 (52 and 53 Vict. cap. 39), secs. 6 and 20.—In 1893 the judicial factor on a trust-estate, who was appointed in 1877, and whose factory did not fall under the Pupils Protection Act, 1849, presented a petition for delivery of his bond of caution, stating that his duties had come to an end, and that he had obtained a discharge from the beneficiary, which he produced. He did not ask for a judicial discharge. The Court *refused* to grant a warrant without first making a remit to the Accountant of Court to examine the factor's accounts.

Observed that the effect of the Judicial Factors (Scotland) Act, 1889, is to subject all factories alike to the supervision of the Accountant of Court, and that it is in his discretion to say whether a full audit may be dispensed with.

1st Division.
Ld. Kyllachy.

ROBERT EASTON AITKEN, C.A., Glasgow, who had been appointed on 3d February 1877 judicial factor to administer a trust fund of £300, presented a petition to the Court of Session for delivery of his bond of caution. He stated that the fund had been duly administered by him in terms of the trust-deed, and he produced a discharge by the beneficiary entitled to the fund, to whom it had been paid over on his coming of age.

No answers were lodged, and the petitioner moved for a warrant *de plano* to the Accountant of Court to deliver up his bond of caution.

On 8th August the Lord Ordinary (Kyllachy) pronounced an interlocutor, in which he remitted "to the Accountant of Court to examine and audit the account of the factor, with the relative vouchers, and to report; and in respect that the petitioner objects to the said remit as an innovation on the practice previous to the passing of the Judicial Factors Act of 1889, and desires leave to have the procedure authoritatively settled, grants leave to reclaim."*

The petitioner reclaimed, and argued;—It had been the invariable practice of the Court prior to the passing of the Judicial Factors Act of 1889, where an extrajudicial discharge was produced by the factor, and he did not ask a judicial discharge, but merely delivery of his bond of caution, to make the order *de plano* without a remit.¹ This practice had been departed from since the passing of the Judicial Factors Act of 1889, with the result that great additional expense was caused, especially where the factory had been in existence for some time, and that was a

* The Judicial Factors (Scotland) Act, 1889 (52 and 53 Vict. cap. 39), sec. 6, provides,—“In addition to the factors specified in the recited Act of 1849” [Pupils Protection Act] “the Accountant shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court.”

Sec. 20,—“Section 23 of the Pupils Protection Act shall be held to apply to all factories brought under the supervision of the Accountant by virtue of this Act.”

The Pupils Protection Act, 1849 (12 and 13 Vict. cap. 51), section 23, “And be it enacted in regard to all factories constituted before the passing of this Act that any settlement made of any such factory, though informal, shall be held as a *prima facie* discharge to the factor, and the Accountant shall not report the same as a subsisting factory . . . and in any such factory in which, though there has been no settlement, it shall appear that no benefit is likely to be derived by the parties interested in the estate from further proceeding therein . . . the Accountant shall . . . state in his report that further proceedings are for the present unadvisable.”

¹ Rollo, July 8, 1852, 14 D. 990, 24 Scot. Jur. 588; Mackay, Feb. 21, 1857, 19 D. 503.

great hardship where the estate was a small one. In this case the fund was under £300, and the factory had been in existence since 1877, necessitating an examination by the Accountant of the accounts for each year since then. It was a different case where the factory had been under the supervision of the Accountant from the first, and the audit would only cover the portions of the year which had elapsed since the date of the last audit. Here the estate had been handed over, and no good purpose would be served by the audit.

No. 19.

Nov. 10, 1893.
Aitken.

LORD ADAM.—Prior to the passing of the Judicial Factors Act of 1889 the practice of the Court with reference to petitions of this kind varied according as the factor came under the provisions of the Pupils Protection Act or was outside that Act. If the factor was under the Pupils Protection Act his accounts were always remitted to the Accountant of Court to be audited, but if he did not come under that Act it was the custom to remit to an independent man of business to make that audit, if a judicial discharge was asked by the factor. If, however, the factor did not desire the security of a judicial discharge, but was content with a private or extrajudicial discharge by the beneficiaries under the trust, the Court was in the habit of dispensing with the remit, and *de plano* granting warrant for delivery of his bond of caution. I am of opinion that it was the intention of the Legislature, by the passing of the Judicial Factors Act of 1889, that all factors in future should be treated in the same way as those which were formerly under the Pupils Protection Act, viz., that there should be a remit to the Accountant of Court. I am informed that the practice since 1889 is in all such cases now to remit to the Accountant of Court, which makes the practice uniform. This, I think, was what was intended by that Act, and I am therefore of opinion that the Lord Ordinary's judgment is right, and that the practice in future should be the same in all cases.

LORD M'LAREN.—I see no reason for introducing any difference of practice in regard to the auditing of such accounts. The general effect and design of the Judicial Factors Act of 1889 is to place all judicial factories under the supervision of the Accountant of Court, as in the case of factories under the Pupils Protection Act, and I am confirmed in this view by considering section 20 of the Judicial Factors Act of 1889, which deals with exceptional cases, by enacting that section 23 of the Pupils Protection Act shall be "held to apply to all factories brought under the supervision of the Accountant of Court." I think the present question has been provided for in the statutes, and it is for the Accountant of Court to consider whether there is any case for dispensing with a remit,—such as that the estate is so small that it is not desirable to incur the additional expense, or for any other reason which appears to him to be a sufficient ground for departing from the usual course. I see no grounds, therefore, for interfering with the judgment of the Lord Ordinary.

LORD KINNEAR and the LORD PRESIDENT concurred.

THE COURT adhered.

F. J. MARTIN, W.S., Agent.

No. 20. JOHN CAMPBELL (Inspector of Poor, Inverkip), Pursuer (Respondent),—
Reid—Lees.

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kip v. Inspec-
tor of Poor of
Greenock.

JOHN STRACHAN DEAS (Inspector of Poor, Greenock), Defender
(Reclaimier).—*C. J. Guthrie—D. Dundas—Graham Stewart.*

Poor—Residential settlement—Chargeability during absence—Rehabilitation—Poor-Law Amendment (Scotland) Act, 1845 (8 and 9 Vict. cap. 83), sec. 76.
—A woman who had a residential settlement in the parish of Greenock left that parish in September 1881. In April 1884 she became a proper object of parochial relief in the parish of Cardross. Cardross sent notice to the parish of Inverkip, the pursuer's birth parish, and to Greenock. Inverkip admitted liability, and supported the pauper till August 1886, and made no claim against Greenock. The woman supported herself from August 1886 till February 1887, when she again became chargeable. In a question between Inverkip and Greenock with regard to liability for the relief then given, *held* that the pauper having been absent from Greenock for four years and a day before the commencement of the second period of chargeability, she had lost her residential settlement there, the fact that during her absence she was for a time entitled to parochial relief, and obtained it from another parish, having no bearing on her Greenock settlement.

Beattie v. Adamson, November 23, 1866, 5 Macph. 47, *distinguished.*

1ST DIVISION.
Ld. Wellwood.

THIS was an action at the instance of John Campbell, inspector of poor of the Inverkip district of the parish of Inverkip, against John Strachan Deas, inspector of poor of the parish of Greenock, for payment of £208, being the amount of the advances made by the pursuer on account of Mary Ann Hill from April 1887 to October 1891.

The facts, as stated in a minute of admissions for the parties, were as follows:—

The pauper, Mary Ann Hill, was born in 1856 in the parish of Inverkip. From 1863 she resided with her father in Greenock down to the date of his death in June 1881, by which time he had acquired a residential settlement there. At her father's death the pauper had also a derivative residential settlement in that parish.

In October 1881 she left Greenock, and she never afterwards resided there.

In April 1884 she became a proper object of parochial relief when in the parish of Cardross, and was received into the Dumbarton poorhouse. On 29th October a statutory notice and a formal claim for relief was sent by the Inspector of Cardross to Inverkip. The Inspector of Dumbarton also sent a formal claim to Inverkip and Greenock. In both instances Inverkip admitted liability. Greenock denied liability, and the claim against Greenock was formally withdrawn on 17th November 1885.

The pauper remained an inmate of Dumbarton poorhouse until August 1886, when she left in search of work.

On the 14th February 1887 Hill again became chargeable to the parish of Cardross, and was received into the Dumbarton poorhouse. Inverkip, on receiving a statutory notice and claim from Cardross on 12th March 1887, again admitted liability, and on the same day, for the first time, gave statutory notice to and claimed relief from Greenock. Greenock did not admit liability.

On 14th June 1887 the pauper left Dumbarton poorhouse, and continued from that date onwards to be a proper object of parochial relief. She moved about from parish to parish applying for and receiving relief, and on the relieving parishes claiming against Inverkip, their claims were admitted.

A second statutory notice was given by Inverkip to Greenock on 2d April 1891, and Greenock again denied liability.

The pursuer pleaded ;—(1) The parish of Greenock, as the parish of the pauper's settlement either derivatively from her father, or otherwise in respect of her own residence there, is bound to repay the said advances. No. 20.
Nov. 14, 1893.

The defender pleaded ;—(3) Any residential settlement, if ever possessed by the pauper in the parish of Greenock, having been lost by her absence therefrom for four years, the defender is entitled to absolvitor.* (4) In any event, the defender, having received no notice of the pauper's chargeability for the period between the date of her leaving Dumbarton poor-house and 2d April 1891, is not liable for said period. Inspector of
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tor of Poor of
Greenock.

On 16th November 1892 the Lord Ordinary (Wellwood) pronounced an interlocutor in which he found, "in respect of the decision of the Court in the case of *Beattie v. Adamson*, 5 Macph. 47, that the pauper Mary Ann Hill's residential settlement in the parish of Greenock, which was acquired by continuous residence of the pauper's father prior to his death on 17th June 1881, has not been lost by non-residence, and still subsists," and decerned against the defender.†

* The Poor-Law Amendment (Scotland) Act, 1845 (8 and 9 Vict. cap. 83), sec. 76, enacts,—“That from and after the passing of this Act no person shall be held to have acquired a settlement in any parish or combination by residence therein, unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if during any subsequent period of five years he shall not have resided in such parish or combination continuously for at least one year: Provided always, that nothing herein contained shall be held to affect those persons who, previous to the passing of this Act, shall have acquired a settlement by virtue of a residence of three years, and shall have become proper objects of parochial relief.”

† “OPINION.—In this case the inspector of poor of the parish of Inverkip seeks to recover from the inspector of Greenock repayment of £208, 11s. 11d., being the amount of advances for parochial relief which the parish of Inverkip has made from time to time between 29th April 1887 and 31st October 1891, on behalf of a pauper called Mary Ann Hill.

“The defender's third plea in law is as follows :—(Quotes).

“The material facts of the case are as follows :—The pauper was born in the parish of Inverkip in 1856. Between the years 1863 and 1881 she lived with her father, William Hill, in the parish of Greenock; and at his death on 17th June 1881 she had through him a derivative residential settlement in the parish of Greenock.

“In October 1881 she left the parish of Greenock, and has never resided in it since.

“On 11th April 1884, when she was residing at Cardross, she applied for parochial relief, and on 19th May 1884 she was received into Dumbarton poor-house. It may here be said, once for all, that from that time forward she never ceased to be an object of parochial relief, and never was rehabilitated so as to be no longer entitled to ask for and receive relief. She wandered from parish to parish, always applying for and receiving relief; and on the relieving parishes claiming against the parish of Inverkip, as the parish of birth, their claims were admitted.

“It is admitted that the first statutory notice given by the parish of Inverkip to the parish of Greenock was on 12th March 1887, more than five years after the pauper ceased to reside in Greenock. The question is whether the pauper is to be held to have lost her residential settlement in Greenock by having failed during the period of five years subsequent to October 1881 to reside continuously for one year in that parish; or whether the fact that within the four years immediately after October 1881 she applied for and obtained parochial relief pre-

No. 20.

The defender reclaimed, and the case was twice discussed in the Inner-House. At the first hearing the defender, on the assumption that the

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vented the loss of her residential settlement in Greenock, although no statutory notice was given by Inverkip to Greenock, and no admission of liability was made by the latter parish.

"During the first discussion in the Procedure-roll I referred the parties to the case of *Beattie v. Adamson*, November 23, 1866, 5 Macph. 47, which seemed to me to be directly in point. Repeated examination of that case has satisfied me that the same point was there expressly decided adversely to the argument of the present defender; and sitting alone I feel bound to follow that decision, although but for it I should have been disposed to come to a different conclusion.

"The material facts in *Beattie v. Adamson* were these:—A girl, Elizabeth Clark, born in 1845, resided with her father, an able-bodied man, in the City Parish of Glasgow, where he acquired a settlement by residence. In May 1854 he removed with his family to Barony Parish. In September 1856 he deserted them in Barony Parish and went to England.

"In November 1856 Elizabeth was admitted to the Barony poorhouse, where she remained. On 12th June 1860 Barony Parish sent a statutory notice to the City Parish. The latter denied liability on the ground that Alexander Clark, the father, having lost his settlement in 1859, the settlement was lost both for himself and for his children. They also pleaded that as Clark was an able-bodied man, neither he nor his children were proper objects of parochial relief.

"It is not necessary to follow the case through all its stages. The Sheriff-substitute and the Sheriff both assoilzied the City Parish. The cause having been advocated to the Court of Session, the Lord Ordinary, Lord Barcaple, also assoilzied the City Parish, holding that by 12th June 1860, when the first statutory notice was given to the City Parish, Alexander Clark had lost his settlement in that parish, 'and that at the date of the said statutory notice, the said Elizabeth Clark had not either in her own right or in right of her father a legal settlement in the City Parish of Glasgow.' This judgment was recalled by the Second Division of the Court—Lord Cowan dissenting.

"It will be seen from the opinions of the Judges, that two questions had to be considered. The first was whether Elizabeth Clark was to be regarded as being a proper object of parochial relief in her own right. The majority of the Court, on the strength of a minute of admissions which had been lodged by the defender, held that she was a proper object of parochial relief in her own right, to the effect of making her settlement independent of the retention or loss of her father's settlement. With that question we have nothing to do here.

"But holding that she was a proper object of parochial relief in her own right, the majority of the Court further held, that although she had not resided in the City Parish for upwards of five years, her settlement in that parish had not been lost, because in November 1856, when the settlement in the City Parish still subsisted, she became a proper object of parochial relief in Barony Parish.

"I do not find in the report in Macpherson any record of an argument having been addressed to the Court upon the distinction between the two portions of the 76th section of the Act 8 and 9 Vict. c. 83, and perhaps this may account for the Lord Justice-Clerk (Inglist) treating that question so briefly. He says, (page 52),—'If her father had received parochial relief in another parish, a failure to reside would not have altered his settlement. Is it otherwise in regard to the child?' And again,—'One view of the Lord Ordinary deserves attention at all events from its novelty. He seems to think that the liability of the City Parish must depend not on the question, when did the child become chargeable, but, when was the statutory notice given to the City Parish. I am quite unable to see any grounds for that opinion. The object of a statutory notice is not to create a settlement, it is merely a compliance with a provision of the

case of *Beattie v. Adamson*, 5 Macph. 47, on which the Lord Ordinary No. 20. founded his judgment, was an authority against him, argued that that

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Poor-Law Act, that until a relieving parish gives notice, it shall have no right to recover from the parish of settlement the sums advanced. The giving or withholding notice has no effect on the law of settlement. There can be no doubt of the general principle, that the settlement of the pauper when relief is first given, remains the settlement so long as the pauperism continues.

"Lord Cowan, however, who dissented, went very fully into the question. He did not attach the same meaning to the admission in the defender's minute, and therefore was for holding that the father's settlement having been lost by non-residence, Elizabeth Clark had no residential settlement in the City Parish when the statutory notice was given.

"Although, such being his view, he did not find it necessary to express a positive opinion upon the other question, he thus states his views upon it,—'I am unable,' he says, pp. 54-55, 'to dispose of this case on that ground; and therefore I do not require to consider whether the fact of relief having been furnished by another parish during the four years and a day—admitting it to have been to a person so destitute as to require relief from the parish where she for the time resided—could have the effect of obviating the statutory provision that "no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if, during any subsequent period of five years, he shall not have resided in such parish or combination continuously for at least one year."

"'Were it necessary to decide this question I would feel it to be attended with very great difficulty. The words of the statutory provision are not qualified by any condition whatever. The first branch of the section, having reference to the acquisition of a settlement through five years' residence, expressly provides that the person shall have resided for the five years continuously, without having recourse to common begging by himself or his family, and without having received or applied for parochial relief. And in the proviso saving the rights of paupers who prior to the passing of the Act had resided for three years in a parish, it is added, "and have not become proper objects of parochial relief." The part of the statutory provision with which we have to do contains no similar condition. It provides, in absolute terms, for the release of the parish from liability, if during any subsequent period of five years the person shall not have resided in the parish continuously for at least one year.

"'Absence from the parish for five years without such residence is enough to put an end to the residential settlement. It appears to me that this provision cannot be got over by an offer to prove that the pauper had, in another parish at a greater or less distance, been maintaining himself by begging or by having received or applied to some other parish for parochial relief. I cannot import those conditions which are in the first branch of the statute, nor the words which occur in the proviso, into the second branch of the enactment, in itself subject to but one condition. And I hesitate to think, that although the pauper may have been recognised in another parish as an object of parochial relief, and have got such relief without intimation to and without the knowledge of the parish, this of itself is sufficient to keep up the residential settlement, although during the whole period of five years the pauper has never been within the parish, and no chargeability in respect of him or her has been attempted to be fixed upon its funds.

"'There can be no question that the statutory notice is required for the primary purpose of fixing from its date the right to be relieved of advances made to paupers whose settlement is in a different parish from the relieving one. The question of settlement being acquired or not retained depends upon considerations apart from the giving or withholding of notice. But in such a question as we have to deal with in this case, where relief has been given during the currency of four years and a day, while the residential settlement was yet entire, the giving of notice during that period might have important effects in fixing chargeability on the parish of the pauper so relieved. For, having got

No. 20. decision was unsound and should be reconsidered. At the second hearing the question was argued whether *Beattie v. Adamson* could be distinguished from the present case.

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the notice of chargeability, the parochial inspector was bound either to have got the pauper removed to his own parish, or at least to have provided for his maintenance in the parish of his residence. The pauper must thus have become permanently chargeable during the subsistence of his residential settlement, and after that the settlement could not be lost by non-residence, the pauper being supported all the while by the funds of his proper parish, though not resident in it. It is quite a different case when nothing has been heard of the pauper during the whole five years of his absence. The statutory exemption of liability may be well pleaded in such a case, even although some other parish, without fixing the chargeability of the pauper upon the residential settlement, may have come under advances for his support. The parish of the birth must then be resorted to for relief; and should it happen that the pauper has no parish of birth in Scotland, then the relieving parish, as in other cases of the like kind, must bear the burden.'

"Lord Benholme and Lord Neaves concurred in the Lord Justice-Clerk's opinion that the mere fact of a person becoming a proper object of parochial relief in another parish was sufficient without notice to prevent the loss of a residential settlement. For instance, Lord Benholme says (p. 55),—'It is only when a man is not receiving relief—when he remains able-bodied, that his absence for more than one year out of every five causes the loss of his previously acquired industrial settlement. But if a man falls into poverty and gets relief, I do not see that his subsequent non-residence can affect his settlement . . . (p. 56). The date of the notice is not the proper date. The important date is the time when the pauper became chargeable, not when chargeability was announced to the parish of settlement.'

"Such being the grounds of decision, I cannot but hold the case to be directly in point, and as it has never been expressly overruled, I feel bound to follow it.

"As I have already indicated, I should, in the absence of that decision, have been prepared to decide in favour of the defender. Lord Cowan's views as to the meaning and effect of the 76th section of the Poor-Law Act, which I have intentionally quoted at length, so fully express the interpretation which I am disposed to put upon it, that I do not think it necessary to state my own views at any length. I think there is a marked and intentional difference between the two parts of the 76th section of the Poor-Law Act. The part of the clause which deals with the acquisition of a settlement is fenced with certain conditions which are inserted to prevent the acquisition of a residential settlement by persons who beg or require and apply for parochial relief. Now the things which are declared to disqualify and prevent the acquisition of a settlement, viz., begging or receiving or applying for parochial relief on the part of such persons, are matters which are necessarily within the knowledge and under the notice of the parochial authority of the parish of residence.

"Again, as regards the loss of a residential settlement, the one thing to be looked to is continued absence. The parish of residence has nothing to do with, and knows nothing of, the way in which the person who has left it is living and maintaining himself, or is being maintained. Accordingly all that the statute requires to be proved in order to infer loss of settlement is absence for the requisite length of time.

"That seems to be a reasonable construction of the clause, and it must be remembered that the latter provision as to loss of settlement was enacted in order to amend the rule of the older poor-law, that a residential settlement could not be lost until a new one was acquired: The operation of the amending clause would be limited indeed if loss of a settlement were held to be prevented or arrested whenever the person in question was proved to have begged or asked for relief in another parish during the first four years of absence.

"In the case of *Johnston v. Black*, 13th July 1859, 21 D. 1293, the Court,

The defender argued;—If the Lord Ordinary was right in holding that the question was foreclosed by *Beattie v. Adamson*,¹ then that decision was unsound and at variance with the provisions of the Poor-Law Amendment Act, and the question should be reconsidered. Section 76² of the Act clearly distinguished between the kinds of residence necessary for the acquisition and for the loss of a settlement. Certain conditions as to not begging, &c., were attached to the former, but not to the latter, which depended solely upon whether or not the pauper had been in fact resident for one year continuously during the five years subsequent to the acquisition.³ If, in fact, he had been absent for four years and a day, it followed; therefore, that the settlement was lost. The fact that a pauper received relief in one parish could not be held constructive residence in another. At all events, the parish of residential settlement was

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by their decision, countenanced a qualified construction or limitation of the second half of the 76th section. The judgment proceeded on the footing that if before a residential settlement has been lost by non-residence for four years and a day, the person in right of it becomes a proper object of parochial relief, and is relieved by another parish, and if the parish of residence receives statutory notice of such chargeability, and admits liability, the residential settlement will not be lost, although the pauper continues to reside outwith the parish of residence. The ground of judgment apparently was that the parish of residence (Ayton) having admitted liability, it became its duty to remove the pauper, and if it chose to allow the pauper to remain in the relieving parish and pay for him there, the pauper must be held to have been constructively on the roll in the parish of residence from the date of the notice, or at least from the date of admission of liability. Lord Colonsay says (p. 1296),—‘It is contended that all that the statute requires in order to destroy a settlement is absence for five years, or, as it has been construed, absence for any time more than four years. I think it would be very difficult to maintain that proposition abstractly to its greatest extent. If a party has removed from a parish—from Ayton to the parish of Coldingham,—becomes a pauper at the end of a year or two years, is put upon the roll in Coldingham, relief afforded him, and liability admitted by Ayton, I hold him to be in the same position as if he was on their roll.’ The judgment, it will be seen, proceeded expressly on the ground that Ayton, the parish of residence, admitted liability within the four years.

“The case of *Johnston v. Black* has had a curious record. It does not seem to have been quoted or referred to in *Beattie v. Adamson*; while in the later case of *Cochrane v. Kyd*, 16th June 1871, 9 Macph. 836, it was viewed with considerable doubt, although it was not nearly so strong a decision as that in the case of *Beattie v. Adamson*, which, in its turn, was apparently not alluded to in *Cochrane v. Kyd*.

“I observe that Mr Guthrie Smith, in his work on Poor-Law, pp. 355 to 357, regards the decision in *Johnston v. Black* as allowing the greatest qualification of the 76th section permissible; while he simply notes the facts of the case of *Beattie v. Adamson* and the decision of the Court without comment.

“I have not been given, and I have not found, any further light on that decision (*Beattie v. Adamson*), and I can only say that, in my opinion, it requires reconsideration.

“I understand that the pursuer is content, if successful, to restrict his claim to £200, 15s. I repel the fourth plea in law for the defender, because, in my opinion, the pauper continued to be a proper object of parochial relief continuously after May 1884, such short intervals in the administration of relief as occurred being due merely to her wandering from parish to parish, and from one poorhouse to another.”

¹ *Beattie v. Adamson*, Nov. 23, 1866, 5 Macph. 47, 39 Scot. Jur. 36.

² *Supra*, p. 65.

³ *Crawford and Petrie v. Beattie*, Jan. 25, 1862, 24 D. 357, 34 Scot. Jur. 180; *Cochrane v. Kyd*, June 16, 1871, 9 Macph. 836, 43 Scot. Jur. 457.

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not liable unless it had received the statutory notice within four years and a day from the time the pauper left it.¹ Here Inverkip did not give notice until March 1887. The case of *Beattie v. Adamson* was not against the defender here, for the facts were not the same. In it there was no break in the chargeability, and it only decided that the pauper's settlement was fixed when the chargeability began, so that it could not be changed so long as that chargeability subsisted. It did not follow that when, after rehabilitation, a subsequent chargeability began, the four years' absence necessary for the loss of the residential settlement was to be counted from the cessation of the first chargeability instead of from the leaving of the parish. There was no warrant for such a view in the statute, which, on the contrary, pointed clearly to the date of the pauper's leaving the parish as the only *terminus a quo*. When a pauper became chargeable the question of liability fell to be decided with reference to the date at which that chargeability commenced, and not with reference to any previous period of chargeability.² In *Innes v. Ironside*,³ as in *Beattie v. Adamson*, there was only one period of chargeability. In *Johnston v. Black*,⁴ the decision proceeded on an admission of liability. Besides that decision had been doubted.⁵ In the present case, when the second period of chargeability began there could be no doubt that the pauper had been absent for upwards of four years from Greenock, and that was conclusive of the question.

Argued for the pursuer;—The decision in *Beattie v. Adamson*,⁶ was fatal to the defender's case if well decided. That decision was sound, and supported by other decisions.⁷ The *dicta* of Lord Cowan and the Lord Ordinary (Barcaple) in it were only *obiter* so far as adverse to the pursuer in the present case, their judgment being based on other grounds.

The pauper here had a residential settlement in Greenock in 1881. It could only be lost by absence for four years and a day before she became a pauper. On her becoming a pauper in 1884 Greenock was therefore her settlement, and it continued to be her settlement so long as her pauperism lasted. As she had never been rehabilitated it was her settlement still. *Crawford v. Beattie*⁸ was not adverse, for there the pauper had been four years and ten months absent before becoming a pauper. A pauper could neither gain nor lose a settlement. Section 76 of the Poor-Law Act contemplated the same kind of residence as regards gaining or retaining a settlement.⁹ A pauper could not retain a settlement by living on charity for twelve months in the parish of settlement.

Notice of liability to the parish of settlement had to do only with the amount of the liability. The question was when did pauperism commence. Neither had admission of liability any effect in enabling a parish to escape liability. The maxim *quod fieri debet infectum valet* applied. If otherwise, a parish would be tempted to resist liability till

¹ *Beattie v. Adamson*, 5 Macph. 47, Lord Barcaple, p. 50, Lord Cowan, p. 55.

² *Crawford and Petrie v. Beattie*, *supra*, note 3.

³ *Innes v. Ironside*, June 5, 1868, 5 S. L. R. 582.

⁴ *Johnston v. Black*, July 13, 1859, 21 D. 1293, 31 Scot. Jur. 675.

⁵ *Cochrane v. Kyd*, *supra*, note 3.

⁶ Nov. 23, 1866, 5 Macph. 47, 39 Scot. Jur. 36.

⁷ *Johnston v. Black*, July 13, 1859, 21 D. 1293, 31 Scot. Jur. 675; *Cochrane v. Kyd*, June 16, 1871, 9 Macph. 836, 43 Scot. Jur. 457; *Innes v. Ironside*, June 5, 1868, 5 S. L. R. 582; *Turnbull v. Russell*, Feb. 27, 1858, 20 D. 703, 30 Scot. Jur. 370.

⁸ June 24, 1862, 24 D. 357, 34 Scot. Jur. 180.

⁹ *Beattie v. Stark*, May 23, 1879, 6 R. 956, and opinions of Lords Justice-Clerk, Deas, and Ivory in *Crawford v. Beattie*.

four years and a day had run. But in *Innes'* case it was decided that if a parish ought to have admitted liability it was the same thing as if it had actually admitted it. No. 20.

When the pauper's chargeability ceased in August 1886 Greenock continued to be the settlement for four years and a day. It was settled law that such new period began to run on chargeability ceasing.¹ This was the basis of decision in *Cochrane v. Kyd*. A settlement could neither be gained nor lost by piecing together detached periods of industrial residence. If, therefore, during the six months following August 1886 the pauper was rehabilitated, Greenock was still her settlement in February 1887, when she was permanently pauperised. But intervals of a few weeks or months did not amount to rehabilitation.²

The admission of liability by Inverkip to the parishes that gave temporary relief to the pauper could not enure to Greenock.³ Inverkip was the birth parish, and had, therefore, no claim to resist liability to any parish except Greenock.

At advising,—

LORD ADAM.—This is an action brought by the parish of Inverkip against the parish of Greenock to recover the amount of certain advances made, in respect of a pauper of the name of Mary Ann Hill, from 29th April 1887 to 31st October 1891.

The parish of Inverkip is the parish of birth of the pauper. It is not disputed that the pauper had at one time a residential settlement in the parish of Greenock, and the question is whether or not the pauper had retained or lost that settlement when the advances in question were made to her.

The material facts are not in dispute, and will be found in the joint minute of admissions by the parties.

It appears that the pauper was born in the parish of Inverkip in 1856, that she resided with her father in the parish of Greenock from 1863 to 1881, where he had acquired a residential settlement, and that, on his death in June 1881, she then acquired a derivative residential settlement in that parish.

It further appears that she left Greenock in September or October 1881, and that she has never since resided in that parish.

It further appears that in April 1884 the pauper became a proper object of parochial relief when residing in the parish of Cardross, and that on 29th October 1884 statutory notice and a formal claim for relief were sent by that parish both to Inverkip and Greenock; that Inverkip admitted liability, that Greenock denied liability, and that the claim against Greenock by Cardross was formally withdrawn on 17th November 1885.

It further appears that the pauper continued to be a proper object of parochial relief until 19th August 1886, when she left Dumbarton poorhouse in search of work.

Presumably she had found work and became self-supporting, because we hear no more of her until the 14th February 1887, when she again became chargeable to the parish of Cardross. On 12th March 1887 Cardross gave notice to Inverkip and Greenock. Inverkip admitted liability, Greenock did not.

¹ Johnston, *ut supra*.

² Beattie v. Wood, Feb. 9, 1866, 4 Macph. 427, 38 Scot. Jur. 198; Beattie v. Greig, July 9, 1875, 2 R. 923; Beattie v. Brown, Dec. 11, 1883, 11 R. 250; Beattie v. Arbuckle, Jan. 15, 1875, 2 R. 330.

³ Beattie v. Brown, *ut supra*.

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I do not think it necessary to trace the history of this woman further, as from this time onwards she appears to have continued to be a proper object of parochial relief.

From the facts, as I have stated them, it would appear that there is no evidence that the pauper received relief or was a proper object of parochial relief during upwards of five months from August 1886 till February 1887. I think that the presumption is that she was during these months self-supporting, and that the effect of that was to rehabilitate her from her previous state of pauperism. I think, accordingly, that the question which we have to decide in this case is, what was the parish of settlement of the pauper on the 14th February 1887, when she for the second time became chargeable to the parish of Cardross, and whether she had at that date lost or still retained her residential settlement in the parish of Greenock.

That depends on the construction of section 76 of the Poor-Law Act of 1845. The first part of that section provides for acquisition of a settlement by residence, and the second for the retention of a settlement so acquired, and enacts that "no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement, if, during any subsequent period of five years, he shall not have resided in such parish or combination continuously for at least one year."

In this case the pauper left Greenock in October or September 1881, upwards of five years before February 1887, the date when she became chargeable as a pauper, and never afterwards resided there. It appears to me, therefore, that she has not fulfilled the condition on which alone she was entitled to retain her settlement in that parish, viz., residence for one year of the five years occurring subsequent to her leaving it.

But it is said by the pursuer that she was in receipt of parochial relief during a part of these five years, and that, if the time during which she so received relief be deducted from the statutory five years, it will be found that the pauper had not lost her residential settlement by reason of non-residence; and he claims to have this deduction of time made, on the ground that the pauper was a proper object of parochial relief, and that in law a person, while a proper object of parochial relief, can neither acquire nor lose a settlement.

The facts are as stated by the pursuer, but I do not think that his proposition in law is well founded.

He maintains, however, that it was so decided in the case of *Beattie v. Adamson*, and the Lord Ordinary is of opinion that that case is directly in point, and has decided the case adversely to the defender on its authority, at the same time expressing a strong opinion that, but for that case, he would have arrived at a different result.

But his Lordship's opinion as to the authority of *Beattie v. Adamson* is founded on a view of the facts in this case which I do not think is correct, and which I think cannot be sustained. "On 11th April," he says, "when she,"—that is, the pauper Hill,—“was residing at Cardross, she applied for parochial relief, and on 19th May 1884 she was received into Dumbarton poorhouse. It may be here said, once for all, that from that time forward she never ceased to be an object of parochial relief, and never was rehabilitated so as to be no longer entitled to ask for and receive relief.”

If that was the true state of the facts, they would have been similar to those in *Beattie v. Adamson*, and I should have come to the same conclusion as his Lord-

ship, because I think that what that case decided was, in the words of the Lord President, "that the settlement of the pauper when relief is first given remains the settlement so long as the pauperism continues," and this, he says, is a general principle of which there can be no doubt. I think that *Beattie v. Adamson* did no more than apply that rule to the facts of that case, and I think it is a sound rule, and should not be disturbed.

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But, as I have pointed out, the pauper in this case ceased subsequent to 1886 to be a subject of parochial relief and had been rehabilitated. We are dealing with the settlement of a pauper in a new pauperism commencing in 1887, and the question is as to the effect to be given to a previously existing state of pauperism in determining that settlement. We are not dealing with facts emerging during an existing pauperism, as in *Beattie v. Adamson*.

No doubt in that case there are observations by the Judges which touched the question, particularly by Lord Benholme, to the effect that it is only when a man is not receiving relief that his absence for more than one year out of five causes the loss of his previously acquired industrial settlement, and by Lord Cowan to an opposite effect. But I think that the question was neither raised nor decided in that case, and that it is not an authority ruling the present case. That being so, I am of opinion, for the reasons fully and clearly stated by Lord Cowan and by the Lord Ordinary, and which need not be repeated, that the pauper having been absent from the parish of Greenock continuously for upwards of five years has lost her residential settlement in that parish.

With reference to the case of *Johnston v. Black*, the ground of judgment is, I think, correctly stated by the Lord Ordinary, viz., that it proceeded on the fact that the parish of Ayton had admitted liability within the four years, and that the Court held that the pauper was in the same position as if he had been on their roll, and resident in the parish. It would appear that some doubt has been thrown on the authority of that decision, but however that may be, it is an essentially different case from this, in which liability was repudiated, and that repudiation acquiesced in.

The only other case to which I would refer is that of *Crawford v. Beattie*, in 24 D. 357.

In that case the pauper had a residential settlement in the Barony Parish of Glasgow. In 1851 he left that parish. In 1854 he became a lunatic, and was supported in an asylum by his friends for one year and ten months, when he became a pauper. The Court held that he had lost his residential settlement in the Barony Parish. In giving judgment, the Lord President said,—“The full period of time prescribed by the statute having elapsed betwixt the date of Biggar's (the pauper) migration and the date of his becoming chargeable, the only question in which the Barony Parish can, under the 76th section of the statute, have an interest is, whether during that interval he did or did not reside in the Barony Parish continuously for at least one year.”

So I think here that the only question in which the parish of Greenock has an interest is, whether the pauper resided continuously in that parish for one year after she left, and as that question cannot be answered in the affirmative, she cannot be held to have retained her settlement, and that consequently the interlocutor should be recalled, and the defender assoilzied.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I concur with Lord Adam, and it is satisfactory to

No. 20. know that the Lord Ordinary would have come to the same conclusion if he had not thought himself precluded by the decision in *Beattie v. Adamson* from giving effect to his own opinion. I agree with Lord Adam that that decision is not in point. There certainly are observations to be found in the opinions of the learned Judges, and particularly in the opinions of Lord Cowan and Lord Benholme, which may seem to support the interpretation of the decision which the Lord Ordinary has adopted. But then Lord Cowan dissented from the judgment, considering that it necessarily involved propositions which I think the majority of the Court would have agreed with him in rejecting. Lord Benholme's observations must be read with reference to the special facts of the case and to the previous opinion which had been delivered by the Lord Justice-Clerk, the late Lord President. It appears to me that the true grounds of judgment must be sought in the opinion of the Lord Justice-Clerk and in the interlocutor of the Court; and going to these sources I agree with Lord Adam that the decision does not support the doctrine which the Lord Ordinary supposes, viz., that the mere fact of a person obtaining relief during the statutory period of non-residence will prevent the loss of a residential settlement. The points which were raised for decision in the case of *Beattie v. Adamson* are very clearly brought out in the Lord Justice-Clerk's opinion. In the first place, the Court held, as matter of fact, that the child of an able-bodied man had become in its own right a proper object of relief in respect of the state either of her body or of her mind, or of both. The child being a proper object of relief in its own right, the question came to be whether a derivative settlement which she had acquired through her father when she first obtained relief had been lost by her father's subsequent non-residence; and, apart from the specialty I have just mentioned—with which we have no concern here—the case appears to me to have decided three things. In the first place, that when a child has acquired a derivative settlement from its father that becomes its own settlement to all intents and purposes. That proposition had been established by previous decisions. It is the first step in the argument of the Lord Justice-Clerk towards the conclusion at which he ultimately arrived. Second, that no loss of settlement by an able-bodied father can in any way affect the settlement of the child who has become a proper object of parochial relief. And third, that the settlement of a pauper, being a proper object of relief, remains his settlement so long as the pauperism continues. I do not think that any other legal propositions but these are laid down in the opinion of the Lord Justice-Clerk. He begins by considering the special question which I have adverted to, whether the child was a proper object of relief in its own right or not, and then having answered that question in the affirmative he goes on to ask what was the child's settlement when she first obtained relief. As to that there was no question. Then he says,—“But then it is said further that in 1888 or 1889 her father lost that settlement by allowing five years to pass by without residing twelve months in the City Parish.” And his answer to the argument founded upon that proposition is that if the child had followed the father's settlement there might have been a question. Then he says,—“No loss of settlement by the father who continues able-bodied can in any way affect the settlement of the child who has become a proper object of relief. Therefore, it appears to me that the City Parish was the settlement of the child when she became chargeable, and will remain so as long as she continues chargeable.” Then his Lordship goes on in the last sentence of his opinion to lay down the general prin-

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ciple that the settlement of the pauper when relief is first given remains the settlement so long as the pauperism continues. The interlocutor contains a series of findings to the same effect, and it is quite impossible to extract from any of them any support whatever for the conclusion which the Lord Ordinary rightly rejects, that the mere fact of a person receiving parochial relief in one parish is sufficient to prevent the loss of a residential settlement previously acquired in another. Now, that decision being inapplicable, because the pauperism, as Lord Adam has explained, had ceased for a time, I agree with his Lordship that there can be no question at all as to the proper application of the statute to the circumstances of the present case.

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LORD PRESIDENT.—I concur.

THE COURT recalled the Lord Ordinary's interlocutor, and assolizied the defender.

J. & J. H. BALFOUR, W.S.—R. R. SIMPSON & LAWSON, W.S.—Agents.

WILLIAM KECHANS, Complainer (Respondent).—*R. K. Galloway.*
THOMAS BARR, Respondent (Reclaiming).—*G. W. Burnet.*

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Bill of Exchange—Denial of signature—Suspension—Caution.—A person who had been charged upon a bill bearing his name as acceptor presented a note of suspension of the charge on the ground that he had not adhibited or authorised the signature.

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Circumstances in which the Court passed the note without caution.

THOMAS BARR, wine and spirit-merchant, Glasgow, was charged at the instance of William Kechans, merchant, Lanark, to pay the sum of £1000, being the amount of a bill at twelve months, dated 3d June 1892, upon which his name appeared as an acceptor, along with those of George Moffat and of three other persons. He brought a suspension of the charge, in which he alleged that he had not adhibited his name to the bill, or authorised anyone to do so for him.

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Lord Low.

On 28th June 1893 the Lord Ordinary (Low) ordered answers, and appointed "the charger to produce the bill charged on, and the complainer to produce genuine subscriptions in real transactions bearing his signature of date prior to the charge."

In his answers the charger denied the complainer's material averments, and "explained that, in the beginning of June 1892, George Moffat . . . was indebted to him in a sum of £1000. For this sum the respondent agreed to draw upon Moffat a bill of exchange, dated 3d June 1892, payable twelve months after date, on the condition that certain friends of Moffat's should sign the bill as co-obligants. The bill in question was accordingly sent to Moffat for acceptance by him and his friends, and, in due course, the respondent received it back accepted by Moffat, the complainer, and the other three persons mentioned. The respondent had no reason to doubt the genuineness of any of the signatures. Moffat had previously granted bills in favour of the respondent, for sums due by him, and had obtained the signatures to said bills of the same parties, including the complainer, as co-acceptors with him. . . . On 20th June the protest was duly registered in the Books of Council and Session. The acceptors of the bill, including the complainer, were then charged on the extract registered protest, to pay the sum therein, with the result that this suspension has been brought, being the first intimation to the respondent that the validity of any of the signatures

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was challenged. If the complainer did not in fact adhibit his signature to the bill in question, as to which the respondent has no knowledge, and makes no admission, it is averred that he authorised this signature to be adhibited. At all events the complainer became aware, long before it became due, of the existence of said bill, and of the fact that his signature was on it as an acceptor, but he took no exception to same, and only challenged it after Moffat, who was his son-in-law, had been sequestered. He thereby ratified and adopted his signature, assuming it to be unauthorised, as genuine, or, at all events, he is now precluded, as in a question with the respondent, from pleading that the signature is not binding."

He further explained at the bar that he had held two other bills purporting to be signed by the complainer, which had been acknowledged as valid instruments, but he admitted that the signatures upon them did not resemble that upon the bill founded upon.

The complainer produced a sheet of paper, upon which he had written subsequent to the date of the charge his signature, and that signature was manifestly unlike the signature upon the bill founded on. He explained that he was a very old man, that he could not write well, and that consequently he had no earlier signatures to exhibit; that in the case of the other bills he had authorised the bank to accept the signature of his wife, but that here he had given no such authority.

On 18th July the Lord Ordinary passed the note without caution.

The charger reclaimed, and argued;—The Lord Ordinary had proceeded on the older cases,¹ in which the Court had passed *simpliciter* bills of suspension, where they were satisfied from inspection that the bills charged on were forged. The modern view, however, must be given effect to, which was that the inference to be drawn from such inspection alone was not sufficiently strong to warrant passing a bill without caution.² If the complainer admitted that he had authorised the signature by his wife of the other bills, the *onus* lay upon him of proving that he had not authorised the signature upon the bill in question.

Argued for the complainer;—The Lord Ordinary was right in not requiring caution, looking to the special circumstances of the case.

LORD PRESIDENT.—I think we may adhere to the Lord Ordinary's interlocutor without infringing any of the general rules applicable to cases of this kind.

The complainer alleges that the document in question is a forgery, and upon the Lord Ordinary requiring him to produce genuine subscriptions in real transactions bearing his signature of date prior to the charge, he makes an explanation which accounts for the absence of documents of that character. He says that he is a very old man, that he does not write well, and that he is not in the habit of signing documents of the character required by the Lord Ordinary. He, however, produces in default a sheet of paper, on which he has written his signature; it is manifestly unlike the signature upon the bill on which the charge proceeded.

Now, the attitude of the respondent turns out to be more complicated than it appeared to be on the record. The respondent is in possession of two bills dated prior to the one in question, each of which he held or holds as a valid

¹ Paterson v. Mitchell, Nov. 25, 1826, 5 S. 43; Wilson v. Hart, Feb. 25, 1826, 4 S. 504; Ross v. Millar, &c., Dec. 2, 1831, 10 S. 95, 4 Scot. Jur. 163.

² Ross v. Millar, &c., *supra*, note 1, per Lord Cringletie, 10 S. 96; Renwick v. Stamford, Spalding, and Boston Banking Co. Limited, Nov. 24, 1891, 19 R. 163.

instrument, and on both of them there is something which purports to be the signature of the complainer; and the respondent is constrained to say that the two signatures do not resemble the signature upon the bill upon which the charge proceeded.

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Nov. 14, 1893.
Kechans v.
Barr.

That being so, and looking to the tone of the record, I cannot say that I read the case upon the ordinary footing of a man asserting that the signature upon a bill in his possession is a genuine signature; and that, coupled with the explanations made at the bar, seems to warrant the Lord Ordinary in passing the note without caution.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

THE COURT adhered.

W. & F. C. MACIVOR, S.S.C.—PATRICK & JAMES, S.S.C.—Agents.

MRS CECILIA PEARETH LENNOX, Pursuer (Respondent).—*Dickson—Fleming.*

No. 22.

ANDREW REID, Defender (Appellant).—*Ure—Crabb Watt.*

Nov. 14, 1893.
Lennox v.
Reid.

Lease—Heir—Executor—Rent legally due prior to heir's succession, but conventionally payable thereafter—Title to sue—Removing.—Where a tenant is bound to pay rent at a certain term, the landlord then in possession is entitled to enforce the obligation notwithstanding that he may be liable to account for the rent recovered to the representatives of his predecessor.

In March 1893 the proprietor of an estate to which he had succeeded in June 1892 raised an action under the Agricultural Holdings Act, 1883 (1) for the removal of a tenant on the ground that he had failed to pay the first half year's rent for crop and year 1892 due under his lease at Martinmas 1892; and (2) for payment of the said rent. The defender maintained, *inter alia*, that the pursuer had no title to sue in respect that the rent in question, though conventionally payable at Martinmas 1892, was legally due at the preceding Whitsunday, and had vested therefore in the last proprietor, and fell to be paid to his executor. *Held* that the pursuer being in possession of the estate when the rent became payable in terms of the lease had a good title to sue for removal and to enforce payment of the rent, and that the tenant had no concern with any question of accounting between him and the representatives of the last proprietor.

ON 26th June 1892 Mrs Peareth Lennox succeeded, as heir of entail, to the lands of Woodhead and Antermomy.

1st Division.
Sheriff of
Stirlingshire.

In March 1893 she brought an action under the Agricultural Holdings Act, 1883, sec. 27,* in the Sheriff Court at Stirling against Andrew Reid, the tenant of her farm of Inchbreak, concluding for his removal from that farm at the ensuing Whitsunday term, and for payment of £80, being the half year's rent payable by him under his lease at Martinmas 1892, but still unpaid.

It appeared that the tenant's entry under his lease was at Martinmas

* Section 27 of the Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), provides,—“When six months' rent of the holding is due and unpaid it shall be lawful for the landlord to raise an action of removing before the Sheriff against the tenant, concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought, and unless the arrears of rent then due are paid or caution is found . . . the Sheriff may decern the tenant to remove . . .”

No. 22. 1889 to the arable lands, and at Whitsunday 1890 to the houses and grass lands. The rent for the farm was £160, payable in equal portions at the terms of Martinmas and Whitsunday in each year, the first half year's rent being payable at Martinmas 1890. The tenant made no payment at the term of Martinmas 1892.

Nov. 14, 1893.
Lennox v.
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The defender pleaded, *inter alia*;—(1) No title to sue.

On 13th April 1893 the Sheriff-substitute (Buntine) repelled this plea, and allowed a proof as to the amount of rent actually in arrear.

On 1st June 1893, after proof, the interim Sheriff-substitute (Mitchell) found that the full half year's rent of £80, payable at Martinmas 1892, was still unpaid, gave decree for that amount, and ordained the defender to remove.

On 26th June 1893 the Sheriff (Lees) adhered, with the variation that the term of removal should be fourteen days after the date of the interlocutor.

The defender appealed to the Court of Session, and argued;—(1) No title to sue. The rent in question, if still due, was payable to the executor of the late proprietor, for although conventionally payable at Martinmas 1892, it was legally due at the preceding Whitsunday (before the pursuer had succeeded to the estate), and had therefore vested in the late proprietor.¹ Even if it were held that the rent was not legally due at Whitsunday, still the pursuer was only entitled (under the Apportionment Act*) to that part of it which effeired to the period between 26th June and Martinmas 1892, *i.e.*, less than six months, and the Agricultural Holdings Act required that his rent should be in arrear for six months before a landlord could sue a removing under it. But assuming that the pursuer was entitled to sue the removing, he had no right to the rent in question, which clearly belonged to the late proprietor, and the defender was only bound to pay to his proper creditor.

Argued for the respondent;—The defender had failed to make payment of six months' rent at the proper term, and the landlord's title to remove him was therefore clear. He was also entitled to enforce payment of the rent. It might be that under the Apportionment Act the executor of the last proprietor would be entitled to a portion of the rent recovered, but with that the defender had nothing to do. That Act was concerned with the claims of heirs and executors *inter se*, and did not affect the right of the proprietor for the time to enforce the obligations of a lease. Even if the whole of the rent in question had vested in the last proprietor, the same principle applied, for although the pursuer might have to account for the rent to his executors, still he was *in titulo* to receive payment of it from the tenant in the first instance.

At advising,—

LORD KINNEAR.—This is an action for removal of a tenant, founded on the 27th section of the Agricultural Holdings Act, 1883, and for payment of £80 of rent alleged to have become due at Martinmas 1892. It is not disputed that if the rent sued for were in fact due to the pursuer, the conditions of the statute would be satisfied. But the defender pleads that the pursuer has no title to sue for rent payable at Martinmas 1892. The defender's plea is founded on the hypothesis that the rent exigible at Martinmas 1892 belongs to the executor of the late proprietor. The pursuer's averment is that the rent for crop and year 1892 was payable in equal portions at Martinmas 1892 and Whitsunday 1893,

¹ Campbell v. Campbell, July 18, 1849, 11 D. 1426, 21 Scot. Jur. 553.

* The Apportionment Act, 1870 (33 and 34 Vict. cap. 35).

and this is not disputed. But the defender maintains that the legal terms were **No. 22.**
 Whitsunday and Martinmas 1892; and therefore that as the portion conven-
 tionally exigible at Martinmas was legally payable at the previous Whitsunday, **Nov. 14, 1893.**
 it vested in the late proprietor, who survived till the 26th of June 1892, and is **Lennox v. Reid.**
 now payable to her executor, and not to the pursuer as heir of entail in possession. I express no opinion as to the respective rights of heir and executor. These may depend on the practice of the estate, or solely on the application of general rules to the special conditions of the lease. However that may be, the executor is no party to the process, and we cannot determine the measure of his right in his absence. But assuming for the purpose of the argument that in the division of rents between heir and executor the whole amount payable at the Martinmas term, after the late proprietor's death, must fall to the latter, the pursuer has, nevertheless, in my opinion, a perfectly good title to enforce the obligations of the lease, and the tenant has no concern with any question of division or apportionment between her and her predecessors. The supposed claim does not arise under the Apportionment Act, but it is a claim of precisely the same nature as that which the Apportionment Act gives to the executor for the rents accruing between Whitsunday and the 26th of June. It is a claim available against the heir in possession to account for the rents which she may levy. But the executor is not put in possession of the estate either by the Act or by the common law, and the proprietor in possession for the time being has an undoubted title to levy the rents. His right to do so is expressly reserved by the statute, in so far as regards apportioned rents. But in this respect the Act only follows the rule of common law. The general rule is that the contract of lease is transmissible to the respective successors of the contracting parties; and that, to use the words of the first Lord Curriehill, "when such transmission takes place, its obligations are prestable, not by or to the original parties or their legal representatives as such, but by and to the parties who shall be in the respective positions of lessor and lessee, or landlord and tenant at the dates when these obligations become prestable." As between landlord and tenant it is of no consequence whether the conventional terms correspond with the legal terms or not. It is the conventional terms, or in other words the terms of their contract which regulate their rights and liabilities; and if a tenant is bound by his contract to pay rent at a certain term, the obligation is prestable at that term to the landlord then in possession, irrespective of the obligations of the latter to the representative of the predecessor. If the defender had been interpellated by the executor from making payment to the pursuer, the question might have been different. But it is not suggested that the executor has made any claim against him, and if such claim were to be made there can be no question that the landlord's discharge would give the tenant a sufficient answer.

LORD M'LAREN.—It is important that it should be understood that the contract of lease is a real contract, and that the respective obligations of landlord and tenant are prestable by them and their heirs, and are therefore exigible by the heirs of the original parties when owing to death there comes to be a change of ownership. It would be especially inconvenient to tenants, and it might be fraught with injustice to their interests if tenants who were ready to make a payment of their rent to the proper party were obliged to inquire into the testamentary arrangements of a deceased proprietor, and to discover who—whether in intestacy or under a settlement—would be eventually, and as in a question

No. 22. of succession, entitled to a bygone rent. It is much more convenient and is in accordance with the settled principles of the law that the tenant should be entitled to pay over such a rent to the successor in the lands. The principle is not confined to the contract of landlord and tenant, but applies to other relations, *e.g.*, superior and vassal, and indeed to all contracts which are properly real contracts.

Nov. 14, 1893.
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The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT, on 14th November 1893, affirmed the interlocutor appealed from, except in regard to the term of removal, and decerned against the defender for removal at Martinmas 1893, and for payment.

DUNDAS & WILSON, C.S.—DOVE & LOCKHART, S.S.C.—Agents.

No. 23.

THOMAS DUFF GORDON DUFF, Pursuer (Reclamer).—*Jameson—M'Lennan—Russell.*

GEORGE PIRIE, Defender (Respondent).—*Dickson—Ure.*

Nov. 14, 1893.
Duff v. Pirie.

Arbitration—Corruption—Act of Regulation—Arbiter's fee—Personal objection.—An arbiter who had accepted a reference without stipulating for any fee intimated to the parties that an award had been signed, and requested payment of a fee of £300 before they uplifted the award. Each of the parties paid one-half of the fee without protest.

In an action by one of the parties for reduction of the award on the ground that the arbiter had acted corruptly in the sense of the Act of Regulation in demanding payment of a fee as a condition of allowing the award to be uplifted, *held*, that as the pursuer had paid his half of the fee without objection he was barred from challenging the award on the ground stated.

Arbitration—Ultra fines compromissi.—A contract for the construction of certain harbour works contained a clause referring to an arbiter named all disputes as to the rights or obligations of either party under the contract, or in any way connected therewith. A dispute arose as to which of the parties was liable in the cost of removing certain silt which had accumulated on part of the rock which the contractor was bound to excavate, but which he refused to excavate until the employer removed the silt. This dispute having been submitted to the arbiter, he pronounced an award, in which he ordained the contractor to excavate the rock, "this work to be done immediately after the removal of the silt"; found that the silt fell to be removed at the expense of the employer, and ordained him to remove it within one month, failing which the contractor was not to be bound to excavate the rock.

The employer brought an action for reduction of the award on the ground that the arbiter had no power to ordain him to execute works. *Held* that the award was not *ultra vires*, in respect that the order on the pursuer was not obligatory but was merely a condition which he must fulfil before enforcing the order on the contractor to excavate the rock.

Arbitration—Award—Reduction—Personal objection.—In the pleadings before an arbiter, under a reference in a contract for the construction of harbour works, the employer objected to a claim by the contractor on the ground that the claim was excluded by a special agreement between the parties. The contractor denied the existence of such an agreement. The arbiter sustained the contractor's claim.

In an action at the instance of the employer for reduction of the award on the ground that the claim was excluded by the express words of the contract, *held* that the employer having based his case before the arbiter on the alleged special agreement, was barred from pleading the contract as a ground for reducing the award.

In September 1888 George Pirie, contractor, Aberdeen, entered into a contract with Thomas Duff Gordon Duff, of Hopeman, in the county of Elgin, to execute certain works at the harbour of Hopeman. The specification, which was incorporated with the contract, contained a clause (quoted below),* under which disputes between the parties were referred to John Willet, Mr Duff's engineer, whom failing, to William Smith, engineer, Aberdeen.

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Duff v. Pirie.1ST DIVISION.
Ld. Kyllachy.

In January 1892 differences arose between the parties, which were submitted to Mr Smith, Mr Willet having died.

The arbiter accepted the reference, and thereafter issued an "interim award and order," dated 15th March 1892, and "interim decree-arbitral," dated 3d June 1892.

On 28th June 1892 Duff raised an action against Pirie for reduction of both these decrees.

No proof was taken in the action, which was decided upon the record

* "If at any time before the commencement, or during the progress, or during the period of maintenance of the works, or after the completion of the contract, any disputes or differences shall arise between the employer and the contractor . . . as to the true intent, construction, or meaning of this specification, or of the said drawings or schedules of quantities, or of the contractor's tender or acceptance thereof, or of any of the conditions contained in each and all of these, or of anything to be contained in the formal contract to be entered into as herein provided, or as to the terms in which such contract shall be framed, or as to the manner of executing or protecting or maintaining the works contracted for, or as to the quality of the materials employed, or proposed to be employed therein, or as to the measurement or valuation of the works executed under the contract, or the amount of any advances to be made to the contractor, or as to any claims for additional or extra works, or as to any claims of deduction for or in respect of alterations or diminutions on the works, or as to any charge, account, cost, expenses, or damages made or claimed by the employer against or from the contractor, or his foresaids or sureties, or made or claimed by the contractor or his foresaids against or from the employer, arising out of the execution, or the failure in the execution of the works, or any part thereof, or arising out of or payable by reason of the performance, or the failure in the performance, of any of the obligations undertaken by the parties in the contract, and generally as to the rights or obligations of either party under this contract, or any matter or thing whether of the nature above specified, or of any other kind, as well non-executorial as executorial, arising out of, or in any way connected with the execution of, or failure to execute, the works contracted for, or the performance of, or failure to perform, any of the obligations undertaken by the parties, or the exercise of any of the powers conferred on them, or arising out of, or in any way connected with the contract, then all such disputes and differences shall be submitted and referred to the decision, final sentence, and decret-arbitral of the said John Willet, whom failing, of William Smith, M. Inst. C.E., Aberdeen, presently engineer to the Aberdeen Harbour Commissioners, and whatever the said arbiters shall respectively determine in the premises, in whole or in part, by award or awards, decret or decreets-arbitral, whether interim or final, to be pronounced by them respectively, the employer and the contractor . . . shall be bound to acquiesce in, implement, and fulfil to each other; which submission shall not fall by lapse of year and day, nor by the death or bankruptcy of . . . the employer or the contractor . . . the said arbiters respectively having full power not only to determine the liability of any of the parties to the other for or in respect of the claims, charges, costs, expenses, or damages, as to which any dispute or difference is referred, but also conclusively to assess and fix the amount thereof, as well as to award all the costs incurred under said submission. The said submission shall be held to exclude the jurisdiction of any Court of law in reference to any of the matters before referred to."

No. 23. and productions, including the contract and specification, and the proceedings before the arbiter.

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A variety of reasons of reduction were stated, of which the following are now reported:—

I. The decree-arbitral of 3d June 1892 contained, *inter alia*, the following findings:—"Sixth—Rock Excavation.—I ordain the second party, during and after removal of the silt specified in article seventh hereof, to bore, blast, and remove the remaining rock excavation below low-water level down to the specified depth of three feet below low water, this work to be done immediately following upon the removal of the silt or sufficient portions thereof to facilitate the work of boring and blasting. Seventh—Silt.—I hereby find and determine that the accumulated silt lying on the rocks yet to be excavated in the entrance channel of the harbour falls to be lifted at the expense of the first party, and ordain him to do so within a period of one month from the date of these presents, which period I reserve right to extend on cause shewn, failing which the second party shall not be bound to implement article sixth hereof."

The pursuer maintained that these findings were *ultra vires* of the arbiter, in respect that in the sixth finding "he makes the defender's obligation to remove the remaining rock excavations below low-water level conditional upon the silt specified in article seventh being removed by the pursuer, notwithstanding that by the contract the defender is absolutely bound to make said excavations, and to remove said silt"; further, in the seventh finding, "he ordains the pursuer to remove certain silt within a month from the date of his decree, thus going entirely beyond the scope of the contract, which imposes no obligations to perform works on the pursuer"; and further, "he takes upon himself to relieve the defender from his contract obligation mentioned in the sixth finding, unless the pursuer implements the arbiter's said incompetent order within the time which he has chosen to fix."

It appeared that the parties were at issue before the arbiter as to which of them was liable in the expense of removing the silt referred to in these findings, the pursuer maintaining that it fell to be removed by the defender under his contract, and the defender that the silt, having accumulated in consequence of operations by the pursuer outside the contract, fell to be removed by the pursuer.

In the action the defender maintained that the findings were *intra vires*, their effect being simply to sustain his contention.

II. The decree-arbitral of 3d June also contained the following:—"I further decern and ordain the first party [Duff] forthwith to pay to the second party [Pirie] the sum of £1257, 7s. 1d., as a further interim payment, with interest thereon at the rate of 5 per centum per annum from the date hereof until payment."

The arbiter issued no note or explanation of the method by which he reached this figure, but the pursuer undertook to shew, by comparing the sum awarded with the total of the contractor's claims, that the arbiter must have included, at least to the extent of £298, certain claims by the defender, which, as the pursuer contended, were excluded by the express terms of the contract.

(1) The first of these claims was for a sum of £573, 6s., in respect of alleged rock excavations above low-water level made in excess of 8630 cubic yards, which, as the pursuer averred, was to be taken as the quantity to be excavated under the contract (which was for a lump sum), whatever the actual quantity excavated might be.

The schedule of quantities annexed to the specification set forth, *inter*

alia, that the sandstone rock excavations amounted to 8630 cubic yards. **No. 23.**
 The specification further provided as follows:—"It is stipulated and agreed to that the contractor shall verify the levels of the ground if he thinks proper, and satisfy himself as to the dimensions, character, and nature of the whole works, and obtain his own information on all matters which can in any way influence his tender; and his signature to the specifications, schedule of quantities, and drawings is given and shall be accepted as full evidence of his adoption of the same and his acknowledgment of their accuracy and sufficiency. . . . Detailed schedules of the work specified are provided, which schedules are believed to be accurate, but at the same time are not warranted to be correct, and no claim of any kind shall be made or allowed, though the same shall be found inaccurate, contractors being bound to satisfy themselves as to their completeness and accuracy before making any offer."

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In the record before the arbiter the pursuer did not found on the provisions of the specification just quoted, but averred that shortly after the commencement of the works a dispute arose between the parties as to the quantity of rock to be excavated above low-water level, and that after referring the matter to a neutral engineer it was, by letters passing between the parties, "definitely settled that the quantity of rock to be excavated corresponded with the quantity scheduled, namely, 8630 cubic yards."

In the action the pursuer maintained that the claim for £573, 6s. was absolutely excluded by the provisions of the contract and by the special agreement, and consequently that it was *ultra vires* of the arbiter to sustain the claim.

The defender denied the existence of the arrangement averred by the pursuer, and maintained that the dispute fell within the clause of reference.

(2) The second claim under the present head was thus stated by the defender in the record before the arbiter,—“The second party also claims the following items for work done which was carried away by the sea owing to the faulty designs of the first party's engineer, and the practical impossibility of building certain parts of the works in accordance with the original plans and specifications, viz. :—

“Cost of recovering and repairing crane washed down from north pier,
 October 1890, £110 0 0

[Then followed other similar items.]

[Total] £460 0 0”

The pursuer maintained that this claim was excluded by the following clause in the specification:—"The contractor shall undertake and be held liable for all sea risks of whatever description during the progress of the works, he being held to have satisfied himself as to the sufficiency of the designs on making his tender."

The defender further did not admit that the arbiter had sustained either claim, and maintained that it was "premature for the pursuer to object to the money decerniture being *ultra vires* of the arbiter. Both decrees-arbitral are interim ones, and the total sum decerned for does not exceed the whole of the defender's claim."

III. On 3d June 1892 the clerk to the reference wrote to the pursuer as follows:—"I now beg to intimate that the decree has been signed by the arbiter of this date. In accordance with the usual practice, I presume you will put me in a position to pay his fee before taking the decree out of his hands. . . . His account, according to usual engineering charges, would amount to £338, 16s., which he restricts to the sum of

No. 23. £300. . . .” Referring to this letter the pursuer averred, that in the belief that the decree therein mentioned was exhaustive of the matters submitted, and under pressure put upon him by the arbiter to pay one-half of the fee, as a condition of the decree being delivered up, the pursuer was compelled to pay one-half of the fee, being £150; that on obtaining the decree, the pursuer discovered that it was not exhaustive of the submission, in respect of various matters set forth; and therefore that, “in demanding payment of a fee, after the arbitration had reached such an advanced stage, but while he himself contemplated further procedure therein, in concealing from the pursuer that such further procedure was contemplated, and in leading him to believe that the document to be issued upon payment of the fee was a final decree, the arbiter was guilty of corruption within the meaning of the Act of Regulations.”

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In answer, the defender averred,—“That the pursuer voluntarily agreed to pay one-half of the arbiter’s fee along with the defender, and further, that until the adjustment of the record herein pursuer never raised any objection to his payment of the arbiter’s fee.” The defender therefore pleaded;—(7) The pursuer having paid his share of the arbiter’s fee, and appeared and pleaded before the arbiter after he had so done, he is barred from objecting to the decrees on the ground that the arbiter had fixed a fee to be paid to him.

On 16th February 1893 the Lord Ordinary (Kyllachy) pronounced an interlocutor sustaining the reasons of reduction with reference to a matter not now reported, and, *quoad ultra*, repelling the reasons of reduction, and assolzieing the defender, “reserving all competent objections to the final award and decree-arbital when issued.” *

* “OPINION.—The pursuer in this case is Mr Duff, of Hopeman, the proprietor of the harbour of Hopeman in Morayshire, and the defender is the contractor for certain recent extensions of the harbour works. The object of the action is to reduce two interim decrees-arbital pronounced by the arbiter nominated in the contract; the grounds of reduction being generally, that the arbiter has exceeded his powers, has ignored the express terms of the contract, and has moreover been guilty of corruption in so far as, having accepted the reference without stipulating for remuneration, he demanded, before issuing his second decree-arbital, a fee of large amount fixed by himself, and payable by the parties in equal shares.

“There has as yet been no proof, but I have heard a prolonged argument in the Procedure-roll, each party asking a judgment on the record and productions, which latter include the contract and relative specifications, and also the proceedings before the arbiter in the reference.

“I have found the case to be attended with difficulty, and I have hesitated a good deal as to my judgment. I have not much doubt that the arbiter has taken considerable liberties with the contract; and I cannot regard lightly what appears to have happened about his fee. But what I have had to consider is, whether his action has been such as to invalidate his award, and I have also to consider how far the pursuer’s challenge is premature, or on the other hand, comes too late.

“Perhaps I ought in the first place to deal with the matter of the arbiter’s fee. I confess that if I had to decide this objection on its merits, I should have some doubt whether, as the case stands, I was in a position to do so. I observe that the arbiter has not been called as a party to the action, and if this particular objection was to be urged he ought to have been so. Moreover, I am not sure that I can take it as admitted that the demand complained of, which is contained in a letter from the clerk to the reference, was authorised by the arbiter. But in the view which I take, it is not necessary to decide how far these difficulties are insuperable, or indeed to decide anything as to this part of the arbiter’s conduct; for it appears to me that the objection urged, even if well

The pursuer reclaimed, and argued ;—(1) The 6th and the 7th findings were both bad, and ought to be reduced—the 6th because it was condi-

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founded, was capable of being waived ; and I think it clear that both parties did waive any right which they, or either of them, may have had to bring the reference to an end on receipt of the communication which is complained of. It appears from the proceedings that they not only paid the fee asked without objection, and took up the award, each party taking his chance of its contents, but that after the award was issued, both parties appeared and pleaded before the arbiter, at all events on certain questions relating to costs. Indeed it is stated, and so far as appears correctly, that no challenge on this score was intimated or even indicated until the adjustment of the record in the present action.

“ I cannot hold that in the circumstances the pursuer can, in a question with the defender, urge this ground of objection now.

“ I must, at the same time, take leave to say that I must not be understood to give any countenance to the argument submitted by the defender to the effect that it is quite lawful and proper for an arbiter, who has accepted a gratuitous reference, to demand, towards the close of the proceedings and on the eve of issuing his award, a fee for his trouble fixed by himself. I was told that such is the practice in England, and it may be so ; for such abuses are difficult to check, inasmuch as from their very nature they tend to secure their own impunity, and can but seldom come under the cognisance of the Courts. But whatever may be the practice in England, I am at least confident that no such practice exists in Scotland. If it does so, I have never heard of it, and I should be very sorry to hear of it now. One thing I think is certain, that as the law of Scotland stands, such a proceeding on the part of an arbiter would most probably be held to amount to corruption. In the case of *Blair*, January 12, 1738, *Elchies, voce Arbitration*, 3, the Court reduced an award on the ground of corruption, because the arbiters refused to give up their award until they got payment of the fee demanded by them, which one party refused but the other agreed to give. And in the more recent case of *Fraser*, May 26, 1838, 16 S. 1049, the opinions of the Judges shew, I think, pretty plainly that the result in that case would have been the same but for the specialties—(1) that the arbiters had stipulated for remuneration, not indeed strictly before acceptance, but yet at the outset of the submission ; and (2) (what was greatly relied on), that the remuneration demanded was not fixed by the arbiters themselves, but was remuneration left to be fixed by a neutral authority. I think this last case by no means detracts from the general rule ; and for my part I should be sorry if any laxity were permitted in such a matter ; for nothing could, in my opinion, be of worse example than that an arbiter, having undertaken a submission without stipulating for remuneration, and having thereby agreed to accept such remuneration as the parties might send him, should nevertheless, towards the close of the proceedings, and while he still has the parties in his power, demand from each of them a sum of money fixed by himself, to which he has no legal claim, and should propose to enforce this exaction by declining otherwise to issue his award, that is to say, to perform his duty under the reference.

“ So much for the pursuer's challenge on the head of corruption. I may next consider the point taken by the defender, that the two awards being only interim awards, and being, therefore, open to be reconsidered in the final award, it is incompetent to reduce them now. Now, to some extent I think this argument has force. In a case of this sort it is always open to the Court to refuse to interfere until the pursuer has exhausted his ordinary remedies ; and where an interim decree pronounced in a submission is challenged upon grounds which are doubtful, or which involve inquiry, and where, at the same time, the matter of complaint admits of being adequately redressed in the final award, I should certainly refuse to try a question which may ultimately be found to be unimportant. But, on the other hand, an interim award may sometimes be in substance a part award. It may in its nature be incapable of after correction. Or, again, while capable of correction, it may be so plainly and obviously bad that

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tional and inconclusive,¹ the 7th because it ordained the pursuer to execute works, which the arbiter had no power to do. It was plain under the

the party aggrieved is entitled to obtain redress at once. It is, therefore, I think, impossible to lay down any general rule with respect to the challenge of interim awards. The principles which I have tried to indicate must be applied to each case as it occurs. We shall see by-and-bye how far they help in the disposal of some of the questions which are here raised. . . .

"With respect to the second award, there are several of the pursuer's objections which I cannot entertain. In particular . . . (2) It is also complained that the arbiter has ordered the pursuer to remove certain silt from the harbour, as preliminary to the completion by the defender of the excavations under the contract. It appears to me that this is matter rather of form than of substance. What is meant by the award plainly is, that in the judgment of the arbiter the pursuer is responsible for the silt, and that the contractor is not bound to go on with his work until it is cleared away. There is really no order on the pursuer to execute new works. He may execute the work ordered, or not execute it, as he pleases. And that being so, I can see nothing wrong. The arbiter, I must suppose, has held it proved that the silt in question came, as the defender contends, from the blasting operations ordered by the pursuer outside the harbour, and outside the contract. As to this, he may have been right or wrong; but he was entitled to judge. . . .

"It remains to consider the other and last objection, which is this:—The arbiter has decreed against the pursuer for payment of a sum of £1257, 7s. 1d. 'as a further interim payment.' He does not explain how this sum is reached; but the pursuer undertakes to shew, by comparing the sum awarded with the total of the contractor's claims, that the arbiter must have included, at least to the extent of about £298, certain claims by the contractor which are expressly excluded by the contract. These claims are (1) for certain excavations within the contract limits, and necessary to deepen the harbour to the contract level, but in excess of the estimated quantity of excavation contained in the schedules; (2) for the loss of a certain crane, and other losses sustained by the contractor from what were plainly sea risks during the execution of the contract. The pursuer says, and I think with force, that if the arbiter entertained those claims, or either of them, he did not merely misconstrue the contract, but ignored or defied it, and that this, if it does not infer corruption, at least involves a breach of an essential, although implied, condition of the contract of reference.

"Now, if I were bound to hold that the arbiter had in fact sustained either of the two claims in question, I should have great difficulty in upholding the award. At least I should have great difficulty on the materials before me, or upon any explanations which the defender has been able to offer. But there here comes in the circumstance that this is an interim award—that the arbiter is not before me—and that he has not had an opportunity of explaining on what principle or on what calculation he has arrived at the sum of £1257, 7s. 1d. which is in question. It may be that the fact is as the pursuer says; but on the other hand, it is at least possible that the arbiter has included some other items, as, for instance, the expense, or part of the expense, of the works ordered by him under these interim decrees-arbitral. Or it may be that there has been simply a miscalculation which can be set right in the final award. Now, while anything of that kind is possible, I should be unwilling to make the assumption which the pursuer suggests—an assumption which would reflect seriously on the arbiter, and might be doing him great injustice. Accordingly I do not feel bound at this stage to follow the pursuer into the analysis and calculation on which this objection rests. I prefer to assume—what I think from the arbiter's position I am justified in assuming—that if there is an error in this matter it will be corrected; and that the final award will be one which, in this and other matters, will respect the contract, and do justice between the parties. . . ."

¹ Clyne's Trustees v. Edinburgh Oil Gas-Light Co., Aug. 27, 1835, 2 S. and M. 243.

contract that the duty of excavating the rock in question fell to the defender, and it was also his duty to remove the silt, for he undertook all risks occasioned by the action of the sea. He ought therefore to have been ordained absolutely to excavate the rock; instead of which, the arbiter had taken it upon himself to make the defender's duty of excavating the rock conditional upon the pursuer removing the silt within one month. This was not a case in which a valid portion of an award could stand as being separable from an invalid portion.¹ (2) The decree for £1257 was bad, either because the arbiter had thereby given effect, at least to the extent of £298, to one or other or both of two incompetent claims, or because he had awarded a larger sum than the defender claimed.² The claim for £573 was negatived by the express provisions of the contract under which the defender accepted the schedule quantities as correct, and the claim for £460 was met by the clause in the contract under which the defender undertook all liability for sea risks. For the arbiter to sustain either claim was *ultra vires*; and if so, the decree for £1257 must be set aside *in toto*, the arbiter having lumped together competent and incompetent money awards.³ The Lord Ordinary, while of opinion that it would have been *ultra vires* of the arbiter to sustain either of these claims, had refused to grant decree of reduction partly on the ground that the award was an interim one, and partly on the ground that the arbiter had not been asked to explain his award. But the award of 3d June, though styled an "interim decree-arbitral," was truly a final award as regarded these claims, if the arbiter had sustained them.⁴ Nor was it necessary to examine the arbiter, it being clear on the face of the proceedings that the arbiter had either awarded more than was claimed or had sustained incompetent claims. But it was quite competent to examine an arbiter as to the meaning of his award,⁵ and if that was thought necessary here, the pursuer should have been allowed an opportunity of doing so, instead of being at once put out of Court. (3) For an arbiter, who had accepted a gratuitous reference, to demand a fee as a condition of issuing his award, amounted to corruption in the sense of the Act of Regulation, especially where as here the award was an interim one. The pursuer had not waived his right to take this objection merely by paying his share of the fee.⁶ The fact that an arbiter had acted *ultra vires* did not entitle a party to decline to proceed with the reference.⁷ It was not necessary to call the arbiter as a defender;⁸ but the pursuer had no objection to having the action intimated to him.

Argued for the defender;—(1) The 6th and 7th findings were unobjectionable. The parties were at issue as to which of them was responsible for the removal of the silt, and they submitted this dispute to the arbiter, who sustained the defender's contention, and had given effect to his opinion

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¹ Johnston v. Cheape, July 8, 1817, 5 Dow's App., p. 247; Cox Brothers v. Binning & Son, Dec. 18, 1867, 6 Macph. 161, 40 Scot. Jur. 93.

² Napier v. Wood, Nov. 29, 1844, 7 D. 166, 17 Scot. Jur. 80; Adams v. Great North of Scotland Railway Co., Nov. 20, 1890, 18 R. (H. L.) 1.

³ Mackenzie v. Inverness and Aberdeen Junction Railway Co., June 9, 1866, 4 Macph. 810, 38 Scot. Jur. 429.

⁴ Edinburgh and Glasgow Railway Co. v. Hill, Jan. 28, 1840, 2 D. 486; Montgomerie v. Carrick, June 23, 1848, 10 D. 1387, 20 Scot. Jur. 504.

⁵ Glasgow City and District Railway Co. v. Macgregor, Cowan, & Galloway, Feb. 25, 1886, 13 R. 609.

⁶ Fraser v. Wright, May 26, 1838, 16 S. 1049, per Lord Glenlee, p. 1056.

⁷ Cox Brothers, *supra*.

⁸ Montgomerie, 1798, M. 631; Jack v. Cramond, 1777, M. *voce* Arbitration, No. 5.

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in the findings in question. The 7th finding did not, properly speaking, ordain the pursuer to remove the silt, but merely intimated that if he did not do so the defender was not bound to do the excavation. Such a finding was perfectly competent under a wide clause of reference like the present, where the arbiter had a free hand to adjust the rights and obligations of either party, and was not bound strictly by the record as in a judicial reference.¹ (2) It was not *ultra vires* of the arbiter to sustain either the claim for £573 or that for £460. With respect to the former, the question submitted to the arbiter was whether the parties had come to a special agreement to take 8630 cubic yards as the quantity to be excavated under the contract, and if the arbiter had sustained this claim, he must be held to have done so on the ground that no such agreement had been proved. It was too late therefore for the pursuer to question the award on the ground that the claim was excluded by the express terms of the contract. Even if the arbiter had sustained the claim on the ground that it was not so excluded, such an award, while it might be wrong in law, was not so erroneous as to be *ultra vires*. So also if the arbiter had sustained the claim for £460, that award was not *ultra vires*. The question was whether certain damage had been caused by "sea risks"; and this question being referred to the arbiter, he had, as the pursuer maintained, decided it in favour of the defender. But the question whether any particular damage had been caused by sea risks was a question of fact, the determination of which was certainly within the powers of the arbiter, and there was nothing to shew that to sustain the defender's contention was so wrong as to be *ultra vires*. It was, however, by no means clear that the arbiter had in fact sustained either claim, and in order to justify a decree of reduction, without having any explanation from the arbiter, it must be plain *ex facie* of the proceedings that the arbiter had included incompetent claims. This was an interim decree, and if it erred merely in being for too large a sum that could be set right in the final decree. (3) The demand of a fee by the arbiter did not amount to corruption. Had either party refused to pay, that would not in any way have affected the award, which was signed before the demand was made. In any case the objection came too late, the pursuer having paid his share of the fee without objection.

At advising,—

LORD PRESIDENT.—I agree with the Lord Ordinary in holding that in the matter of the arbiter's fee the pursuer's challenge of the award is precluded by his own conduct. His Lordship's strictures on the proceedings ascribed to the arbiter are highly salutary; and it does not detract from my concurrence in these remarks if I add that I do not at present see how an extortionate demand for a fee made after an award has been honestly resolved on and signed can react on the award so as to render it corrupt and reducible. The Lord Ordinary's ground of judgment, viz., bar, being sufficient, it is not necessary further to examine the question.

Turning to the various objections to the two awards, I shall take first the award of 15th March 1892, making only this one general observation that the reference clause in the contract is one of great and remarkable latitude. [After considering grounds of reduction not now reported]—

The next point in dispute is the seventh head, and the form in which the arbiter has put his decision gave rise to a plausible argument for the pursuer.

¹ Mackenzie v. Girvan, Dec. 19, 1840, 3 D. 318, see pp. 327-8.

The matter stands thus : The contractor said that the execution of some extra work which had been ordered by the pursuer had caused an access of silt in a part of the work where rock had yet to be excavated. Now, the arbiter had a long proof on the questions of fact as to the origin of the silt, and he came to be satisfied that the defender was right in his view, and that its amount was such as to render it a new obstacle in the way of the excavation of the rock, unforeseen and unprovided for in the contract. His view was therefore that the contract did not apply to the existing circumstances. This being so, he might, I think, have found that in the events which had happened the contractor was not bound to do the excavation ; and this is what he has virtually though not expressly done. It is true that he in words ordains the pursuer to remove the silt, and on this being done, ordains the defender to excavate the rock. Now, if this order on the pursuer had been expressed as obligatory, or, in other words, if the contractor could, under this order, have forced his employer to remove the silt, it might be difficult to maintain that it was within the arbiter's powers. But then the closing words of this seventh head contemplate the employer not choosing to remove the silt, and prescribe the consequence, which is merely that then the contractor shall not be bound to excavate the rock. I consider, therefore, that the order comes to no more than this, that if the pursuer likes to remove the silt, then and only then the defender must excavate the rock. I have only to add on this head that the pursuer joined issue and went to proof on the questions raised on the record about this silt, and cannot now impugn the arbiter's power to decide them.

The remaining question is as to the decree for £1257, 7s. 1d. The pursuer alleges that in granting this decree the arbiter has taken into account two claims, both of which he maintains to have been *ultra fines compromissi*. Whether either of those things was taken into account there is unfortunately nothing to shew, and it is to be regretted that in dealing with a matter of considerable complexity and magnitude the arbiter did not, either in his award itself or by issuing notes of proposed findings, let the parties see what he was giving this money for. It was argued indeed—and the Lord Ordinary has taken that view—that this being an interim award there would be an opportunity for the arbiter in his final award reconsidering any disputable question and rectifying any error in the award under consideration by ordering repayment. I am not satisfied, looking to the claims and procedure and also to the structure of this award itself, that the decree would be held to have only this provisional character, and that it was not, while entitled “interim,” a determination of the merits of the claims dealt with. I do not pronounce on this, but the point is so far from clear that if I had thought that the pursuer had succeeded in shewing that the arbiter could not legally take into account the two claims which he suspects to compose part of the lump sum awarded, I should have considered it necessary to ascertain whether in fact they had been taken into account by the arbiter. I have come to think, however, that the pursuer has failed in this contention, and that, even assuming that the items challenged have been computed, this would not expose a final decree, and does not expose this decree, to reduction.

Now, the first of those heads of challenge relates to £573. The contract was for a lump sum, and in the schedule of quantities certain excavations were stated at 8630 cubic yards. The contractor claimed payment for more than 8630, because he said more had been done, and he was entitled to be paid for

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No. 23. *it.* The answer made by the pursuer was that it had been settled by agreement, pending the work, that the quantity of rock to be excavated corresponded with the quantity scheduled, viz., 8630 yards. The case of the pursuer was thus rested not on the terms of the contract, but on the terms of the subsequent letters, or, in other words, the legal view now maintained was waived. The question thus submitted to the arbiter was clearly within his competence to decide. I may add that if the question had been one of the construction of the contract, I am not satisfied that a decision adverse to the pursuer would have been illegal even if legally erroneous.

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The other claim for loss of a crane and other articles seems to have been considered by the arbiter without objection by the pursuer to the competency of the proceeding, and I am disposed to think that he cannot now impugn it as *ultra fines compromissi*. But as the pursuer, in order to make good his objection to the award, required to prove the incompetency of both this claim and the claim previously considered, it is not necessary to examine this matter in detail.

The result of my opinion is that the Lord Ordinary's decree of partial reduction should be recalled, and the rest of his interlocutor adhered to, the absolutor being extended to the whole conclusions of the summons.

LORD M'LAREN and LORD KINNAR concurred.

LORD ADAM was absent.

THE COURT recalled the Lord Ordinary's interlocutor, in so far as it sustained the reasons of reduction, and *quoad ultra* adhered.

MACKENZIE, INNES, & LOGAN, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

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NORTH ALBION PROPERTY INVESTMENT COMPANY, LIMITED, Pursuers
(Reclaimers).—*Johnston—Ure—John Wilson.*

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JOHN WILSON (MacBean's Curator Bonis) AND ANOTHER, Defenders
(Respondents).—*Murray—Younger.*

Right in security—Debtor's right to assignation of bond on payment.—Where the debtor under a bond and disposition in security has sold the security subjects under burden of the bond, he is entitled, on being called on to make payment of the bond under his personal obligation, to require the creditor, as a condition of payment, to assign the bond to him.

1ST DIVISION.
Ld. Wellwood.

By bond and disposition in security, dated 13th, and recorded 21st May 1874, Hugh MacBean, oil and colour manufacturer in Glasgow, acknowledged to have borrowed and received the sum of £3000 from the trustees of William Bankier, merchant in Glasgow, which sum he bound himself to repay at Martinmas 1874, with interest at 5 per cent during the not payment, and in security of the said personal obligation he disposed to and in favour of Bankier's trustees, heritably but redeemably on payment of the principal sum with interest, yet irredeemably in the event of a sale in virtue of the powers thereof, certain subjects in Glasgow extending to 870 square yards.

By disposition, dated November 1874, MacBean sold the security subjects to George Jeffrey, teacher in Largs, for £4400, Jeffrey, in satisfaction of the price, paying £1400 to MacBean and freeing and relieving him, as by acceptance of the disposition he bound himself to free and relieve him, of the bond and disposition in security, which bond and dis-

position in security, and the whole obligations therein contained, it was by the disposition agreed should transmit against Jeffrey and his heirs and successors whomsoever.

In March 1876 Jeffrey sold the security subjects, which, after various transmissions, were bought by George Eadie, builder, Glasgow, in March 1877. Each of the successive purchasers was taken bound to pay the sum in the bond, and when Eadie acquired the subjects, they were still burdened with the bond, and also with two postponed bonds, for £880 and £550, which had been granted after MacBean had sold the subjects.

Immediately after acquiring the subjects, Eadie borrowed £3000 from the North Albion Property Investment Company, Limited, for which he granted a bond dated 5th, and recorded 6th June 1877, and in security disposed a piece of ground extending to 552 square yards, being part of the subjects disposed in security to Bankier's trustees.

By deed of restriction dated 2d and 5th, and recorded 16th October 1877, Bankier's trustees, upon the narrative that Eadie had applied to them to release part of the subjects held by them in security under the bond granted by MacBean, but without any consideration being paid to them therefor, declared a portion of these subjects, extending to 325 square yards, to be released and disburdened of the security constituted by that bond.

Thereafter, by assignation dated 18th February, and recorded 4th March 1880, in consideration of the sum of £3000 paid to them by the North Albion Investment Company, Bankier's trustees assigned and disposed to that company the bond and disposition in security granted by MacBean and the subjects thereby disposed in security, but excepting always from the said subjects the 325 square yards released by the deed of restriction in 1877.

On 1st September 1892 the North Albion Property Investment Company, founding on the personal obligation in the bond of 1874, brought an action against John Wilson, C.A., Glasgow, curator bonis to Hugh MacBean, and also against MacBean, concluding for payment of £3000, being the principal sum due under the bond, together with £172 as arrears of interest.

The pursuers pleaded, *inter alia*;—(1) The pursuers are entitled to decree against the defender Hugh MacBean, and also against the defender John Wilson as his curator bonis, in respect of the obligation undertaken by the former in the said bond and disposition in security, for the principal sum therein contained and the interest thereon, all as concluded for, with expenses. (3) The pursuers' right to enforce the personal obligation undertaken by the defender Hugh MacBean in the said bond and disposition in security granted by him is not prejudiced by the renunciation by Mr Bankier's trustees of part of the security subjects contained in said bond and disposition in security. (4) The pursuers are not bound, on payment only of the amount due under the bond of 1874, to grant an assignation of the security subjects contained in the said bond, in respect that the said subjects are also held by the pursuers in security of another debt, and that the pursuers would be prejudiced by the keeping up of the security created by the said bond of 1874, or at least have an interest to object to that security being maintained. (5) *Separatim*. In any view, the pursuers are entitled to recover payment of the sum sued for, under deduction of a sum equivalent to the value of the part of the security subjects released as aforesaid.

The defenders, who stated (what the pursuers did not deny) that they had no knowledge of the granting of the deed of restriction by Bankier's trustees, pleaded, *inter alia*;—(2) The authors of the pursuers, as creditors

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No. 24. in said bond, having, without the knowledge or consent of Mr MacBean, altered the contract between him and them, he was thereby freed of liability for the said bond. (3) The defenders ought to be assoilzied, in respect that the pursuers are not in a position to assign to the defenders the said bond, together with the subjects disposed by Mr MacBean in real security of the payment thereof, in exchange for payment of the sum contained in the bond.

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On 8th February 1893 the Lord Ordinary (Wellwood) sustained the defences, and assoilzied the defenders.*

* "OPINION.—This case raises some interesting and novel questions.

"1. The leading question which was argued is whether the granter of a bond and disposition in security who has sold the security subjects after granting the bond and disposition is entitled, when called upon by the creditor to pay the debt in full under his personal obligation, to demand from the creditor an assignment to the bond. Owing to various transmissions the narrative in the record is somewhat complicated, but, stated shortly, the essential facts of the case are as follows :—

"A borrows £3000 from B, and grants a bond and disposition in security in the usual terms, the security subjects extending to 800 square yards of ground. A then sells the security subjects to C under burden of the bond, the sum in the bond being treated as part of the purchase-price. C afterwards applies to B to restrict the bond in order to enable C to sell 300 square yards free of the bond. B agrees to do so without receiving any consideration, and the bond is accordingly restricted to 500 square yards. B thereafter assigns the bond so restricted to D, who had previously obtained a postponed bond over the 500 square yards still covered by the original bond by A.

"The heritable subjects having depreciated in value, D demands from A, the granter of the first bond, full payment of the debt. A declines to pay, on the ground that D, as a condition of receiving payment, is bound to assign to him the bond which he granted to B, and that as it can no longer be assigned in its entirety, A is freed from his obligation.

"I do not profess to give a complete statement of the facts or figures, but it is sufficient to shew how the questions arise. D represents the present pursuers, and A, the defender Hugh MacBean.

"The position maintained by the pursuers is this, that under the original bond and disposition in security the creditor had two separate and distinct remedies—one, the personal obligation of the debtor, the other the heritable security; that he might use the one or the other just as he found convenient; and that if the debtor sold the security subjects the creditor might, if he chose, discharge the bond in whole or in part, and thus free the lands, while at the same time the personal obligation of the debtor remained intact.

"The defender, on the other hand, maintains that an assignment of the bond, a reconveyance of the security, is the counterpart of payment; and that if the creditor has disabled himself from reconveying, the original debtor is liberated.

"Before I proceed to consider the legal aspect of the case, I propose to inquire what would be the practical result to the parties of sustaining the one contention or the other.

"To deal first with the defender's view. So long as the security subjects remain in the hands of the debtor the question cannot arise. If the debt is paid up the security is discharged.

"The difficulty arises when the debtor sells the security subjects. So long as the bond remains undischarged the subjects are to that extent diminished in value; the seller cannot obtain full value for the subjects. He accordingly conveys the subjects under burden of the bond, receives so much less money, and for greater security takes the purchaser bound to relieve him of the debt, and to agree that the debt shall transmit against him. All this appears on the face of the recorded deed. The result of this is that, although the debtor remains liable, if called upon by the creditor to pay, he has not only the personal obliga-

The pursuers reclaimed, and argued;—As a matter of contract the creditor in a bond and disposition in security, on receiving payment of

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tion of the purchaser but also the value of the heritable subjects between him and ultimate loss.

"On the other hand, the creditor has not merely the original debtor's personal obligation and the security of the heritable subjects unimpaired, but also the personal obligation of the purchaser, for which he had not bargained.

"That is the result from the defender's point of view.

"Again, according to the pursuers' argument, the result would be that the original debtor would be entirely deprived of the benefit of the security subjects, and might in certain events be compelled to pay the debt twice over. As I have pointed out, the price which a seller receives who sells property under a bond is diminished by the sum covered by the bond; and if he is afterwards called upon to pay the debt in full, and the purchaser is bankrupt, and he is deprived of all relief from the sale of the security subjects, he will simply have paid the debt twice over. That is what the pursuers' counsel maintains to be the law.

"This statement of the case shews, I think, that the result contended for by the pursuers would be productive of great hardship to the original granter of the bond, while the creditor would suffer no prejudice if the defender's contention were sustained. It remains to be considered whether the defence is warranted by the law of Scotland.

"I think it may be taken that there is no express decision or authority in the law of Scotland directly in point. On the other hand, certain English cases have been quoted, in which it is maintained the point was expressly decided in favour of the defender's view. I shall afterwards consider these cases in detail.

"To deal first with the law of Scotland. In the absence of express decision or authority, the question must be decided upon principle. I think it is to be solved by considering the nature of the contract between the original debtor and the creditor. The security which the debtor grants and the creditor accepts is really a pledge for payment of the debt; and the law of the contract of pledge—viz., that the pledgee must apply and use the pledge only for the purpose for which it is given—rules the present case. It is not necessary to refer in detail to the history of redeemable securities; but if it is attended to, it will be seen that a wadset, of which the modern heritable security is a development, is simply a pledge of land in security of debt, the lands pledged having to be reconveyed and restored to the debtor on payment of the debt. Now the creditor's obligation under the contract of pledge is to restore the subject of the pledge on payment of the debt. The right of property remains with the pledger, subject to the burden, and the creditor has no right of use during his possession of the pledge. The subject of the pledge cannot be sold without the order of a Judge; the seller cannot sell at his own hand—Bell's Pr., secs. 206, 207.

"It will be seen that these limitations of the pledgee's powers in regard to the subject of pledge find their counterpart in some at least of the rules applicable to the use which the holder of heritable security is entitled to make of his right. If the creditor demands payment of his debt while the security subjects remain in the original debtor's possession and the debt is paid, the security as an accessory obligation is discharged, or at the request of the debtor it is assigned to a third party. If payment is not made, and the creditor sells under his bond and recovers full payment, the personal obligation is discharged, and the creditor accounts for the surplus, if any. So far there is no difficulty; the creditor can only use and deal with his security as a pledge.

"If, again, the debtor sells the security subjects under burden of the bond, the bond which the creditor holds still remains a security for payment of the original debtor's debt. The debtor remains bound; the creditor, who is not a party to, and cannot be prejudiced by, the transmission, does not accept the purchaser in his room—although the purchaser also may be bound if by his title the obligation transmits against him; and I do not see why the creditor's rights

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the debt, was under no further obligation than to grant a discharge of the bond; he was under no obligation to reconvey the subjects disposed in

in regard to the use of the security should be enlarged by the fact that the debtor has transferred the estate to another. Practically, the position is the same as if originally the debtor had assigned in security a bond over another person's land, in which case the creditor could not, I take it, have discharged the bond without liberating his debtor.

"If, when the lands are in the possession of the purchaser, the creditor proceeds to sell under his bond and recovers full payment of his debt, I do not understand it to be maintained that the original debtor is not thereby liberated. The pursuers' counsel, however, carried his argument so far as to maintain that the creditor was entitled, if he chose, to discharge his bond altogether with or without consideration, without regard to the interests of the original debtor. If this were so, the creditor might transact with the purchaser or with postponed bondholders for the discharge of the bond; discharge it for something less than the sum in the bond, and still claim full payment—not merely the balance—from the original debtor. If the creditor could discharge the bond without consideration, he could also transact for its discharge. I see no distinction between those proceedings, and either in my opinion would be a violation of the condition under which the creditor obtained the security.

"It may be that, when the creditor proceeds to sell, it is not necessary that he should give notice or premonition to the original debtor. But neither is he under any obligation to give notice or premonition to postponed bondholders; and yet he is bound to account to them and all interested for the price realised, and to carry through the sale with a just regard to the interests of all concerned. It would be strange if the one person to have no voice in the matter were the original obligant, who is still liable for payment of the full debt.

"I do not think that the authorities quoted for the pursuers conflict with the view that the sale of the subjects under the bond does not affect the rights of parties in the security. The case chiefly relied on is the *University of Glasgow v. Yuill's Trustee*, 9 R. 643. In that case two points were decided. First, that where it is agreed *in gremio* of the conveyance that the personal obligation in a bond and disposition in security shall transmit against a purchaser of the heritable subjects, the effect of such transmission is that it operates as if the purchaser had granted a bond of corroboration without any discharge of the personal obligation of the original debtor. The creditor, who is no party to the transaction, and who cannot be prejudiced by it, nevertheless gets an additional obligant; but the original debtor is not discharged.

"The second and more important point decided was one which turned upon the law of bankruptcy and the Bankruptcy Statutes. Yuill in 1876 granted a bond and disposition in security in favour of the University of Glasgow for £9000. Thereafter in 1877 the security subjects were acquired by David Horne, under burden, *inter alia*, of the University's bond for £9000, and in the conveyance to him it was agreed that the personal obligation should transmit against him in terms of the Conveyancing (Scotland) Act, 1874.

"Yuill thereafter became insolvent, and his estates were sequestrated and a trustee appointed. The University of Glasgow claimed to be ranked on the bankrupt estate for the full amount of the debt and interest; and the question was whether they were or were not bound, under the 65th section of the Bankruptcy (Scotland) Act, 1856, to deduct in claiming the value of their heritable security. The trustee in Yuill's sequestration rejected that claim, in respect that they had not, for the purpose of ranking, valued and deducted the security subjects, and had not exhausted or discussed the said property and David Horne the disponent. The University appealed to the Sheriff, who recalled the trustee's deliverance, and ordained him to admit them to a ranking in terms of their claim, and this judgment was affirmed by the First Division of the Court. The Lord President Inglis's opinion is valuable as containing an exposition of the rights of a secured creditor in common law when his debtor becomes insolvent. He states the following rules of ranking as well settled:—'First, a creditor

security. It was true that the discharge was put on the record, but that was not as being a reconveyance; its object merely was to divest the

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who holds personal or real securities other than that of the bankrupt and his estate, is entitled so to use his various securities as to make them all available to the fullest extent so as to operate payment in full, but no more. Second, if co-obligants, whether as joint debtors or as principal and cautioners bound to the creditor, are all bankrupt, he is entitled to rank on the estate of each for the full amount of his debt, so as to operate full payment out of the combined rankings. Third, if a creditor has, in addition to the personal obligation of his debtor, a security over some subject not belonging to his debtor, he is entitled to realise the full value of his security; and supposing that does not satisfy his claim, to rank on his debtor's estate for the full amount of his debt. And fourth, it is important to observe that it makes no difference though the real security is over a part of the insolvent debtor's estate. He may exhaust that security, and rank, not for the balance, but for the full amount of his debt, on the remainder of the insolvent's estate *pari passu* with the unsecured creditors, so as to operate full payment of his debt.'

"It will be observed that the right of a creditor who holds a security, whether over the estate of his debtor or that of a third party, is simply to operate payment in full of his debt, from both sources. In order to secure this, he is entitled to rank upon the bankrupt estate, without deduction, for the full amount of his debt. To this extent he has an advantage over unsecured creditors, but at most he will only obtain a dividend upon his debt, and the remainder he may, if he can, recover out of his security. But he is only entitled to use those two remedies to the effect of getting full payment of his debt. This is well expressed in the passage from Bell's Commentaries which the Lord President quotes,—'Bell's Commentaries, 7th edition, p. 419—It is of some consequence to determine what shall be the effect in bankruptcy of a creditor secured over a particular estate drawing, or being entitled to draw, a large part of his debt out of that estate, preferably to the personal creditors, when he comes to demand payment of what remains still due. It is the right of a creditor by the common law of Scotland to demand payment of his whole debt under the obligation of his debtor, and this right does not bar him from claiming the full benefit of any pledge or security which he may hold, provided from both sources he does not derive more than full payment of his debt.'

"The only question remaining was to what extent the common law had been altered by statute. That depended upon the terms of the 65th section of the Bankruptcy Act, 1856, under which a creditor who holds a security over any part of the estate of the bankrupt is bound, in order to be ranked to draw a dividend, to deduct the value of his security from his debt and specify the balance. The question to be decided was whether Yuill, having conveyed away the security subjects, the bond which he had granted when he was owner of the subjects or the estate over which the security was constituted could be held to be part of the bankrupt's estate within the meaning of the statute. The question is one of considerable nicety, because if the creditor in a heritable security is bound while the debtor remains solvent to count and reckon with the debtor for the heritable security, the security or right to demand an accounting for its value is in a sense part of the debtor's estate; and there is room for argument that its character is not altered by the debtor's bankruptcy. But the Court took a strict view of the matter. They were dealing with a question in bankruptcy where the creditor was unable to obtain full payment under the debtor's personal obligation, and they were construing a statute which to a certain extent restricted the creditor's rights at common law. The view which they took was that the property referred to in the statute depended upon true ownership, and that as the security subjects, if liberated from the security, would not have been part of the bankrupt's estate available for distribution among his creditors, the value of the heritable security did not fall to be deducted by the creditor in his claim. I do not, however, find in the opinions of the Judges any countenance for the view either that the creditor

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creditor of any power of dealing with the estate. His right was to obtain payment of his debt, and he was entitled to make that right effectual,

could operate more than full payment out of the ranking and the security together, and certainly I find no authority for the contention that a security-holder dealing with a solvent debtor is entitled to recover full payment from him, and refuse him the benefit of the security which was given for the sole purpose of securing payment of the debt.

"It was also pleaded for the pursuers that where a creditor has two obligants bound as full debtors, he may discharge one without losing his recourse against the other. This does not, in my opinion, touch the present case, which I think turns upon the nature of the transaction between one of the principal obligants and the creditor. It is to be remembered that we are here dealing with a question between the parties to the original transaction, or, what is the same thing, between one party to the original transaction and the assignee of the other.

"Therefore, if the case has to be determined on principle according to the law of Scotland, I am prepared, although not without hesitation, to sustain the defender's contention upon this point.

"I am confirmed in this view by the English decisions quoted for the defender, in particular the leading case *Palmer v. Hendrie*, 27 Beavan, 349, and 28 Beavan, 341, and the recent case *Kinnaird v. Trollope*, L. R., 39 Chan. Div. 363. No doubt the law of England upon this subject must be received with caution, but I do not think that these decisions proceed on any technicalities of English law, but upon broad principles of equity which are equally applicable to a kindred question in Scotch law.

"In certain respects a mortgage differs from a heritable bond, but the differences are more in form than in substance. Under a mortgage the legal estate or fee passes to the mortgagee, and the mortgagor is left with only an equity of redemption. But he is usually left in possession of the lands, and he has power to grant further mortgages over the equity of redemption or to assign it absolutely. Thus, in substance, he is practically in the same position as the owner of lands who has granted a heritable security. Again, the mortgage, although in form a conveyance of the fee, is really nothing more or less than a security. On payment of the debt, the mortgagee is bound to reconvey the lands, and if he sells them to pay his debt, he must account to the mortgagor. If he forecloses in default of payment, it seems that he is entitled to retain the lands, even although they are of greater value than the debt; but if, after foreclosing, he finds that the lands are not sufficient in value to cover the debt, he cannot sue the mortgagor for the balance on the covenant or personal obligation, except on condition of reopening the foreclosure and reviving the equity of redemption.

"I understand that the following points are established by the decisions:—

"1. If the mortgagor has assigned the equity of redemption absolutely, he is still entitled to a conveyance of the legal estate if sued on the covenant; and if the mortgagee has parted with the whole or part of the legal estate, he is thereby disabled from suing the mortgagor on the covenant.

"2. If, after the mortgagor has assigned the equity of redemption, the mortgagee obtains from the assignee a second mortgage, he is still bound, if he sues on the covenant, to convey the legal estate to the mortgagor, on payment of the debt for which the first mortgage was granted, subject to such equity of redemption as may be subsisting in the assignee or any other person; and he is not entitled, as a condition of such conveyance, to demand payment from the mortgagor of the sum covered by the second mortgage.

"In the case of *Palmer v. Hendrie* the facts were these,—Palmer, the plaintiff, in 1847 mortgaged some leasehold property to Hendrie for £800, and he covenanted in the usual terms to pay the mortgage money. After part of it had been paid off, Palmer agreed to transfer the equity of redemption to Overton & Hughes, who were solicitors. Accordingly, by an indenture, dated in February 1850, Palmer assigned the property to them, subject to the mortgage, and

either by proceeding against the debtor under the personal obligation in the bond or by proceeding against the security subjects, or he might make

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Overton & Hughes covenanted to pay the mortgage and to indemnify the plaintiff therefrom. After this Hendrie executed certain deeds by which he and Overton & Hughes granted under-leases of part of the property at peppercorn rents, and by these transactions considerable sums by way of premium were received and retained by Hughes. Overton's interest in the mortgaged property was transferred to Hughes, who, in 1858, absconded, and was declared bankrupt.

"In January 1859 the executors of Hendrie commenced an action at law against Palmer upon his covenant to recover £300, alleged to be due on the mortgage. Palmer then filed a bill against the executors, submitting that in equity he had been relieved from all liability upon the covenant for payment of the mortgage money contained in the deed of 1847.

"The opinion of the Master of the Rolls, Sir John Romilly, on a motion for an injunction in the action, so fully explains the law of England in regard to the rights of mortgagor and mortgagee in such circumstances, that I now quote it at some length. He says (p. 351),—'I am of opinion that there can be no question as to the relative rights and obligations of a mortgagor and mortgagee. A mortgagee may pursue all his remedies at once; he may bring actions of covenant and ejectment, and at the same time proceed to foreclose the mortgage. If he forecloses it, and afterwards sues on the covenant, he thereby opens the foreclosure; but if he sues on the covenant, and does not get fully paid, he may still go on and foreclose the mortgage. But after he has once been paid in full, under the covenant, he cannot touch the estate, and is precluded from all proceedings afterwards. These, then, are the relative duties and reciprocal obligations between mortgagor and mortgagee. The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage money has been fully paid, he is bound to deliver over the mortgaged estate to the mortgagor. The question is, whether, when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against the mortgagor to recover the amount of the mortgage money. He can, undoubtedly, at law, sue upon the covenant, and consequently the executors of Hendrie are, at law, entitled to recover from the plaintiff the unpaid mortgage money; but the mortgagees must perform their reciprocal obligations: they are bound, on payment, to restore the property to the mortgagor; and if it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorised by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law. Suppose a mortgagee has conveyed away the property without receiving any consideration for it, can he afterwards sue the covenantor, who, on his part, is unable to redeem the property, there being none left to redeem? What is there in this case to take away the plaintiff's right to redeem the property, or his right to compel the defendants to restore it on being paid? I see nothing in the case to do it.'

"He then deals with the argument for the defendant to the effect that the plaintiff (the mortgagor), by conveyance of the equity of redemption, was precluded from calling for a conveyance of the legal estate, having ceased to have any interest whatever in the mortgaged property. On this subject he says (p. 352),—'It is argued that, by the conveyance of the equity of redemption, the plaintiff is precluded, under any circumstances, from calling for a conveyance of the estate. But it is to be observed that the transferees became liable to pay the mortgage money, and that they covenanted to indemnify the plaintiff therefrom. Hendrie was no party to the deed, and his executors insist that it was not binding on them, and that they have a right to sue the plaintiff on the covenant in the mortgage deed. But he has since admitted the transaction, and granted leases of the property at nominal rents, and has either received the purchase-money for the leases or has allowed Overton & Hughes to do so. I think his executors cannot now repudiate the transfer and avail themselves of

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it, for the purpose of saying, on the one hand, that it relieves them from their obligation to restore the estate, and on the other that they can still sue for the mortgage money.'

"The proceedings on the hearing are reported in 28 Beavan, 341. The Master of the Rolls adhered to his former opinion, and the only passage in the opinion then delivered that I need quote is the following. He says (p. 343),— 'If a man mortgages property, and afterwards sells the equity of redemption to a third person, who then sells the property with the concurrence of the mortgagee, such mortgagee cannot, if he has allowed the purchaser of the equity of redemption to receive the purchase-money, sue the original mortgagor for the amount of the money which he has thus allowed to be paid to the purchaser of the equity of redemption. That is one of the first principles of equity.'

"The result was that defendants were perpetually restrained from all proceedings at law in respect of the mortgage debt and interest.

"The case of *Palmer v. Hendrie* was followed in 1888 by the case of *Kinnaird v. Trollope*, L. R., 39 Chy. Div. 636. The facts of the case closely resemble those of the present, as will appear in the following passage in the rubric,— 'In 1870 the defendants mortgaged property to the plaintiffs to secure £12,000 and interest, and entered into the usual covenants for payment of principal and interest. In 1872 the defendants, for value, absolutely assigned their equity of redemption to A B, and he covenanted to indemnify them against the £12,000 and interest. In 1875 A B further charged the property to the plaintiffs to secure £8000 and interest, covenanting that it should not be redeemable, except upon payment of the £8000 as well as the £12,000. A B afterwards became insolvent; and the property having depreciated in value, the plaintiffs brought an action against the defendants, on the covenant contained in the mortgage of 1870, to recover the £12,000 and interest.' The defendants were willing to pay the £12,000 and interest, but upon condition that the plaintiffs assigned to them the mortgage of 1870 as security for the £12,000 in priority to the plaintiffs' charge for £8000 created by the indenture of 1875.

"It will be seen that in *Kinnaird v. Trollope* the mortgagee had not parted with any part of the legal estate, but he had obtained from the assignee of the equity of redemption a further charge on the property, and he maintained that he was not bound to convey or assign the legal estate to the mortgagor, except on payment not only of the sum covered by the first mortgage, but also the sum lent to the assignee of the equity of redemption. The decision in *Kinnaird v. Trollope* is chiefly of importance as bearing upon the second point in the present case; but the decision of Justice Stirling proceeds upon a thorough examination of the previous authorities, including *Palmer v. Hendrie*, and the principles thereby established or recognised. The following part of his opinion bears on this point. He says (pp. 645, 646)— 'Then, does it make any difference if, after the assignment of the equity of redemption, the assignee mortgages either to the original mortgagee or to some other person? I think not. Such a mortgage creates in the new mortgagee a fresh interest in the equity of redemption; but it does not, in my opinion, impose any additional burden or liability on the mortgagor. On this part of the case *Palmer v. Hendrie* again throws some light. It was there held that the mortgagor on paying off the mortgage debt is entitled to have the property restored to him unaffected by any acts of the mortgagee unauthorised by the mortgagor. The necessary authority might be derived either (as in the case of *Rudge v. Richens*) from the powers conferred by the mortgage deed, or from the direct concurrence of the mortgagor, or possibly otherwise; but it was held in *Palmer v. Hendrie* that

¹ *M'Whirter v. M'Culloch's Trustees*, July 9, 1887, 14 R. 918; *M'Nab v. Clarke*, March 16, 1880, 16 R. 610.

If he obtained full payment out of the security subjects, the discharge dissolved the personal obligation; if conversely he obtained payment under

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the mere concurrence of the assignee of the equity of redemption in acts which were not within the powers conferred by the mortgage was insufficient. It was argued in the present case that by absolutely assigning the equity of redemption the mortgagor authorised the assignee to deal with it as his own property, and consequently to raise money on it. If this argument be well founded, I have difficulty in seeing why the dealings which formed the subject of decision in *Palmer v. Hendrie* should not have been held to be authorised by the mortgagor. Such authority as was conferred by the assignment did not, in my judgment, extend to raising money on behalf of the mortgagor, or to making his right of redemption more burdensome to him than it would otherwise have been. The assignee could only raise money on his own behalf, and could not by so doing impose (as against the mortgagor) an additional burden on the mortgaged property.

"The result was that the plaintiffs (mortgagees) were held entitled to judgment for £12,000 as the sum in the first mortgage, with interest, but only upon terms that they reconveyed the property to the defendants, subject to such equity of redemption as might be subsisting in any person or persons other than the defendants themselves.

"It seems to me that, *mutatis mutandis*, these decisions are directly in point. In both cases the mortgagor was completely divested of his estate in the lands. He had parted with the legal estate to the mortgagee, and with the equity of redemption to the assignee. And yet it was held that he could not be called upon to pay under the covenant or personal obligation which still subsisted in favour of the mortgagee, except on condition of having the legal estate reconveyed to him, subject to the equity of redemption with which he had parted.

"In parting with the equity of redemption, the mortgagor did what in Scotland would be equivalent to selling the lands under burden of the bond. What he was entitled to receive back from the mortgagee on payment of the sum in the first bond was in point of form the legal estate subject to the assignee's equity of redemption; but in substance that is equivalent to an assignation of a heritable security.

"It therefore seems to me that, after making all allowance for certain peculiarities in the law of England applicable to mortgages, the decisions to which I have referred are directly in point. The principle which underlies them is that a mortgage is a pledge; and that it is a term or condition of the bargain between mortgagor and mortgagee—which is unaffected by subsequent transmission of the equitable estate by the mortgagor, or transactions between the mortgagee and the assignee of the equity of redemption—that the mortgagor shall not be called upon to pay under his covenant or personal obligation except on condition of the mortgaged property being reconveyed to him, subject to other existing equity of redemption.

"II. The pursuers' second answer to the defence is that they are not bound to assign the security, because they would be prejudiced by doing so, in respect that they hold a postponed bond over the security subjects, which are now not of sufficient value to meet both bonds. There can be no doubt of the pursuers' interest to refuse to grant an assignation, but in the circumstances it does not, in my opinion, constitute a legal excuse. As assignees of the original creditor, the pursuers are open to all defences and exceptions which could have been pleaded against the former. If I am right in the views which I have expressed as to the debtor's right to insist that the heritable security granted by him shall be in one way or another applied in extinction or relief of his personal obligation, he has no need to appeal to the equitable right which a person who pays a debt in full has to demand an assignation to the debt and any security which may be held by the creditor.

"In such a case, the person who pays the debt has had, strictly speaking, no previous right or interest in the security, and may not even have known of its existence. But the creditor is bound to grant an assignation if he has no good

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the personal obligation, the discharge disburdened the security subjects. The fact that the debtor had parted with the security subjects did not release him from the personal obligation, nor did it enlarge the creditor's obligation. If the debtor was called on to pay under the personal obligation, all that he could demand in consideration of payment was a discharge of that obligation. The effect of that discharge was to free the security subjects, but the benefit of this disburdening fell to the proprietor of the subjects, whoever he might be, and not to the debtor in the bond, who in selling the subjects had parted with all real right in them, and whose only remedy, if he had any, was a personal right of relief against the disponee of the subjects. Nor were the pursuers in equity bound to grant an assignation of the bond on receiving payment from MacBean, for MacBean was not a cautioner or volunteer, he was the principal debtor;¹ and further, in answer to such a claim the pursuers were entitled to plead that the granting of an assignation would be to their own prejudice as postponed bondholders.² The English authorities relied on by the Lord Ordinary could not safely be applied to this question, which was a pure question of Scots conveyancing. Even in England it had been held that

reason for refusing. The right to demand it, however, is founded in equity, and therefore, if the creditor can qualify any substantial prejudice which will, or even may possibly ensue, he will be entitled to refuse. Upon this ground the case of *Guthrie v. Smith*, 8 R. 107, proceeded.

~~In the present case, the defenders' claim for an assignation is founded, not on equity, but on implied contract. If the creditor's rights in the security were limited, as I hold them to have been, he could not, by advancing money to the purchaser of the lands and taking a postponed bond over the security subjects, free himself from his obligation to apply the first bond to the purpose for which it was granted. On this subject I think the remarks of Justice Stirling in *Kinnaird v. Trollope*, which I have quoted, are closely in point. He says, — 'The assignee could only raise money on his own behalf, and could not by so doing impose as against the mortgagor an additional burden on the mortgaged property.'~~

"Applying those words to the case in hand, the creditor and the purchaser of the security subjects could not, without the consent or knowledge of the granter of the first bond, arrange that any additional burden should be placed upon the security subjects to the effect of prejudicing the original debtor's rights in the bond which he had granted. Of course the purchaser was entitled to grant, and the creditor to take, a postponed bond over the subjects on the ordinary footing of its ranking after the first bond; but what the pursuers now seek to do is to appeal to the fact of the creditor having, without the original debtor's consent or knowledge, acquired a postponed bond over the security subjects as a reason for refusing an assignation to the first bond, and, after obtaining full payment from the debtor, to apply the whole proceeds of the heritable subjects in part payment of the two bonds which they hold over them.

"No separate argument was addressed to me in support of the pursuer's fifth plea in law, which is to the effect that in any view they are entitled to recover payment of the sum sued for, under deduction of a sum equivalent to the value of the part of the security subjects released as aforesaid.

"It was not contended that if, as a condition of receiving payment from the defenders, the pursuers are bound to assign the bond, and were in a position to do so, there would be any conveyancing difficulty in the way of assigning it to or for behoof of the defenders.

"On the whole matter, I think that the defence is well founded, and that the defenders must be assoilzied."

¹ Carrick v. Rodger, Watt, & Paul, Dec. 3, 1881, 9 R. 242.

² Ersk. iii. 5, 11; Bell's Prin., sec. 557; Fleming v. Burgess, June 12, 1867, 5 Macph. 856, 39 Scot. Jur. 481; Guthrie v. Smith, Nov. 19, 1880, 8 R. 107.

a mortgagor was not entitled after payment of the debt to keep up a first mortgage without the consent of the puisne mortgagee.¹ No doubt in the case cited both mortgages had been granted by the same person, but the defender must be held to have granted the second bond for £3000, he having sold the property and so entitled the disponees to burden the property.

Argued for the defenders;—The debtor in a bond and disposition in security was bound personally to pay the debt, and in security conveyed heritable subjects to the creditor heritably but redeemably in the event of repayment of the debt with interest. On payment therefore the borrower was entitled to be discharged of his personal obligation, and also to be put into the same position as regarded the security subjects as he was before the bond was granted. In the ordinary case of the debtor remaining proprietor of the security subjects, a discharge of the bond effected both these results, without a formal reconveyance. But none the less was the creditor bound to reconvey the subjects on payment by the debtor, if a mere discharge was not enough. If, therefore, he was unable or unwilling to fulfil that obligation, he could not enforce the personal obligation against the debtor, on the general principle that one seeking to enforce a contract must fulfil his counter obligation.² As the pursuers' contract obligation was to reconvey the security subjects, they were not entitled to refuse to grant an assignation to the bond on the ground that such an assignation would be to their prejudice as second bondholders. It was true that a debtor who had granted two bonds over the same subjects could not on payment of the debt due under the first bond keep up that bond to the prejudice of the second bondholder.³ But MacBean was not the granter of the second bond here, nor had he assented to the granting of it. The argument, that by selling the security subjects and so putting the buyer in the position of being able to burden them further, the debtor must be held to have assented to what the purchaser did, had been expressly rejected in England.⁴ The English authorities did not depend on any peculiarities of English law,⁵ and were clearly in favour of the defenders.

At advising,—

LORD KINNEAR.—The Lord Ordinary has observed that the question in this case is one of novelty. But it depends upon clear and familiar principles, and I cannot say that their application to the circumstances of the case appears to me to involve any serious difficulty.

In May 1874 the defender Hugh MacBean borrowed £3000 from Bankier's trustees, and executed in their favour a bond and disposition in security in ordinary form, obliging himself to repay the loan, and disposing to the lenders a piece of ground in Glasgow, extending to 870 square yards, in security of the personal obligation.

In November 1874 the borrower MacBean sold the subjects under burden of the bond to George Jeffrey for £4400, £1400 being paid in money, and the purchaser undertaking to pay the balance of £3000 by relieving the seller of his bond in favour of Bankier's trustees. In addition to this obligation of

¹ Teevan v. Smith, 1882, L. R., 20 Chanc. Div. 724.

² Mackay v. Dick & Stevenson, March 7, 1881, 8 R. (H. L.) 37; Sligo v. Menzies, July 18, 1840, 2 D. 1478.

³ Love v. Storie, Nov. 6, 1863, 2 Macph. 22, 36 Scot. Jur. 10.

⁴ Kinnaird v. Trollope, 1888, L. R., 39 Chanc. Div. 636.

⁵ National Bank of Scotland v. Union Bank of Scotland, Dec. 10, 1885, 14 R. (H. L.) 1.

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relief the disponent agreed that the obligations contained in the bond should transmit against him and his heirs and successors, and that agreement appears *in gremio* of the conveyance in terms of the 47th section of the Conveyancing Act, 1874. There can be no question as to the import or legal effect of this transaction. The seller did not insist upon the price being fully paid up in order that his liability under the bond might be discharged, but relied upon the lands being sufficient to meet his creditor's claims. His personal obligation was therefore allowed to remain in force, but the debt was still secured upon the lands, and assuming the security to be sufficient he effectually protected himself against his disponent not merely by taking him bound in relief, but also by requiring him to undertake a direct liability to the creditor enforceable by diligence or otherwise in the same manner as against himself as the original grantor of the bond.

The lands were sold by Jeffrey, and after passing through various hands they were acquired in March 1877 by George Eadie. At that date they were still subject to the bond for £3000, which had never been called up, and they were further burdened with two postponed bonds for £800 and £550 for loans contracted by successive proprietors after they had ceased to belong to the defender. But nothing had been done to prejudice the security held by Bankier's trustees, or to alter in any way the mutual rights and liabilities of the creditor and debtor under their bond. Each new proprietor in turn had become bound to pay the debt, and so to relieve his predecessor. But the personal liability of the defender was still undischarged.

But the position of parties was materially altered by a subsequent transaction. Immediately after acquiring the property Eadie borrowed £3000 from the pursuers, the North Albion Company, and disposed in security a portion of the ground included in the defender's bond and disposition in favour of Bankier's trustees. The new bond was of course postponed to the first, and therefore the pursuers could take no benefit from their security until Bankier's trustees were fully paid. But, presumably for the purpose of improving their position, and at all events with that result, Eadie in October 1877 obtained from the trustees a deed of restriction whereby, without any consideration having been paid to them, they released a portion of the land, extending to 325 square yards, from the security constituted by their bond, and declared it to be redeemed and disburdened thereof.

In 1880 the pursuers purchased the right of Bankier's trustees for the sum of £3000—the full amount of their loan—and obtained from them an assignation and disposition of their bond and security excepting the portion which they had released. The pursuers, as assignees of the original bondholders, now sue the defenders for payment of the sum contained in the bond. But they are not in a position to reinvest him in that part of the security subjects which their authors have released, and they decline to reinvest him in the part which is still covered by their security. They maintain that their right to enforce his personal obligation is in no way prejudiced by the release, and that they are not bound to grant an assignation of the bond, because the subjects still affected by it are held by them in security of another debt so as to give them an interest to insist that it shall be discharged of the debt which they are now seeking to enforce.

I am of opinion with the Lord Ordinary that the pursuers' position is untenable. The rights of debtor and creditor under the bond in question are in all

material respects identical with those of pledger and pledgee. The bond and disposition in security constitutes a real contract by which the debtor conveys to his creditor a heritable subject, to be held by him in security of the debt, and to be redelivered on payment or satisfaction. It is quite true, as the pursuers' counsel maintained, that the creditor is entitled to the benefit of all his remedies so as to obtain full payment. He may enforce the personal obligation against the debtor without losing his real right over the subject of the security if his debtor does not pay in full. But his obligation under the contract is to restore the land on payment of the debt, and he cannot demand payment on any other condition. These are concurrent obligations, and if the creditor has disabled himself from performing his part of the contract by making away with the impignorated lands he cannot enforce the counter obligation against his debtor. The pursuers are in no better position than their authors by whom the subjects impignorated were conveyed without consideration to Eadie, and indeed they claim to take benefit from the renunciation in Eadie's favour as enlarging their security as creditors under his bond. Their contention therefore is that when lands have been conveyed in security of a loan, the lender may convey them without consideration to a third party, and may still enforce payment of the loan from the borrower without giving back the lands.

It was argued in support of this claim that the creditor in a heritable security is under no obligation to convey, but only to discharge the debt; that if the borrower has retained the property the discharge will operate a reconveyance to him; that if he has sold the property the discharge must of necessity operate in favour of his disponee, but that that is not the fault of the creditor, but the legal consequence of his own act. The conveyance, it is said, carries with it an assignation of the right to redeem, and entitles the creditor to transact with the assignee. But the debtor it is said is not only divested of his right to redeem, he is absolutely divested of the property affected by the security. The discharge or renunciation therefore, which is the only instrument which a security-holder whose right is determined is under obligation to grant, cannot operate in favour of the debtor, but only in favour of the disponee, to whom he has chosen to convey the lands. It follows that he cannot reacquire the right which he possessed when he executed the bond and disposition in security, nor can he acquire any new right in the lands except by an assignation of his creditor's right. But a creditor is under no legal obligation to assign to his debtor. The debtor's interest to obtain an assignation arises from a contract with which the creditor has no concern, and the right to demand it is admitted on a principle of equity only, and may be excluded by a counter equity in the creditor. But the pursuers hold the subjects in security for a separate debt and cannot be required to grant an assignation which may prejudice that security.

This reasoning appears to me to be fallacious from beginning to end. A heritable security may in general be extinguished by a discharge declaring the lands to be redeemed and disburdened, not because the creditor is not bound by his contract to reconvey, but because a formal disposition or resignation is unnecessary to operate a reconveyance. Before the present statutory forms were introduced it was settled law, as a consequence of the rule, that the feudal infeftment is merely accessory to the personal obligation, that the infeftment on a bond and disposition in security might be extinguished by a registered renunciation. But the creditor's obligation is not to be measured by the forms of conveyancing, but by the substance of his contract. And neither the common

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law nor the Acts of 1845 and 1868 relieve him of his obligation to redeliver the land, which he holds only in security of a debt, when the debt is paid in full. So long as the debtor retains the property that obligation will be effectually performed by executing a discharge in the usual form. But the obligation is not to disburden the lands, in whose hands soever they may be, but to redeliver them to the debtor when he is called upon to pay. And if the lands have been sold under burden of the debt, so that a mere discharge will not operate in the debtor's favour, he is entitled to demand an assignation and disposition, not upon any principle of equity, but because that is the appropriate instrument for giving effect to the creditor's obligation to give back the subjects which have been impledged to him when his debt is paid. It is true that the defender's right has been assigned, and if it had been assigned absolutely the pursuers and their authors would have been entitled to transact with the assignee. But it was obvious on the face of the titles that the assignation of the right to redeem was conditional on the disponees making payment of the debt and so discharging the defenders' obligation as well as disencumbering the lands. There is no difference in this respect between the position of the ultimate purchaser Eadie, with whom the pursuers transacted, and that of the immediate purchaser from the defender. The conveyance in his favour was under burden of the security, and by accepting it he bound himself to pay the debt, and so to relieve his immediate authors of their obligation to relieve the defender of all liability. He had no right therefore in the subject of the security, and could acquire none, which should be good against the defender, except by paying the debt or otherwise procuring a discharge of the defenders' liability under the bond. It is true that the redeemable right created by a bond and disposition in security is a mere burden on the fee, and therefore that a discharge of the security or the debt must necessarily disencumber the lands for the apparent benefit of the proprietor for the time being. But so long as it remains undischarged the redeemable right in security is held and may be transmitted as a separate and distinct estate; and whether the creditor who holds it has a right to transfer it to the actual proprietor of the feudal fee depends not upon the form of his title but upon his personal obligations by his contract with the debtor from whom he acquired. If he may dispose of it gratuitously to the prejudice of his debtor, it would seem to follow that he might sell it for a price, and I can see no ground of distinction in this respect between a discharge in favour of the feudal proprietor and an assignation in favour of a third party. The only difference is that the proprietor in this case had undertaken a personal liability for payment of the debt, and was entitled upon such payment to disencumber his estate. The creditor might therefore accept him as debtor in place of the defender if he thought fit, and this is what he has done in effect. I do not think it material whether Bankier's trustees should be held to have accepted Eadie as their debtor, and renounced by implication their claim against the defender, or to have exonerated the defender from liability by disabling themselves from performing their counter obligation. In either view they could not transfer their right in security to the defender's prejudice and still enforce payment from him under his bond. The English decisions to which we were referred afford valuable and interesting illustrations of a principle which is common to the laws of both countries. But the principle is not in controversy. No one disputes that a pledgee must give back the pledge when the debt is paid by the pledgor. The only question raised by the

pursuers' argument is whether that general rule is not excluded in the case of a bond and disposition in security by technical rules of Scotch conveyancing. For the reasons already given, I am of opinion that that question must be answered in the negative.

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LORD M'LAREN.—The history of the case and the bearing of the facts upon the question at issue are so fully explained in the opinion which has been delivered that it is not necessary that I should do more than briefly indicate the reasons which lead me to concur in the judgment proposed.

When a proprietor of lands and heritages grants a bond for borrowed money, and disposes his lands in security of his obligation to repay, he has two rights as against his creditor. First, he is entitled, on payment of the principal sum and interest, to be retrocessed, or to have the burden on the lands removed, which, according to our practice, is accomplished by means of a discharge of the bond noted in the Register of Sasines. Secondly, in case of default in payment, and the consequent sale of the lands under the power of sale contained in the bond, he (the debtor) is entitled to have the price of the entire subject applied by the creditor in redemption of the debt, so that he shall not be liable to be distressed for payment of any larger sum than the balance remaining due after the surplus proceeds of the sale shall have been so applied. So long as the debtor retains the property of the lands no question can arise, because the creditor's right is a redeemable right, becoming irredeemable only in virtue of a sale under the power, and the creditor cannot without the debtor's consent give away any part of the security or dispose of it by a private sale so as to give a good title to the disponee. But the debtor, after granting a bond and disposition in security, retains the power of selling and disposing of the subject under the burden of the bond because he is the proprietor, and when this is done, as in the case before us, the creditor may have two debtors—the purchaser, who is bound as a debtor in virtue of his agreement with the seller, and the original debtor, who continues to be bound in terms of his obligation until the creditor obtains payment or grants a release.

The sale of the subject under burden of the bond makes this difference in the relations of the original debtor to his creditor, that the original debtor is not, and cannot be, reinvested in the estate which he has sold as a consequence of payment in terms of his bond; he is only entitled to an assignation of the bond to the effect that he may take the place of the creditor in the obligation, while the purchaser holds the estate as before under the burden of the debt. This is merely a variation of the mode in which the right of the original debtor is explicated; the substance of the transaction is the same, for in either case the redeemable right to the lands is restored to the debtor when he repays the borrowed money and interest. Again, if the subject of the security comes to be sold under the powers of the bond, the original debtor may require his creditor to apply the proceeds of sale towards the payment of the debt, and he is only liable to the extent of the deficiency of the fund for payment after such application is duly made. So much I think is clear, and indeed cannot seriously be disputed. The heritable creditor cannot by agreement with the purchaser discharge the real security and at the same time require the original debtor to make full payment in terms of his personal obligation. Such a proceeding appears to me to be contrary to the most elementary notions of justice, as it is inconsistent with the contract of pledge and with the general law of rights in

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security. But if the creditor is unable to release the entire subject from the burden affecting it consistently with the retention of a right of action against his original debtor, neither can he release a part of the subject so as to defeat or lessen the right of his debtor to obtain an assignation of the security subjects in exchange for payment of the debt. If only a part of the lands be released the breach of contract is less in degree, but it is perfectly clear that the release is a breach of contract; and in my apprehension the only question is, whether such a breach of contract has the effect of disabling the creditor altogether from suing on his bond, or whether the effect is that the value of the subject released is to be ascertained and its amount imputed along with the proceeds of the sale of the remaining estate towards the extinction of that debt. This question indeed was not argued to us, and I only notice it in passing because it seems to me to be the true alternative, indeed the only alternative which deserves serious discussion.

My opinion is, that by releasing a part of the subject, however small, the creditor is disabled from suing the original debtor on his personal obligation. The creditor's obligation to restore the subject upon the borrowed money and interest being repaid is an obligation arising out of the contract of pledge whereby the lands are disposed in security heritably and redeemably. This obligation to restore is one and indivisible, and it is the counterpart of the debtor's obligation to repay, which is also indivisible. As the debtor while he retains the property has not the right in making a partial payment to demand a restriction of the security—I mean release of a part of the heritable subjects—so neither has the heritable creditor the right to grant a partial release to a purchaser, nor indeed to operate upon the subject of security in any way except by a sale in terms of the power. I can find no principle for converting the legal obligation of the heritable creditor to account for the proceeds of a sale into an equitable obligation to account on the principle of a valuation. If the principle of estimation of value were admitted in a case where only a part of the subject was released, it must also be applicable to the case of a release of the entire subject, and thus the right of the debtor to a retrocession would be converted without his consent into a right of a different nature, and one which it may safely be assumed he never would have agreed to accept when he granted the heritable security.

Now, in the present case it is admitted that the pursuers are not in a position to tender an assignation of the entire subject of the security, nor are they able to offer an assignation of the subject which they have released in exchange for so much of the debt as is not covered by the proceeds of sale of the remanent estate; and it follows, in my opinion, that the defender is entitled to be assoilzied from the action as laid. This will not in the meantime extinguish the bond or deprive the creditor of his recourse in case he shall be able to buy back the released subject before any steps are taken by the defender to have his liability as debtor in the bond determined. It may be that an obligant in such circumstances has the right to bring an action against his creditor tendering payment of the unpaid portion of the debt, and concluding for an assignation of the impledged subjects, or alternatively that he should be declared free from his obligation. Whether such an action could be successfully maintained it is not necessary now to consider, because the question cannot arise under an action at the creditor's instance. In the present action we only decide that the pursuer is not entitled to enforce the bond against the defender, because he does not

offer, and is unable to offer, fulfilment of his counter obligation to restore or assign the subject of the security. **No. 24.**

LORD ADAM and the LORD PRESIDENT concurred.

THE COURT adhered.

DAVIDSON & SYME, W.S.—J. & J. Ross, W.S.—Agents.

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WILLIAM SADLER AND OTHERS, Pursuers (Reclaimers).—*W. Campbell—James Reid.* **No. 25.**

ANDREW COWAN AND ARCHIBALD RAE, Defenders.

ALEXANDER JAMIESON WEBSTER AND OTHERS, Defenders (Respondents).

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THE INCORPORATION OF TAILORS OF AYR, WILLIAM SADLER, AND OTHERS, Defenders (Reclaimers).—*W. Campbell—James Reid.*

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Trust—Trade incorporation—Widows' fund—Illegal resolution—Exclusion of new members.—In 1761 the Ancient Incorporation of Tailors in Ayr resolved that the whole stock of the incorporation, with the sums to be derived from the entries of freemen, should be joined together in a "scheme" for the benefit of the widows and orphans of such members of the incorporation as should contribute to the scheme, and for relief of such members when aged and infirm. After the first year members of the incorporation were not to be allowed to join the scheme when above thirty-six years of age. In 1805 the limit of age was changed to forty years.

In 1846 the Act 9 and 10 Vict. c. 17, abolished the exclusive trading privileges of the incorporation, and subsequently few persons joined it. In 1860 the members of the scheme, with the view of restricting the entry of new members in order to secure greater benefits for themselves, passed a resolution that no members should be allowed to enter the scheme above the age of thirty.

Held (1) that the powers possessed by the incorporation prior to the passing of the Act of admitting persons to the privilege of trading were held by them in trust for public purposes, and that the incorporation could not have refused admission to the trade of persons properly qualified; (2) that the relative scheme was a similar trust, and that the incorporation were not entitled, for the purpose of enlarging the benefits of present members, to impose restrictions on the entry of new members; and (3) that the resolution to exclude persons above thirty being passed for that purpose was illegal.

Trust—Administration—Illegal resolution.—A trade incorporation holding funds in trust for the benefit of existing and future members passed a resolution illegally restricting the admission of future members to persons under thirty years of age instead of under forty as formerly. *Held* that the incorporation were entitled to disregard the illegal resolution without formally recalling it.

ON 5th February 1761, the Ancient Incorporation of Tailors of Ayr passed the following Act:—"We, the Incorporation of Taylors in the burgh of Ayr, considering that the original and sole intention of paying in money to the common stock of said incorporation at the entry of freemen and journeymen and apprentices, was, and is, for the relief of the necessitous or poor of said trade. But as it hath often happened, this laudable design hath not been equally applied as the necessitys of severals have required not being made known to the incorporation; and as the common stock of said incorporation is now much advanced, We have devised a method which will be some small relief to the necessitys of the widows and orphans of the members of said incorporation, and also of

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those who may be rendered unable to work thro' sickness or old age. And this by a small contribution quarterly out of the pockets of the members of said incorporation, and abrogating the usual annual expenses of drinking at the election of a deacon or other affairs of said trade which came off the common stock: And therefore according to the powers and privileges vested in us as an incorporation for managing the said common stock, We do cheerfully and unanimously consent, statute, and appoint that the common stock presently belonging to said incorporation with the yearly interest thereof, and what shall be contributed by the members thereof now and hereafter shall be joined together and be a fund for payment of annuities to the widows and orphans of the members of said incorporation who shall adhere and agree to this scheme, and those who shall be sick and unable to work and maintain themselves thro' old age or infirmitys: And we agree to statute and appoint the following to be the conditions and regulations for promoting and executing this scheme."

By the regulations it was provided that all entry moneys, &c., paid by persons admitted freemen of the incorporation should "be put in and joined to the common stock of said incorporation to make up the fund hereby intended."

Existing freemen were to be allowed to accede to the scheme within twelve months. "After these twelve months no person, though admitted a freeman of the incorporation, shall be allowed to accede to this scheme who is above thirty-six years of age, and he must be free of any epidemical or consumptive disease."

It was further provided that after the scheme had existed for four years annuities of £3 should be paid to the widows and children of every freeman who had contributed to the fund. There was also a provision for payment of sick-money to members, and for pensions of 1s. per week to members disabled from work by old age or other infirmity.

In 1805 new regulations were passed under which the age above which no person was allowed to join the scheme was fixed at forty instead of thirty-six. It was also provided,—“Should it be found necessary for the advancement of this fund to alter any of these articles or regulations, the proposed alteration or amendment shall be laid before the managers, and if they approve of the same it shall be under discussion for three months, after which, if it shall be approved of by a majority of votes at a general meeting, it shall be enacted into a law.”

In 1846 the Act 9 and 10 Vict. cap. 17, for the abolition of the exclusive privileges of trading in burghs in Scotland, was passed.

At a meeting of the members of the incorporation scheme, held on 30th September 1852, William Gunn made the following motion:—"In consequence of no person having entered into the incorporation scheme since the passing of the Act 9 and 10 Vict. c. 17, entitled," &c., "whereby the original uses and purposes of the incorporation, their 'exclusive privileges' and emoluments arising therefrom, were virtually put an end to; and that after having provided for the present aged members and widows, and future aged members and widows, and the orphans of all members, if any be, in terms of the present acts and regulations, the whole heritable properties and others of the incorporation scheme will in time fall to the longest liver of the present members: Therefore, to prevent this manifest injustice, I propose that after having served the above purposes the said whole properties and others shall belong to and become the absolute property of the whole living members and their heirs at the passing of said Act, share and share alike; and that the clerk shall get such deeds of conveyance of said properties as he shall judge proper, to

the now living members of the incorporation scheme, and to the heirs or representatives of such members as shall have died since the passing of said Act, &c., . . . said deeds to be submitted for the opinion and revision of counsel, . . . which motion, having been seconded by the said James Loudon and approved of by the managers present, the meeting unanimously ordain that the same 'shall be under discussion for three months,' in terms of article 23 of the present acts and regulations." No. 25.
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At a general meeting of the members of the scheme, held on 11th January 1853, the motion was unanimously approved of, and passed.

Thereafter, deeds of conveyance in favour of the members of the incorporation and the heirs of deceased members were submitted and ordered to be executed and recorded. One of the members, however, Peter Glass, dissented and obtained interdict from the Sheriff-substitute (J. Robison) against this course being carried out.

In 1855 two new members, James Cunningham and Archibald Rae, were admitted, and in 1856 the entry-money payable by new members was raised, and in 1859 resolutions were passed, giving to each member at the age of sixty a right to receive without inquiry as to health or circumstances an annuity on the ground of old age and infirmity.

At a meeting, on 8th March 1860, at which Rae, Cowan, Cunningham, Glass, and James Loudon, the whole members, were present, a resolution was passed, and confirmed on 12th June following, to the effect (1) that in future the old age annuity should be conferred upon all members "on attaining the age of fifty-six" years; and (2) that "no persons should be admitted members of the . . . scheme who are upwards of thirty years of age." No new members were in fact admitted between 1855 and 1890.

On 1st December 1890 William Sadler (one of the pursuers in the first action after mentioned) was admitted a member of the incorporation, Andrew Cowan and Rae being then the only other members. His claim to be admitted to the scheme fund was disputed, but by decree of the Court of Session dated 28th January 1892 it was declared that Sadler was duly admitted a member of the fund as from 1st December 1890, and was entitled to the privileges of the fund as from that date.

On 30th May 1891, prior to the date of this decree, Andrew Cowan and Rae held a meeting of the scheme fund at which Sadler was not present,—no notice of the meeting having been sent to him,—and they resolved to suspend the standing order of 1805, requiring three months' discussion before altering any rule, and raised the annuities to aged members from £55, which sum they were then paying themselves, to £90 for the future.

William Love and Matthew Morrison obtained decrees of declarator on 28th January 1892 that they were admitted members of the incorporation and scheme fund as at 1st June 1891.

On 13th June 1891, however, prior to these decrees, at a meeting at which Rae and Andrew Cowan were alone present,—Sadler, Love, and Morrison not being present, and not having received any notice of the meeting,—the standing orders that there should be three months' discussion of an alteration of articles were again suspended, the age above which members could not be admitted was altered from thirty years, at which it had stood since 1860, to forty years as originally fixed by the rules of 1805, the age at which members should be entitled to annuities was raised from fifty-five to sixty, and in pursuance of the enactment, on 16th June 1891, Webster and Finlayson, both of whom were over thirty years of age, were admitted members.

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On 13th July 1891 William Cowan, also over thirty, was admitted, Rae and Andrew Cowan being the only members present, and no notice of the meeting having been sent to Sadler, Love, and Morrison. At the next meeting of the incorporation the minute of 13th June was read and approved. Further, on 7th and 24th August 1891 meetings were held at which certain "acts and regulations" were passed and approved of as the "acts and regulations" regulating the affairs of the scheme fund in future and embodying the alterations of annuities above referred to. These proceedings bore to be unanimous, and the minute of meeting of 24th August 1891 bore that the revised articles and regulations were read over and signed by the deacon and other members present, being the whole members of the scheme except Sadler, Love, and Morrison.

On 29th March 1892 Sadler, Morrison, and Love, describing themselves as a majority and quorum of the members of the scheme fund, for themselves and as representing the scheme fund, raised an action against Andrew Cowan and Archibald Rae, two members of the fund, and against Alexander J. Webster, John Finlayson, and William Cowan as "pretended members," concluding for reduction of (1) the minute of 30th May 1891, whereby the annuities of aged and infirm members of said scheme fund were increased from £55 to £90 per annum; (2) the minutes of 13th June 1891, 16th June 1891, and 13th July 1891, whereby the age of admission to said scheme fund was altered, and defenders Cowan, Webster, and Finlayson were admitted members of the scheme fund; and (3) the writ or document titled "Acts and Regulations" of 24th August 1891; and further, for declarator that the last named three defenders were not members of the scheme fund.

The pursuers averred;—"After the passing of the Act 9 and 10 Vict. cap. 17, fewer persons applied to join the incorporation and thus qualify themselves to enter the scheme. The defenders Andrew Cowan and Rae, together with the said deceased James Cunningham, the three youngest members of the incorporation and scheme, took advantage of this circumstance for the furthering of their fraudulent and collusive scheme for appropriating to themselves the whole benefits of said scheme fund. The alterations on the rules and regulations of said scheme fund, after narrated, which were proposed from time to time by the defenders Cowan and Rae and the said late James Cunningham, were designed and intended by them to aid and assist in carrying out said fraudulent and collusive scheme. . . . By such devices as these, viz., increasing the amount of entry-money to the scheme, putting off all applicants with the false excuse that an accountant was preparing a new scale of entry-money until after the applicant had passed the proper age for admission, and refusing to give applicants any information as to the regulations for admission, they discouraged applications; and though several persons duly qualified did apply for admission, the said defenders Andrew Cowan and Rae, along with Cunningham, continued to prevent any one being admitted subsequent to the year 1855. No new member was admitted after Rae and Cunningham became members, which was in that year,—thirty-seven years ago,—until pursuers were admitted." They further averred that the increasing of the annuities and the raising of the age limit from thirty to forty at the meeting to which none of the pursuers were called, the suspension of the standing orders, which required three months' discussion, and the admission of Webster, Finlayson, and William Cowan, were all steps taken by Rae and Andrew Cowan with the view of strengthening themselves in their policy of appropriating the whole benefits of the scheme fund. The pursuers also averred that the acts

and regulations enacted on 7th and 24th August 1891 were illegal, as being passed without notice to the pursuers. No. 25.

Defences were lodged for Andrew Cowan and Rae, but subsequently they consented to decree of reduction. Nov. 14, 1893.
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The defenders Webster, Finlayson, and William Cowan averred that they had no interest to defend the resolutions in favour of Andrew Cowan and Rae; that the pursuers had formed a scheme to obtain complete control of the affairs of the incorporation fund for their own exclusive benefit; that the scheme existed for the benefit of the whole trade in Ayr; and that the former attempts to exclude new members and the present attempt to extrude the defenders were illegal. Webster v. Incorporation of
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The pursuers pleaded;—(1) In respect the foresaid minutes and regulations were passed by a minority of the members and without due and requisite notice to the pursuers, who are a majority of the members, the same should be reduced, as concluded for. (2) The said pretended minutes and regulations being contrary to the constitution and immemorial practice of said incorporation and scheme, and *in fraudem* of the rights of the pursuers and the other future members of said scheme fund, they ought to be reduced, as concluded for. (3) The resolutions in said minutes and the resolutions referred to having been passed and made by the defenders Andrew Cowan and Rae, and sanctioned by the other defenders, with the object of carrying out a fraudulent and collusive scheme by the defenders Andrew Cowan and Rae for appropriating to themselves the whole benefits of said scheme fund to the exclusion of others having just claims thereon, decree of reduction should be pronounced, as craved.

The defenders Webster, Finlayson, and Cowan pleaded;—(4) The said defenders William Cowan, Webster, and Finlayson having been duly admitted members of the scheme, they ought to be assollized, with expenses, from the conclusions of the summons. (6) The said resolutions of 8th March 1860 having been in fraud of the purposes of the scheme and of the rights of the defenders as future tailors in Ayr, are null and void; or otherwise, these defenders are entitled to have the same reduced and set aside.

On 3d November 1892 Webster, Finlayson, and Andrew Cowan raised a counter action against the whole Incorporation of the Tailors of Ayr, and also against William Cowan, Rae, Sadler, Matthew Morrison, and William Love, as individuals, to have it declared that they were duly admitted members of the incorporation and of the scheme fund by the minutes of 13th June, 16th June, and 13th July 1891; and, if necessary, for reduction of the minutes of 8th March and 12th June 1860, whereby the maximum age for admission for members to the scheme fund was reduced from forty years to thirty years.

The pursuers, *inter alia*, averred that the resolutions in 1860 were passed and confirmed in pursuance of a fraudulent scheme devised by the members who were then in the administration of the affairs of the society to appropriate the benefits of the fund to themselves and to prevent the admission of new members.

A proof was allowed in both actions.

The import of the proof fully appears in the opinion of the Lord Ordinary (Kyllachy), where the material parts of the evidence of Rae and Cowan are quoted.

On 1st February 1893 the Lord Ordinary in Sadler's action pronounced this interlocutor:—"Reduces, decerns, and declares in terms of the reductive conclusions of the summons, except as regards the minutes of the scheme fund, dated respectively 13th June 1891, 16th June 1891, and 13th July 1891, whereby the age of admission to the said scheme fund

No. 25. was altered, and the defenders William Cowan, A. J. Webster, and John
 Nov. 14, 1898. Finlayson were admitted members of the said scheme fund: Assolizies
 Sadler v. the said defenders William Cowan, Webster, and Finlayson from the
 Webster. said reductive conclusion: Assolizies also the said three defenders from
 Webster v. In- the declaratory conclusion of the summons, and decerns: *Quoad ultra*
 corporation of finds it unnecessary to dispose of the remaining conclusions of the sum-
 Tailors of Ayr. mons, and therefore dismisses the same," &c.*

* "OPINION.—This action has two objects. The first is to cut down certain increased annuities granted by the corporation scheme to its older members. The second is to exclude from the benefits of the corporation scheme the three defenders Webster, Finlayson, and Cowan. The pursuers are three individual members of the corporation and of the corporation scheme who, if I may use the expression, have fought their way into membership by recent legal proceedings; and the action takes the form of a reduction of certain minutes and regulations by which the annuities in question were increased, and of certain other minutes by which the admission of the three defenders was effected.

"There is now no question as to the first set of minutes—that is to say, as to the first object of the action. The older members, who alone had an interest to defend, have consented to decree as craved, and the other defenders have in this matter the same interest with the pursuers. The controversy is therefore confined to the validity of the proceedings by which the defenders Webster, Cowan, and Finlayson have been admitted to the benefits of the corporation scheme.

"The ground of objection to their admission is this, that at the dates of their respective applications they were over thirty years of age, and that according to the then rules of the scheme no member was eligible who had passed that age. The pursuers complain that this being the rule, the corporation, by the proceedings complained of, first altered the rule in an irregular manner, and then admitted the pursuers as if the rule had been lawfully altered.

"Had the question, in my view, depended on the regularity of the proceedings by which the thirty years' limit of age was altered, as it bears to be by the minute of 13th June 1891 (being the second minute under reduction), I should, I confess, have had some difficulty. The original rules of the society, as established in 1761, provided that the same might be altered at any time by a majority of the members. But by the rules of 1805, which appear to have been in force as from that date, it is expressly enacted that 'any alteration or amendment shall be laid before the managers, and if they approve of the same, it shall be under discussion for three months, after which, if it shall be approved of by a majority of votes at a general meeting, it shall be enacted into a law.' As the facts stand, there is no doubt that this standing order was not obeyed. Before, therefore, I could sustain the regularity of the proceedings complained of, I should have to affirm (1) that it was open to the members of the scheme by the unanimous vote of any meeting to suspend the standing order; and (2) that it made no difference that the rule was altered in the absence of, or without notice to, the pursuer Sadler, who, although not a member at the time *de facto*, must be held to have been a member *de jure*, inasmuch as it has been since found by a judgment of this Court that he was duly admitted to the scheme as from 1st December 1890. Now, as I have already indicated, I should have hesitated to affirm either of those propositions. I am not sure that I could affirm the first; and I do not at present see how I could, in any view, affirm the second. The principle upon which it is held that the ordinary acts of public bodies are not affected by disputes as to the election or qualifications of members does not, I am afraid, apply to such proceedings as those in question.

"But the defenders contend that the regularity or irregularity of the proceedings is not really, in this case, material. They say (what is not disputed) that, but for the age limit referred to, they were entitled to admission,—just as much entitled as the pursuers,—and their case is that the age limit, which is said to exclude them, was an unlawful limit—a limit which had been unlawfully imposed, and which the corporation was not only entitled but bound to

In the action at the instance of Webster, Finlayson, and Cowan the Lord Ordinary pronounced this interlocutor:—"Finds, declares, and

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rescind. In this view, the alteration of the rule of which the pursuers complain was, the defenders say, a mere matter of form—the corporation being entitled to disregard the rule, and it being therefore of no consequence whether they repealed it formally or informally.

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"Now, I do not at all doubt that this reasoning is quite sound if its main premiss be once established, viz., that the rule by which the maximum age for entrants was fixed at thirty years was a rule which had been unlawfully passed. The real question is, whether that proposition can be made good, and that seems to depend upon this—whether certain resolutions passed by the members of the scheme, so far back as 8th March and 12th June 1860, were lawful and valid resolutions?

"The history of that matter seems to be this: The original rules of the scheme provided that members might be admitted up to thirty-six years of age. This was altered in 1805 to forty years, and up to 1860 there was no attempt to disturb the limit of age thus fixed. But after 1846, when the exclusive privileges of municipal corporations were abolished by the Statute 9 and 10 Vict. cap. 17, the numbers of this corporation, as of similar corporations, began to dwindle. The old members died out, and few new members joined either the scheme or the corporation itself. Consequently, it happened that by the year 1853 there were only about half-a-dozen members in existence, and these members, perhaps not unnaturally, began to consider that the corporation funds were their private property, which, subject to existing claims, they might, if they chose, divide. In this view there was, in the year I have mentioned (the year 1853), an attempt made to divide the funds openly and directly, and this having been frustrated by the action of a dissenting member who appealed to the Sheriff, a second and more artistic plan was adopted, for the purpose of securing what I have no doubt the members concerned thought their just rights, or, at least, the legitimate advantages of their position.

"It is to this chapter in the history of the corporation that the resolutions of March and June 1860, to which exception is now taken, belong. These resolutions were passed, the defenders say, as part and parcel of a concerted plan, which they call fraudulent, but which I prefer to call unlawful, for excluding new members from the scheme, and appropriating its benefits to the one or two old members who by this time formed the corporation. The course which seems to have been followed was this:—In the first place, certain additions were made to the entry-money payable by new members. This occurred in 1856. Next, in 1859, resolutions were passed giving to each member at the age of sixty a right to receive without inquiry an annuity on the ground of old age and infirmity. Then followed in 1860 the resolutions in question, which, on the one hand, conferred right to an annuity at the age of fifty-six, and, on the other hand, closed the society to all entrants over thirty years of age. Lastly, there ensued a deliberate and sustained course of action, whereby from the year 1855 to 1891, all applications for admission were either refused on the ground of age, or staved off on the ground that the corporation was in course of consulting an actuary with respect to the future terms of admission. The result, on the whole, was that during the thirty-six years in question (from 1855 to 1891) no new members were admitted—the first to be admitted being the present pursuers, who fought their way in, as I have already mentioned, but who now turn round and seek to exclude the defenders, taking up the position that, while everything else during the period in question was unlawful, and even fraudulent, there was one thing which was lawful, viz., the reduction of the maximum age for entrants.

"The defenders, as I have said, contend that the whole of these proceedings, including very specially the reduction of the maximum age for entrants, were truly part and parcel of the same concerted scheme; and that the object in view throughout was the unlawful object which I have already stated. I have come to the conclusion upon the evidence that in this contention the defenders

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are right. In the first place, the pursuers themselves make the following averment in condescendence 3,—‘After the passing of the Act 9 and 10 Vict. cap. 17, fewer persons applied to join the incorporation, and thus qualify themselves to enter the scheme. The defenders Andrew Cowan and Rae, together with the said deceased James Cunningham, the three youngest members of the incorporation and scheme, took advantage of this circumstance for the furthering of their fraudulent and collusive scheme for appropriating to themselves the whole benefits of said scheme fund. The alterations on the rules and regulations of said scheme fund, after narrated, which were proposed from time to time by the defenders Cowan and Rae, and the said late James Cunningham, were designed and intended by them to aid and assist in carrying out said fraudulent and collusive scheme.’ They then go on to narrate certain minutes making the alterations referred to, and amongst those minutes are those of March and June 1860, which are now particularly in question. No doubt they do not recite the portions of the minutes which altered the age for entrants. They recite only the portions by which the age for annuities was reduced. But no reason is given for thus disconnecting the two portions of the minutes, and for assuming the existence of a different motive as determining the one alteration and the other.

“In the next place, Mr Rae, who has been the leading actor in these proceedings, was at the proof examined by the pursuers, and he made no concealment of what had been the views and objects of himself and his friends. He says,—‘Our privileges as an incorporation had been taken away by Sir Robert Peel’s Bill, and we did not wish to admit any more members to the scheme. That was the real truth of it, and the real object of reducing the age. That was my motive and the motive of the others, with the exception of Mr Cowan. Mr Cowan told me over and over again that it was illegal, and we could not do it.’ And again,—‘I thought, as our special privileges had been abolished, the scheme had become a private society. That was my view of it.’ Mr Cowan was examined for the defenders, and was to the same effect. He says,—‘The alteration was carried at a meeting at which Mr Glass, Mr Loudon, Mr Rae, and Mr Cunningham were present. I was against it, but I was outvoted. I think I entered my dissent. The object of the alteration was, I suppose, to shut up the society, and my object was to continue it for the good of old men connected with the trade and their widows.’ I am quite alive to the fact that Mr Rae’s attitude towards the pursuers is not friendly, and that it is open to suggest that the frankness of his statement may have had some connection with that circumstance. But still the fact remains that what I have read is his evidence, and that of Mr Cowan, and I am bound to say that, having heard them examined, I believed them both.

“In the next place, however, and finally, it appears to me that even discarding the pursuers’ averments, and rejecting the parole evidence, the case is one in which *res ipsa loquitur*. There is, I am afraid, no getting over the fact that during all those thirty-six years no single individual member was admitted—informal applications being staved off, and all formal applications being on one ground or another delayed. Neither can it be overlooked that during the period in question the annuities of the old members were from time to time largely increased. I cannot, I confess, resist the conclusion that, but for the legal proceedings adopted by the pursuers and those acting along with them, the various alterations made from time to time on the rules, including very specially the alteration in the maximum age for entrants, must have resulted sooner or later in the absorption of the funds by the surviving members. It was a pretty shrewd anticipation that the number would not be great of master tailors in Ayr desirous to join this scheme, and ready to do so, and to pay the entry-money demanded, while still under thirty years of age. Nor does it appear to me to help the pursuers, if, as they say, the real object of the thirty years’ rule was to form a complement to the provision that all members should obtain

Sadler, Love, and Morrison reclaimed. The arguments sufficiently appear in the opinions of the Lord Ordinary and Lord M'Laren. No. 25.

At advising,—

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LORD M'LAREN.—Your Lordships have now to consider reclaiming notes in two actions, the first being at the instance of Sadler and others, three members of the scheme fund of the Incorporation of Tailors of Ayr, the chief object of which is to reduce certain minutes of the scheme fund of the incorporation, whereby the defenders Webster, Finlayson, and William Cowan were admitted to the benefit of the scheme. The object of the counter action is to have it found and declared that the three persons last named were duly admitted to the scheme. Both actions contain conclusions for the reduction of previous minutes of the incorporation or scheme, and these are all auxiliary to the principal conclusions. In the view of the Lord Ordinary the parties Webster, Finlayson, and Cowan were properly admitted members of the scheme. I have come to the same conclusion, and on the same grounds, and if your Lordships agree with me, I propose that we should adhere to the Lord Ordinary's judgment in the first action, and that in the second action we should also adhere with a variation which only affects the form of the judgment.

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The principle which underlies the whole of the reasoning on which the Lord Ordinary's judgment is based is that the corporation scheme is a trust, and that the members are trustees for themselves and the future members of the scheme. I shall consider this proposition first in order, because, if it is admitted or established that the schemes of trade incorporations for the benefit of aged members are of the nature of trusts for purposes of public utility, it follows that the existing members of such societies or quasi-corporations are not entitled to administer their affairs in such a manner as to secure to themselves the benefits of the trust to the exclusion of others of the class for whose benefit the scheme was instituted. If this be the true principle to be applied to the case before us, it is not difficult to shew that the grounds on which the desired exclusion of Webster and others from the Incorporation of Tailors is rested entirely fail.

On the question of fiduciary relation, the fundamental fact is that the Incorporation annuities on attaining the age of fifty-six. If that was the object, the pursuers' case, instead of being better, would, I think, be worse. It might have been lawful to assume that at the age of sixty-five, or even at the age of sixty, members of the scheme were no longer able to work at their craft. But a similar assumption with respect to all persons of the age fifty-six strikes me, I confess, as somewhat violent.

"But if the fact be that these resolutions of March and June 1860 were of the character, and had the objects which I have just described, is there any doubt that they were unlawful? I think not. The corporation scheme constitutes in my view a trust, the members being trustees for themselves and the future members of the scheme; and that being so, it must, I think, be held to have been a breach of that trust so to manipulate the rules and conduct the affairs of the scheme as to exclude or throw obstacles in the way of new members, and thus to appropriate the benefits of the trust to the trustees themselves. I rather think that this is the principle to which the pursuers themselves appealed when they sought entrance into the scheme. At all events it is a principle which I am prepared to affirm, and accordingly I propose to hold that *de jure* the age limit stood, and still stands, as it was fixed in 1805; that therefore there was no obstacle to the defenders' admission when they severally applied; that in rescinding the rule of 1860 and admitting the defenders, the corporation did no more than it was bound to do; and therefore that, on the whole, the defenders are entitled to absolvitor. . . ."

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poration of Tailors of Ayr, on which this benevolent scheme was engrafted, was one of the ancient burghal trade societies or guilds which by our customary law possessed exclusive privileges of trading within the burgh. It is evident that such a system of trade organisation could not exist consistently with a right on the part of the members constituting the society at a particular time to close their doors against new applicants, and to appropriate to themselves the monopoly of the trade and custom of their burgh. Accordingly, in the older decisions regarding the constitution and rules of such societies, it is always assumed that qualified craftsmen are entitled to admission to the society or guild on proof of their ability to exercise the craft, and payment of the dues of admission. The burghesses had indeed a twofold interest in the due administration of the duties committed to the guilds, an interest that the guilds should be open to themselves and their families, and an interest that the guilds should be open to qualified tradesmen, and should not be allowed to degenerate into monopolies. Here then we find two of the elements of a public trust, a definite purpose, being a purpose of public utility, and a body of corporators entrusted with the duty of administration. When to these is added a third element, the existence of a fund appropriated to the relief of indigent members and the families of deceased members, we have all the distinctive marks of fiduciary relation which exist in the case of any ordinary charity or public endowment.

Now it may be that, since the abolition of the exclusive trading privileges of these burghal corporations, it might be difficult for an applicant to qualify an interest to acquire the status of a master tailor in Ayr, distinct from the prospective interest which he would take (along with that recognisable social position) in the funds of the scheme. But then that prospective pecuniary interest is in itself a title to a qualified applicant to vindicate his right of admission, as has been repeatedly held with reference to endowed schools and charitable institutions of all kinds, and, as we are informed, in a previous litigation regarding this very institution. Here, the persons whose rights are in dispute have been admitted, and this is also a title to maintain their position by an appeal to the purposes of the trust or scheme, as expressed in its articles and regulations.

Passing to the constitution of this particular trust, we find that, so early as the year 1761, it is set forth in the acts or minutes of the Incorporation of Tailors "that the original and sole intention of paying in money to the common stock of said incorporation at the entry of freemen, journeymen, and apprentices, was and is for the relief of the necessitous or poor of said trade." On this narrative, and for the relief of the widows and orphans of the members, and also of those who may be disabled through sickness or old age, by means of small quarterly contributions "and abrogating the usual annual expenses of drinking at the election of a deacon," the incorporation cheerfully and unanimously agreed that its common stock, with the yearly interest thereof and what should be contributed by the members, should be combined into a fund for these benevolent purposes. It is unnecessary to examine the details of the scheme, which is in substance and effect what would now be termed a trade insurance fund. But I note further that in 1805, the membership of the guild having meantime increased in numbers, this scheme was revised and put into the form of an articulate paper consisting of 23 articles, which paper is subscribed by the office-bearers as the "articles and regulations" of the scheme. The 23d article is important. It is in these terms,—“Should it be found necessary for the advancement of this fund to alter any of these articles or regulations, the pro-

posed alteration or amendment shall be laid before the managers, and if they approve of the same it shall be under discussion for three months, after which, if it shall be approved of by a majority of votes at a general meeting, it shall be enacted into a law." The articles of 1805, with some amendments, constitute the existing law of the scheme.

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The matter in controversy, as explained by the Lord Ordinary, is confined to the validity of the proceedings by which the defenders in the first action, Webster, Finlayson, and Cowan, have been admitted to the benefits of the scheme. The objection to their admission is this,—That at the dates of their respective applications they were over thirty years of age, and that according to the then existing rules of the scheme, no member was eligible who had passed that age. The pursuers complain that the corporation first altered the rule in an irregular manner, and then admitted the defenders as if the rule had been lawfully altered. The defenders reply that according to the articles and regulations of 1805 (article 3) the age limit for admission was forty; that the reduction of the age limit from forty to thirty by the minutes passed in 1860 was a proceeding *ultra vires* and unlawful, which the incorporated society was entitled, if not bound, to disregard. Hence, it is argued, a resolution of the society to disregard the minutes of 1860, and to revert to the age limit fixed in 1805, is sufficient to displace the illegal enactment of 1860, and it is not necessary in order to restore the age limit of forty that the forms required in the case of a new law should be gone through; because, it is said, as soon as the illegal minutes of 1860 are rescinded the regulation of 1805 revives, and with it the right of admission to the scheme within the age of forty.

Now, on the main question, the illegality of the resolutions or minutes of 8th March and 12th June 1860, the case of the defenders, as stated in their 18th answer, and more fully developed in the 5th condescendence of their counter action, is this,—That the resolution in question was passed and confirmed in pursuance of a fraudulent design, devised by the members who were then in the administration of the affairs of the society, to appropriate the benefit of the funds to themselves, and to prevent the admission of new members.

As to the intention to appropriate the corporate funds there can be no doubt. It is recorded in the minute of meeting of 30th September 1852 that a motion was then submitted by Mr William Gunn narrating that no person had entered into the incorporation scheme since the passing of the Act 9 and 10 Vict. cap. 17, entitled "An Act for the abolition of the exclusive privileges of trading in burghs in Scotland"; and that, after having provided for the present aged members and widows and orphans, the whole heritable properties and others of the incorporation scheme will in time fall to the longest liver of the present members. It is therefore proposed to vest the property of the society in "the whole living members and their heirs, share and share alike," and that the clerk shall get the necessary deeds of conveyance prepared. This motion was approved by the managers present, and at subsequent meetings held in January and August 1853, the proposed resolution was confirmed; and thereafter deeds of conveyance in favour of the members of the incorporation and their heirs, said to be revised by an eminent Glasgow conveyancer, were submitted and ordered to be executed and recorded. These proceedings were stopped in consequence of an application to the Sheriff for interdict at the instance of a dissentient member.

It is alleged by the defenders that the members who failed in this direct

No. 25. attempt to appropriate the property of the society set themselves to attain the same result indirectly, by closing their doors against new applications. The Lord Ordinary has held that this allegation is proved, and that the reduction of the age limit was an incident of the illegal design. It does appear that in the year 1855 two new members were admitted. In 1856 the entry-money payable by new members was raised, and in 1859, resolutions were passed giving to each member at the age of sixty a right to receive, without inquiry as to health and circumstances, an annuity on the ground of old age and infirmity. In 1860 resolutions were passed, the first of which conferred right to an annuity at the age of fifty-six—and this proceeding is not defended—the second being the resolution in question altering the age limit for admission to the society. What followed may be stated in the words of the Lord Ordinary:—"Lastly, there ensued a deliberate and sustained course of action, whereby, from the year 1855 to 1891, all applications for admission were either refused on the ground of age, or staved off on the ground that the corporation was in course of consulting an actuary with respect to the future terms of admission. The result, on the whole, was that during the thirty-six years in question (from 1855 to 1891) no new members were admitted—the first to be admitted being the present pursuers, who fought their way in, as I have already mentioned, but who now turn round and seek to exclude the defenders, taking up the position that, while everything else during the period in question was unlawful, and even fraudulent, there was one thing which was lawful, viz., the reduction of the maximum age for entrants."

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I do not propose to enter more minutely into the documentary evidence in support of the Lord Ordinary's conclusions, because I concur unreservedly in his Lordship's view of the evidence. It is the less necessary that I should examine the proceedings very critically, since two of the members, Rae and Cowan, who took the chief share in the management of the society's affairs during the long period in which the society intercepted all voluntary admissions to its privileges, state with perfect distinctness what was the object of the resolution of 1860. Mr Rae was in favour of making the society a close corporation. Mr Cowan (who seems to have been in a minority of one on this question) was in favour of keeping the society open, as he says, "for the good of old men connected with the trade, and their widows"; but they are agreed that the motive of the resolution was, as it is put, "not to admit any more members to the scheme." The parts of their evidence which bear on this question are quoted in the Lord Ordinary's judgment, and the statements amount to a substantial admission of the truth of the defender's averments.

On 13th June 1891 the members of the society, having been brought to a more just conception of their duties and obligations towards the younger craftsmen of their trade, rescinded the resolution of 1860 by which the age limit was fixed at thirty. I think that the members of the society are entitled to the credit of having performed this act of justice spontaneously, and I sympathise in the Lord Ordinary's suggestion that their past course of action is to be attributed rather to mistaken notions as to their individual rights than to any wilful design to defraud the objects of the scheme. The only objection taken to the resolution of 13th June is, that it is prefaced by a resolution "that the standing order that three months' notice of an alteration in printed acts and regulations of 1805 of the incorporation scheme be suspended at this meeting."

The objection is at best a very technical one, because the standing order in question (Art. 23 of Act 1805), does not prescribe three months' notice, but only that the resolution shall be "under discussion" for three months, after which, if approved, it shall become law. Now, it is not alleged that at any time within three months a motion was made to disapprove of the resolution of 13th June, and I observe from the minutes that not only was the minute of 13th June read and approved at the next meeting, but within the period of three months, viz., on 7th and 24th August, when the revised acts and regulations were under consideration and approved, two opportunities presented themselves on which motions disapproving of the resolution in question might legitimately have been proposed. Moreover, the proceedings on these three occasions,—13th June, 7th and 24th August—bear to be unanimous, and on the last of these occasions the minute bears that the revised acts and regulations were read over and signed by the deacon and other members present, being the whole members of the scheme. I do not find these revised regulations in the printed papers, but if they do not expressly include the resolution of 13th June, they do so by necessary implication; because no benefit scheme could have any meaning or effect which did not fix either directly, or by reference to other documents, so important a point as the age at which the right of admission should cease. Then, as I have said, the proceedings were throughout unanimous; and there is authority for the proposition that a corporation, acting for a legitimate purpose, and within its powers, may dispense with formalities, provided the members are unanimous. If this principle be good for anything, it ought, at least, to cover the case of a society or corporation rescinding an unlawful resolution, which it is their duty to put out of the way at the first opportunity, when its illegality is brought to their notice.

Now, if I have rightly judged the facts of this case, there cannot be the smallest doubt that the resolution of 8th March 1860, reducing the age limit to thirty years, was an illegal act, in the sense of being an abuse of the powers of the then existing members of the body-corporate. It may here be observed that the 23d article of the scheme, to which I have already more than once referred, gives only a qualified power of altering the rules. It begins with the significant phrase, "Should it be found necessary for the advancement of this fund to alter any of these articles." But by the admission of the gentlemen who assisted at the passing of the resolution of 1860, this resolution was not passed with any view to the "advancement" of the scheme, but in the hope of putting an end to the scheme, and appropriating its revenues to their own purposes. The attempted alteration of the scheme was therefore not within the powers conferred by the 23d article, and while it may be that an action would be necessary to set it aside at the instance of an outside party, it appears to me that if the corporators themselves, who knew the motive of the resolution, and were aware of its illegality, and were unanimous in their wish to return to the path of legitimate administration, chose to treat the resolution as a proceeding *ultra vires*, they were justified in doing so without waiting the expiration of the period of three months which is prescribed as requisite in the case of passing a new law, or an alteration or amendment of the old laws. I do not look upon the proceedings at the meeting of 13th June 1891 as being of the nature of an amendment of the scheme falling within the provisions of the 23d article, but rather as the fulfilment of a necessary duty incumbent on the corporation, which is to be performed in the same way as any other corporate act, viz., in this case,

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No. 25. by a unanimous resolution, recorded in the minute-book, and approved at a subsequent reading of the minutes.

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For these reasons, I propose that the interlocutor brought under review in the action at the instance of Sadler and others be adhered to. With respect to the counter action, the Lord Ordinary has found it unnecessary to pronounce a decree reducing the minutes of 8th March and 12th June 1860. While I do not dissent from the reasons which resulted in this finding, yet, as the rescission of these minutes was challenged by Mr Sadler and the two other pursuers, I think it was a proper step of procedure to bring these minutes under reduction, and that the minutes ought now to be reduced, in order that there may be no dubiety regarding your Lordships' opinion as to their essential nullity. With this variation, I propose that the interlocutor in the action at the instance of Webster and others should also be adhered to.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT refused the reclaiming note in the first action, and in the second action pronounced this interlocutor:—"Adhere to said interlocutor except in so far as it finds it unnecessary to pronounce any decree in terms of the reductive conclusions of the summons, and dismisses the same: Reduce, decern, and declare in terms of the reductive conclusions of the summons; and decern," &c.

MACPHERSON & MACKAY, W.S.—HENDERSON & CLARK, W.S.—Agents.

No. 26.

HAMILTON & BAIRD, Pursuers (Respondents).—*A. J. Young—
A. S. D. Thomson.*

Nov. 15, 1893.
Hamilton &
Baird v.
Lewis.

EDWARD DILLON LEWIS, Defender (Reclaimer).—*McLennan.*

Proof—Oral modification of written contract—Compromise of action by joint minute.—Held that it was incompetent to prove by parole evidence an alleged verbal agreement to vary the terms on which an action had been compromised in a joint minute signed by counsel.

1ST DIVISION.
Lord Kin-
cairney.

IN an action raised by Messrs Hamilton & Baird, writers, Glasgow, against E. D. Lewis, residing at Erisca Castle, Argyllshire, to recover payment of certain sums, the Lord Ordinary (Kincairney) allowed a proof, which was fixed to take place on 18th May 1893.

Thereafter, counsel for the parties signed a joint minute in which they "concurred in stating to the Court that the parties had settled this action by the defender consenting to pay to the pursuers the sum of £700 in full of the conclusions of the summons, including expenses, on or before the 30th day of June 1893, and failing payment of the said sum of £700 sterling by the defender on or before that date, then the defender consents to decree being granted against him in favour of the pursuers for the sum of £950 sterling, with expenses, in full of the conclusions of the summons; and they concurred in craving the Lord Ordinary to interpose authority to this joint minute, and, *quoad ultra*, to assoilzie the defender from the conclusions of the action, and to discharge the diet of proof fixed for the 18th day of May 1893."

On 17th May the Lord Ordinary allowed the joint minute to be received, and discharged the diet of proof.

On 6th July the Lord Ordinary pronounced this interlocutor:—"In respect of the joint minute for the parties, and also in respect of the defender's failure to pay to the pursuers the sum of £700, including the expenses of the action on or before the 30th day of June last, decerns

against him for payment to the pursuers of the sum of £950 sterling in full of the conclusions of the libel." No. 26.

The defender reclaimed, and lodged a minute craving to be allowed to amend his defences by adding a statement of *res noviter veniens ad notitiam*, with pleas in law relative thereto. Nov. 15, 1893. Hamilton & Baird v. Lewis.

In this statement the defender averred that before 30th June, the date fixed for payment of the £700 in the joint minute, Hamilton, as one of the partners of the pursuers' firm, had by arrangement a meeting with him and his solicitor at the Great-Eastern Hotel, London; that at this meeting it was agreed between the parties that in lieu of the payment of the £700, Hamilton, who was alleged to have full authority from the pursuers to settle the action, should accept certain guarantee policies which the National Insurance and Guarantee Corporation, Limited, were under obligation to grant to the defender; that Hamilton departed from the joint minute in so far as inconsistent with the terms of this agreement; that in breach thereof, and notwithstanding the protests of the defender, who had all along been willing to implement it, the pursuers induced the Lord Ordinary to pronounce the interlocutor reclaimed against.

The defender argued that he was entitled to prove by parole evidence the alleged agreement.¹

Counsel for the pursuers were not called upon.

LORD PRESIDENT.—The parties in this action settled the case by joint minute, signed by counsel, and the terms of the minute are quite unambiguous. It constituted a contract upon which the party entitled to implement was justified in taking decree.

The case now made is that a meeting between the parties took place in a London hotel, at which it was verbally agreed that a different mode of payment should be accepted by the pursuers from that proposed in the joint minute, and a parole proof is asked.

There is no warrant for allowing a party to get over a solemn contract by parole proof of communings of this sort.

I think the decree of the Lord Ordinary must stand.

LORD ADAM.—There was here a written compromise of the action. What is now averred is a distinct variation of the terms of the written contract, and that cannot be proved by parole.

LORD M'LAREN concurred.

LORD KINNAR was absent.

THE COURT refused the prayer of the minute, and adhered.

ROBERT J. CALVER, S.S.C.—D. W. PATERSON, S.S.C.—Agents.

¹ Love v. Marshall, June 12, 1872, 10 Macph. 795, 44 Scot. Jur. 456; Thomson v. Fraser, Oct. 30, 1868, 7 Macph. 39, 41 Scot. Jur. 28.

No. 27. REV. PETER CAMERON BLACK AND OTHERS (Kirk-Session of the Parish of Monkland), Pursuers and Real Raisers.

Nov. 15, 1893.
Old Monkland
School Board
v. Bargeddie
Kirk-Session.

SCHOOL BOARD OF OLD MONKLAND, Defenders and Claimants.—

Dickson—Ure.

REV. ALEXANDER THOW SCOTT AND OTHERS (Kirk-Session of the Parish of Bargeddie, *quoad sacra*), Defenders and Claimants.— *Wallace.*

Trust—Charitable trust—Settlement of scheme—Nobile officium—Process—Multiplepointing—Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), sec. 16—Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 38.—In 1869 the kirk-session of Old Monkland, by means of a sum of £750 raised by public subscription, built a school at Bargeddie in the parish, the title being taken in favour of the kirk-session, it being declared that the school “shall be conducted in all time coming in connection with the Church of Scotland,” and that the kirk-session should “have power to use the schoolroom at any time or times they may think fit for missionary meetings.”

In 1873 the school was acquired by a railway company under compulsory powers, but the kirk-session continued to use the school as tenants of the railway company, which did not require to demolish the building. The price was consigned in name of the kirk-session, who paid the rent to the company from other sources than the consigned money.

In 1892 the kirk-session brought an action of multiplepointing for disposal of the price and the accumulated interest thereon, in all about £2600.

Claims were lodged by the School Board of Old Monkland, who claimed the whole fund under the 38th section of the Education Act, 1872, and by the kirk-session of the *quoad sacra* parish of Bargeddie (which had been disjoined from Old Monkland in 1876), who claimed that so much of the fund *in medio* as might be required to carry out the purposes of the original scheme, other than educational, should be appropriated to them. The pursuers did not contest either claim, and merely desired exoneration. The Lord Ordinary pronounced an interlocutor finding that neither party had a title to uplift the fund *in medio*, and that both claimants were agreed that the fund should be administered as an educational or educational and religious trust, in terms of a scheme; and remitting to a reporter to prepare a scheme. The reporter prepared a scheme whereby £500 of the fund was allocated to the kirk-session of Bargeddie, and the balance to the School Board of Old Monkland. The Lord Ordinary reported the scheme to the Court under the Trusts Act, 1867, sec. 16. The Court approved the scheme, and remitted to the Lord Ordinary, who thereafter pronounced an interlocutor ranking and preferring the claimants accordingly.

1ST DIVISION.
Ld. Kyllachy.

IN 1869 the minister and kirk-session of the parish of Old Monkland set on foot a public subscription for the purpose of providing a school at Bargeddie, in the parish. Subscriptions to the amount of about £750 having been obtained, a site was purchased on which a school was subsequently built. The title to the site was a disposition dated 2d December 1869, and recorded 3d December 1873, in favour of the minister and elders of Old Monkland, forming the kirk-session thereof, “and their successors in office, in all time coming, in trust for behoof of the said church and parish,” it being declared “that the foresaid lands hereby disposed are so disposed solely for the purpose of being used as a site for a school, and pertinents; declaring also that the said school, which is to be called ‘Bargeddie School,’ shall be conducted in all time coming in connection with the Established Church of Scotland, and in conformity with the principles thereof, and that the kirk-session for the time being of the said church and parish of Old Monkland aforesaid shall have power to use the schoolroom at any time or times they may think fit for missionary meetings.”

In 1873 the Caledonian Railway Company acquired the buildings under compulsory powers, and the price was fixed at £1800. This money was

consigned in bank in name of the minister and kirk-session as trustees. The railway company did not require to demolish the school buildings, which continued to be used for their original purpose by the kirk-session of Old Monkland, who paid a rent to the railway company. No charge for this rent was made either on the consigned money or on the interest thereof.

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In July 1892 the minister and kirk-session of Old Monkland brought an action of multiplepoinding for determination of the right to the £1800 of consigned money, and to £880 of interest which had accrued thereon.

The pursuers stated that the school buildings had become dilapidated, and that the Government grant would be withdrawn unless new buildings were provided; that the fund *in medio* was claimed by the School Board of Old Monkland, and also by the kirk-session of Bargeddie *quoad sacra* parish (which had been disjoined from Old Monkland in 1876); and that the pursuers did not dispute either claim, and merely desired judicial exoneration.

The School Board of Old Monkland claimed to be ranked and preferred to the whole fund *in medio*, founding on the 38th section of the Education Act, 1872,* and averring that, if preferred, they intended to apply the money *pro tanto* in building a new school.

The school board pleaded;—(1) The fund *in medio* being the proceeds of a school which has all along, since 1870, been used and recognised as a public school, the claimants should be ranked and preferred thereto. (2) In respect the pursuers do not object to these claimants being ranked and preferred to the fund *in medio*, the present claim should be sustained. (3) The subjects, of which the fund *in medio* is the proceeds, being destined solely as a site for a school and pertinents, and these claimants being charged with the duty of providing school accommodation within the parish, they should be ranked in terms of their claim.

The minister and kirk-session of Bargeddie *quoad sacra* parish claimed “that the fund *in medio*, or alternatively so much thereof as may

* The Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 38, enacts:—“With respect to schools now existing, or which may hereafter exist in any parish or burgh, erected or acquired and maintained, or partly maintained with funds derived from contributions or donations (whether by the members of a particular church or religious body, or not), for the purpose, or authorised by the contributors or donors to be applied for the purpose of promoting education; be it enacted, that it shall be lawful for the person or persons vested with the title to any such school, with the consent of the person or persons having the administration of the trusts upon which the same is held, to transfer such school, together with the site thereof, and any land or teacher's house held and used in connection therewith, to the school board of the parish or burgh in which it is situated, to the end and effect that such school shall thereafter be under the management of such board as a public school in the same manner as any public school under this Act, and it shall be lawful for the school board, with the sanction of the Board of Education, to accept of such transference, and on the same being made and accepted the said school, with the site and any land and teacher's house included in the transference, shall be vested in the school board, and the school shall thereafter be deemed to be a public school under this Act, and shall be maintained and managed by the school board, and be subject to all the provisions of this Act accordingly; and the existing teachers, if any, of such school may be continued as such teachers by the school board, and their continuance in office may be made a condition of the transference of the school to the school board. . . . And the use of the schoolhouse at such times and for such purposes as shall not interfere with the use thereof under the provisions of this Act by the school board may also be made a condition of the transference thereof to the school board.”

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be required to carry out the purposes of the subscription, other than educational, should be set aside, and a scheme adjusted at the sight of the Court for its management."

The minister and kirk-session of Bargeddie pleaded ;—(1) The purposes of the original subscribers not having been entirely educational, but including the use of the building for religious purposes connected with the parish of Bargeddie, the fund *in medio*, or alternatively so much thereof as may be required to carry out the said purposes, should be set apart, and a scheme adjusted at the sight of the Court for its management. (2) The claimants being now charged with the interests of the Church of Scotland in the *quoad sacra* parish of Bargeddie, have a title and interest to maintain the claim now submitted.

On 8th March 1893 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that neither claimant has a title to uplift the fund *in medio*: Finds that both claimants are agreed that the same should be applied as an educational or educational and religious trust, in terms of a scheme to be fixed by the Court: Finds also that the pursuers and raisers, the holders of the fund, have stated no objection to this course, desiring only that the fund shall be applied so as to relieve them of responsibility: In these circumstances, remits to Mr Bremner P. Lee, advocate, to consider the record and appendix and whole proceedings, and to meet with the parties or their agents, and to prepare the draft of a scheme for the application of the fund in such manner as will most nearly serve the purposes which the subscribers to the school the price of which is in question had in view; and recommends to him to lodge the said scheme, if possible, by the first sederunt-day in May next, in order that the same may be discussed and reported to the Inner-House during next Summer Session."*

On 13th June Mr Lee reported in favour of allocating £500 to Bargeddie Kirk-Session, and the balance of the fund *in medio* to Old Monkland School Board.

On 29th June the Lord Ordinary pronounced this interlocutor:—"Having considered the report of Mr Lee, and neither party desiring to be further heard thereon, reports to the First Division of the Court the scheme set forth in the said report, and grants warrant to enrol in the Inner-House rolls."†

* The Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), section 16, enacts,—“Applications to the Court under the authority of this Act shall be by petition addressed to the Court, and shall be brought, in the first instance, before one of the Lords Ordinary officiating in the Outer-House, who may direct such intimation and service thereof and such investigation or inquiry as he may think fit, and the power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation, and all such petitions shall, as respects procedure, disposal, and review, be subject to the same rules and regulations as are enacted with respect to petitions” under 20 and 21 Vict. cap. 56, “provided that when, in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such scheme, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled, and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to Her Majesty’s Advocate, who shall be entitled to appear and intervene for the interests of the charity, or any object of the trust, or the public interest.”

† “NOTE.—As set forth in the Lord Ordinary’s interlocutor of 8th March, all parties are agreed that the fund *in medio* must be applied as an educational or educational and religious trust, under a scheme to be fixed by the Court.

After hearing parties, the Court appointed intimation of the action to be made to the Lord Advocate.

On 20th July, the Lord Advocate having stated that he did not desire to intervene, the Court pronounced the following interlocutor:—"Having heard counsel for the parties on the report by Lord Kyllachy, and considered the cause, with the report by Mr Lee, No. 78 of process, find both parties entitled to their expenses out of the fund *in medio*, and approve of the apportionment of the said fund suggested in Mr Lee's said report, and accordingly adjust, settle, and determine that, after deduction of the said expenses, £500 shall be paid from said fund to the kirk-session of Bargeddie *quoad sacra* parish in order that they may apply the same toward building or otherwise acquiring a new Sunday school or mission hall to be held and used in connection with the parish church of said parish; and further, settle and determine that the remainder of the fund shall be paid to the School Board of the parish of Old Monkland to be used and applied by them for the ordinary educational purposes of the said last-mentioned parish, and decern: Remit the accounts of the above-mentioned expenses to the Auditor to tax and to report to the Lord Ordinary; remit to the Lord Ordinary to proceed with the cause as may be just, with power to decern for the taxed amount of said expenses."

Thereafter, on 15th November 1893, the Lord Ordinary pronounced an interlocutor ranking and preferring the Kirk-Session of Bargeddie to £500 of the fund *in medio*, and the School Board of Old Monkland to the balance of the said fund.

J. B. M'INTOSH, S.S.C.—MACPHERSON & MACKAY, W.S.—MENZIES, BLACK, & MENZIES, W.S.—Agents.

No. 27.

Nov. 15, 1893.
Old Monkland
School Board
v. Bargeddie
Kirk-Session.

WILLIAM DUNLOP (Official Liquidator of Donald's Chlorine Company, Limited), Petitioner (Respondent).—*Johnston—Burnet.*

WILLIAM DONALD, Respondent (Reclaimer).—*R. V. Campbell—Macaulay Smith.*

No. 28.

Nov. 15, 1893.
Dunlop v.
Donald.

Company—Winding-up by the Court—"Officer of company"—Managing director—Effects to which company prima facie entitled—Retention—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 100.—By sec. 100 of the Companies Act, 1862, the Court may, after making a winding-up order, require "any officer of the company" to transfer to the liquidator any "effects which happen to be in his hands for the time being, and to which the company is prima facie entitled."

A, the holder of certain patents, who had sold them to a company, and was under an obligation to assign them to it, became its managing director.

In a liquidation at the instance of a creditor of the company the liquidator presented a note under the above section craving the Court to ordain A to assign the patents to him. A maintained, first, that the petition was incompetent, in respect (1) that he was not an officer of the company, and (2) that the company was not *prima facie* entitled to the patents, which he held, not as an officer of the company but as an undivested seller; and second, that he was entitled to retain the letters-patent in security for the payment of the balance of the price.

Held (1) that A was an officer of the company in the sense of the section; (2) that the substantial right to the patents belonged to the company, and that the liquidator was entitled to a decree ordaining A to assign them; but (3) that

The only question therefore is as to the proportions in which the fund should be divided between the one set of purposes and the other. The Lord Ordinary thinks the reporter has reached a result which recommends itself as just and equitable, looking to the source from which the fund is derived. The Lord Ordinary's only doubt was whether the kirk-session had got quite enough; but they profess themselves satisfied with the report."

No. 28. A was entitled to a reservation of any claim to a preference in the liquidation for the balance of the price which he would have had if he had retained possession of the patents.

Nov. 15, 1898.
Dunlop v.
Donald.

ON 22d December 1890 Donald's Chlorine Company, Limited, was incorporated, and registered under the Companies Acts, 1862 to 1890.

1st Division.
Ld Stormonth-
Darling.

By the memorandum of association the objects for which the company was formed were declared to be, *inter alia*, to acquire, work, and develop the inventions and patents for the manufacture of chlorine, for which William Donald, residing at Saltcoats, held certain letters-patent. Power was further taken to adopt and carry out a memorandum of agreement dated 18th December 1890, entered into between Donald and John Nelson, as trustee for the company.*

After its incorporation the company adopted the agreement, and in

* By this agreement it was provided,—“Second, The vendor (Donald) agrees to sell to the company, and the second party, acting on behalf of the company, agrees to purchase the said inventions and letters-patent. . . . Third, The consideration to be given by the company to the vendor for the said inventions, letters-patent, and others, and for the obligations hereby undertaken by him, so far as not paid for by the salary and commission to be paid him under article twelfth hereof, shall be the sum of £20,000, which shall, to the extent of £18,800, be satisfied by the allotment to him, or his nominees, of 1880 fully paid-up deferred shares of ten pounds each of the company, having the rights specified in the said memorandum and articles of association, and to the extent of twelve hundred pounds sterling, by payment to him of (1st) a sum of seven hundred pounds sterling within thirty days after the registration of the company; (2d) the further sum of five hundred pounds sterling when one hundred tons of bleaching powder, under the said letters-patent, shall have been manufactured and *bona fide* sold by the company, but declaring that it shall be in the power of the company to make the said payment of five hundred pounds at an earlier date if they should be satisfied with the prospects of the company. . . . Sixth, The vendor shall shew a good title in his own name to the letters-patent agreed to be transferred, and shall, at the expense of the company, execute an assignation or assignations, and do all such assurances and things as may be necessary, or may reasonably be required, for transferring and vesting the letters-patent in the company, . . .” By the 10th article it was declared competent for the directors, with the consent of shareholders holding a majority of the shares of the company, to sell the patents, property, and assets of the company to an individual or another company, and provision was made for the distribution of the price obtained from such sale among the preferred and deferred shareholders. “Eleventh, In the event of a winding-up being resolved on in consequence of its being found that the business cannot be carried on with profit, or in any other case than that of a sale having been made of the patents, property, and assets of the company under the preceding article, the patent or patents shall be reconveyed to the vendor without any price being paid by him therefor; but all expenses connected with such reconveyance shall be borne by him. The holders of deferred shares shall have no right to vote in any question of winding-up under this article. In such event the directors shall have right to sell the works as a going concern, if they think proper, with right to use the patents in connection therewith, but subject to the condition that the vendor shall have a right of pre-emption at the price proposed to be taken from any third party. Twelfth, The vendor shall enter the employment of the company on the same being incorporated as manager or as managing director in the option of the company, and shall devote his whole time to the business of the company, and shall principally take charge of the technical and manufacturing department, and any other manager or secretary to be appointed by the company shall principally take charge of the commercial and financial department, subject always as regards the duties of both offices to the control and direction of the board of directors. . . .”

terms of article 3 thereof £18,800 of fully paid-up deferred shares were allotted, and £700 paid to Donald. No. 28.

On 6th June 1893 the Court, upon the application of a creditor, ordered that the company be wound up, and appointed William Dunlop, chartered accountant, Glasgow, to be official liquidator. Nov. 15, 1893.
Dunlop v. Donald.

At this date Donald had not assigned the patents to the company, and he declined to transfer them to the liquidator.

In these circumstances the liquidator presented a note under the 100th section of the Companies Act, 1862,* in which he craved the Court to require Donald to transfer the patents to him. The liquidator founded in particular upon articles 2 and 6 of the agreement, and stated, *inter alia*, as follows :—"In pursuance of the objects of the company the directors have expended the whole of the subscribed capital of the company (£20,000), together with about £11,000 of borrowed money, upon the construction of works for the manufacture of chlorine upon Mr Donald's patented process. These works are not quite complete, but they can be completed now at a very trifling cost. It is very important in the interest of the creditors and shareholders that these works should be sold immediately as a whole, together with the absolute right to the patents, without which it will not be possible to obtain a full price for the undertaking of the company.

"The present note is accordingly presented for the purpose of having the said William Donald ordained to transfer the said patents to the liquidator forthwith.

"The said William Donald held the post of managing director of the said company from its commencement to the date of liquidation, and he is thus an officer of the company within the meaning of the said section."

Donald lodged answers, in which he stated as follows :—"It is admitted that the company was erecting works at Longford, Kilwinning. These works, which are the only works of the company, were not complete at the date of the liquidation. The respondent's patented invention had not been tried by the company, and no products had been manufactured or sold under his processes. . . . The patents now in question were not part of the estate of the company at the commencement of the winding-up. The personal claim of the company thereto under the said agreement was conditional and defeasible. The company have not paid the full price, at least £500 thereof remaining at this date unpaid, and have not fulfilled the inherent condition of the said agreement, requiring *bona fide* manufacture and sale under the respondent's processes. . . . Article 11 imposes an essential burden and condition on the rights of the company under the said agreement, and secures to the respondent the exclusive right to the patents in the cases therein provided for, one of which has now arisen. The respondent as vendor claims his right under this article, and refuses to convey patents which, in terms of the trust and the obligations thereby created in his favour, must be immediately reconveyed to him. . . . During the progress of the works now stopped the respondent acted for the company as technical adviser and works manager. . . . The respondent, whose quali-

* By section 100 of the Companies Act, 1862 (25 and 26 Vict. c. 89), it was enacted that "the Court may at any time, after making an order for winding up a company, require any contributory for the time being, settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company to pay, deliver, convey, surrender or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator any sum or balance, books, papers, estate, or effects, which happen to be in his hands for the time being, and to which the company is *prima facie* entitled."

No. 28. fications are those of a practical chemist only, was a director of the company. . . .
 Nov. 15, 1893. The respondent pleaded;—(1) That the note is incompetent, inasmuch as the present case is not within the purview of section 100 of the Companies Act of 1862. (2) That the petitioner's averments are irrelevant and insufficient. (3) That the respondent is entitled under the agreement, and in the circumstances herein set forth, to refuse compliance with the demand made in the prayer of the note.

Dunlop v.
Donald.

On 20th July the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Having heard parties, and considered the note for the official liquidator, and answers thereto by William Donald, Nos. 13 and 22 of process, requires the said William Donald, within twenty-one days, to transfer to the official liquidator the patents specified in the prayer of the said note, together with his rights and interests in the inventions for which applications have been made for patents, also as specified in said prayer, and decerns: And decerns and ordains the said William Donald, within the period before mentioned, to execute assignments with regard to the patents to which the same are applicable, and similar assignments with regard to the other patents before referred to, such assignments to be adjusted at the sight of . . . Reserving to the respondent, William Donald, any claim which he may make in the liquidation to a preference in respect of the unpaid balance of £500, mentioned in article third of the agreement, No. 17 of process, as if he had retained possession of the patents in question, and to the liquidator his answer to such claim: Finds the said William Donald liable to the official liquidator in the expenses caused by his opposition to the said note."*

* "NOTE.—In order to justify an application under the 100th section, all that is necessary is that there should be estate or effects in the hands of any one of a certain number of persons, including the officers of the company, to which the company is *prima facie* entitled. Now, I am very clearly of opinion that the patent rights, which form the subject of the present application, fall within that description. They are in the hands of Mr Donald, the original patentee, and he is an officer of the company, because he was its managing director. The company's right to these patents stands on an agreement between them and Mr Donald, which, by its second and third sections, provides for the sale of these inventions to the company at a certain price. The price was to be £20,000, and was to be satisfied to the extent of £18,800 by an allotment to Mr Donald of fully paid-up deferred shares, and by an immediate payment of £700. Both of these things have been done; the shares have been issued, and the £700 has been paid. To the extent of the remaining £500, the payment was made conditional on a certain quantity of bleaching powder being manufactured and *bona fide* sold by the company. That event has not taken place, because the company has been wound up on the application of a creditor before it proceeded to manufacture anything.

"Now, the only ground, so far as the agreement goes, upon which the respondent resists this application is, that he has certain rights under the 10th and 11th articles. By the 10th article the directors have power, with the consent of a majority of the shareholders, to sell the patents, and it does not seem to me that that clause in any way affects the present question, no sale having in point of fact taken place. By the 11th article it is provided that, in the event of a winding-up being resolved on, in consequence of its being found that the business cannot be carried on with profit, or in any other case than that of a sale having been made of the patents and assets of the company under article 10, the patents are to be reconveyed to the vendor without any price being paid. If this had been a voluntary liquidation a question of some difficulty might have arisen. But it is not a voluntary liquidation. I must assume that it was in the contemplation of both parties to the agreement that there might

William Donald reclaimed, and argued;—The application was incompetent under the 100th section of the Companies Act, 1862, for (1) the respondent was not an “officer of the company” in the sense of the section. He was merely a practical chemist, and employed as such by the company; (2) he had no assets in his hands to which the company were “*prima facie* entitled.”¹ The patents in question belonged to him *ab initio*, and his relation to the company as regarded them was that of an undivested seller upon a contract of sale not yet fulfilled. It was an inherent condition of the contract that the company should have given the patented process a fair trial to prove its success or failure, and as that condition had not been purified, the respondent was entitled to retain his patents.² Further, part of the price agreed upon had not yet been paid, and he had a lien for this balance of £500. He was also entitled to retain the patents in virtue of article 11 of the agreement, which provided that they were to be reconveyed to him in the event of a winding-up, or “in any other case” than a sale of the assets of the company. In any event, the respondent’s averments must be remitted to proof, and in that case the 100th section was inapplicable.³

Argued for the petitioner;—The application was competent. The respondent was, as managing director, “an officer of the company,” within the meaning of the 100th section of the Act of 1862, and he held assets to which the company were “*prima facie* entitled.”⁴ Under the 6th section of the agreement he guaranteed his own title, and gave an absolute undertaking to assign the patents. In short, the articles of the agreement proceeded on the hypothesis that the property in the patents had passed from him to the company. Whatever right he had to the unpaid balance of £500 was preserved to him by the reservation contained in the Lord Ordinary’s interlocutor, in which, according to the true policy of the 100th section, the representative of the creditors was given instant possession of the property to which the company were *prima facie* entitled, with a reservation of all preferential claims on the part

be a winding-up of a different kind. And that is what has happened. Creditors have stepped in, and have procured an order from the Court for the compulsory winding-up of the company, and accordingly the event contemplated by article 11, and upon which its whole provisions depend, has not taken place. In short, it seems to me that the agreement affords very clear *prima facie* evidence of the company’s right to these patents, and that neither article 10 nor article 11 affords any answer to the liquidator’s demand.

“It is further maintained by the respondent that at all events he has a right of retention of these patents at common law, as security for payment of the balance of £500 of the purchase price. Now, it seems to me that that question does not arise at the present stage, and it is not an impediment to my granting an order under the 100th section. It may be that the respondent has the right for which he contends, although on that point I express no opinion at all. But that is a question which may hereafter be raised in the liquidation, and the only concession which I think the respondent is entitled to at the present stage is, that his right to make that claim, notwithstanding his parting with the possession of the patents, should be reserved.”

¹ Hollingsworth’s case, 1849, 3 De Gex and Smale Reports, 102; *In re National Bank*, 1870, L. R., 10 Equity, 298; *In re Llangennech Coal Co.*, 1887, Weekly Notes, p. 22; *Distillers Co., Limited v. Russell’s Trustees*, Feb. 9, 1889, 16 R. 479.

² *Mackay v. Dick and Another*, March 7, 1881, 8 R. (H. L.) 37, and L. R., 6 App. Cases, 251.

³ *In re National Bank*, 1870, L. R., 10 Equity, 298.

⁴ *In re Oakwell Collieries Co.*, 1879, Weekly Notes, p. 65; *Robertson v. British Linen Co.*, Dec. 12, 1890, 18 R. 1225.

No. 28. of the vendor for after discussion in the course of the liquidation.¹
 Nov. 15, 1893. Article 11 of the agreement clearly applied to a voluntary winding-up,
 Dunlop v. and was therefore inapplicable here.
 Donald.

LORD PRESIDENT.—I think the Lord Ordinary's interlocutor is right. In the first branch of the reclaimer's argument he has maintained that the 100th section of the Companies Act, 1862, does not apply. But when his own position is ascertained, it becomes clear enough that he is one of the officers of the company, and his duties and functions do not seem at all to present any material element of difference from those of the class of officials enumerated in the words of the 100th section. I think that he, being the managing director of the company, is clearly within the section. I may observe that the case of the *Oakwell Collieries* shews that in the English Courts a director has been treated as falling within that section.

The next contention of the reclaimer is, assuming this application to be competent, that he is not bound to part with these letters-patent, except on payment of £500, which is the balance of the price remaining unpaid, the other portion of the price having been made good to him in the prescribed form of the contract,—that is to say, partly in shares and partly in cash.

Now, I note that the reclaimer has not contended that in the event which has happened he is entitled to hold the contract as rescinded, because his argument was founded solely upon his position in relation to this outstanding balance of the price. But then it seems to me that the course taken by the Lord Ordinary affords the appropriate solution of the question thus raised. The Lord Ordinary grants the prayer of the petition for delivery of the letters-patent, but he reserves "to the respondent, William Donald, any claim which he may make in the liquidation to a preference in respect of the unpaid balance of £500, mentioned in article third of the agreement, as if he had retained possession of the patents in question, and to the liquidator his answer to such claim."

Now that is a very careful and full reservation of the rights of the seller which he has urged at the bar, and for the course which the Lord Ordinary has taken, of granting the prayer under that reservation, his Lordship seems to have a very good precedent in the decision of the Second Division in the case of *Robertson*, 18 R. 1225, and also in the decision of Vice-Chancellor Hall in the case of the *Oakwell Collieries*, to which I have already referred. These cases make it sufficiently clear that the Court will grant an order of this kind, notwithstanding that there may have been made a claim of preference or security, the solution being found in the reservation of those claims for discussion, and if need be satisfaction in the course of the liquidation.

In my view, the rights of the parties under the contract stand thus,—I think it is manifest that when the agreement was entered into and the company were in a position to make forthcoming those 1880 fully paid-up shares, they were entitled to have the letters-patent assigned over to them.

It seems to be clear that the company's operations are in the contemplation of the contract to commence on their getting the patents, and their being in a position, therefore, to set agoing the working of the patents, and this £500 seems to me to be due at that stage of the proceedings, when *ex hypothesi* of the contract the letters-patent are in the hands of the company.

¹ *In re Oakwell Collieries Co.*, 1879, Weekly Notes, p. 65; *Adam & Winchester v. White's Trustees*, May 30, 1884, 11 R. 863.

An alternative argument is founded by the reclaimer upon the 11th section of the agreement, but it seems to me that that section does not apply to the case which has here occurred. His demand under the 11th section is that he is entitled, or would have been entitled, if the patents had been already conveyed to the liquidator of the company, to get them back, because he says that, in some sense which is not very clearly explained, a winding-up has been resorted to.

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Now, it appears to me that the 11th section plainly contemplates the case of a winding-up resolved upon by the company. That section, looking back to the 10th, speaks thus,—“You may resolve to sell the patents, and in that case I shall assign, but if you have not decided to hand them over to someone else, but should have resolved by yourselves to stop working by winding-up, in that case the provision of section 11 is to apply.”

But I cannot apply the terms of section 11 to the case which has happened, for the company has not resolved to go into a voluntary liquidation, and they have not sold. It seems to me that this is a case unprovided for by the 11th section, and that the claim of the respondent cannot be given effect to. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—I am of the same opinion. The respondent seems to have been an inventor, and amongst other things, to have invented processes for the manufacture of chlorine, and he seems to have persuaded, and probably quite rightly, the company now in liquidation that the processes were of great value.

He entered into an agreement with them to sell these letters-patent which he had obtained to the company, with the view that they should find the funds necessary for their development. We have the agreement set forth at length in the appendix.

Now, it appears to set out that the one party agreed to sell and the other to purchase, that the price was to be paid in fully paid-up shares of the company, and a sum of £1200 in money, of which sum £700 was to be immediately payable on completion of the agreement, and £500 postponed until the results of the working of the patents should shew that they were successful by the production of a certain amount of money. Upon that event occurring this additional £500 was to be paid. We are told that the sum of £20,000 has been expended by the company in the erection of works for the purpose of manufacturing chlorine. That was the position of matters when an application was made for the compulsory winding-up of the company, and it is now in process of being compulsorily wound up. In these circumstances, I should say that it was part of the agreement—a necessary part—that the vendor should make up a title to his patents, and then and there transfer and assign these to the company. That *de facto* never was done; but nevertheless the company, as I have said, went on spending money as they did for the development of these patent rights. It was in that position of matters that the present application was made. It happens that, *de facto*, the patents have never been transferred to the company, and they remain in the name of Mr Donald, and it is in these circumstances that the liquidator betakes himself to the powers given him by the 100th section of the statute, and prays for an order to compel Mr Donald to transfer these patent rights to him which happen to be in his hands, and which the petitioner says he is *prima facie* entitled to. No doubt they happen to be in Mr Donald's hands, but I have little doubt in this case that the com-

No. 28. pany is *prima facie* entitled to the patents. I do not see how otherwise it
Nov. 15, 1893. could be held. Mr Donald was bound under his agreement to assign to them,
Dunlop v. and they have expended all this money in developing them. That is the posi-
Donald. tion of matters. I think it is quite futile to say that these patents do not *prima facie* belong to the company.

It is contended by the respondent that this 100th section of the Companies Act, 1862, only applies to officers of the company, that Mr Donald is not an officer of the company, and therefore that this application is incompetent in so far as it applies to him. I concur with your Lordship in thinking that there is no doubt that Mr Donald is an officer of the company in the sense of section 100. He is the managing director under the articles of association, and in fact that has been made public. No doubt, as manager his powers are limited to the technical or manufacturing department, but I see no reason why the manager of a company is not an officer of that company. I think the case of the *Oakwell Collieries* is a direct authority upon that point. Therefore I have no doubt that Mr Donald here is an officer of the company in the sense of the 100th section. But then he says,—“I must be paid the full price of the articles sold. There is £500 of the price not yet paid which ought to be paid to me. I have a claim for that.” I think in that case that the interlocutor of the Lord Ordinary protects any rights which Mr Donald may have in respect of his claim for £500.

The only other matter to which I must refer is the argument as to the construction of the 11th section of the agreement. Upon that I entirely agree with your Lordship that it applies to the case of voluntary liquidation, and not to the case of compulsory liquidation, which this is. Upon these grounds I agree with your Lordships that the interlocutor should be affirmed.

LORD M'LAREN.—The relation of Mr Donald to the Chlorine Company which bears his name is one of a nature with which we are very familiar in company cases.

Mr Donald was the proprietor of various patent rights which he had taken out as his inventions. He entered into an agreement with a trustee for a company to be formed, and in the 4th article he agrees to sell to the company, and the second party, as trustee for the company, agrees to purchase these four patent rights. Then the price of the patents is to be paid chiefly in the form of fully paid-up shares of the company to be formed, Mr Donald undertaking that 20,000 preferred shares shall be applied for and taken up by individual companies or corporations, and being also bound to pay all the expenses incident to the formation of the company.

Now, I think Mr Campbell was well entitled to claim for Mr Donald all the protection which the law can give to any vendor who disposes of his right under such circumstances, because the inventor of the patents in this case must have had great confidence in the success of his process when for so small a sum as £1200 in cash he took upon himself this large expense with nothing more than a chance of sharing along with the other members of the company, if successful, the profits of the undertaking. Out of that £1200, £700 was to be paid at once, or within thirty days of the registration of the company, for the purpose, as explained at the bar, of enabling Mr Donald to defray the preliminary expenses. The remaining £500 was to be paid after the manufactory was established, and the business of the company in operation. Now, after the expenditure of all

the capital that has been raised in putting up the necessary buildings and chemical apparatus, the company was brought to a stand by an application for a winding-up order at the instance of a creditor. In the liquidation this application is presented for an order under the 100th section of the Companies Act, 1862, to transfer to the liquidator the patent rights which are the subject of the agreement. Under the 6th article of the agreement the vendor guarantees his own title and gives an absolute undertaking to assign and make over these patent rights. Mr Donald could have had no answer to the demand of the company as soon as it was formed and registered, to execute the necessary transfers of the patent rights. But, doubtless because Mr Donald and the company had confidence in each other, he was not immediately called upon to assign the patents; and in point of fact the patents had not been assigned at the time when the company went into liquidation.

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It seems to me that much may be said for the case of the patentee to the effect that he is not bound to grant the required assignation to the liquidator of an insolvent company, except on the condition of receiving the counterpart of his obligation to assign, viz., the £500 which was to be paid to him in cash. But whether he is entitled to put forward this condition in answer to a demand under the 100th section is a different question. I agree with your Lordships that the policy of the 100th section is a policy which we find running through the various statutes relating to England and Scotland, which give facilities for the winding up of estates of insolvent persons and companies, and the meaning of this section is that the representative of the creditors is to be put into immediate possession of property to which the company has a substantial right, reserving, if necessary, all preferential claims which may affect it.

The Lord Ordinary has reserved to Mr Donald his claim and to the liquidator his answers, and it does not appear to me that Mr Donald's right of retention, if he has such a right, is in any way prejudiced by the order which the Lord Ordinary has pronounced.

On the other hand, I am unable to accept the argument founded on the 11th section of the agreement to the effect that in the event that has occurred Mr Donald was entitled to be retrocessed. I do not read this section as contemplating the case of a creditor's liquidation at all, and if it had, I should have had the very gravest doubt whether an undertaking of this kind could stand, because I cannot conceive that it is in the power of the parties to an agreement to provide that in case of insolvency the property of one of them shall be passed to the other for the purpose of preventing its being distributed amongst creditors.

For these reasons I also am of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR was absent.

THE COURT adhered.

CARMICHAEL & MILLER, W.S.—KIRK MACKIE & ELLIOT, S.S.C.—Agents.

No. 29.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Complainers
(Reclaimers).—*C. J. Guthrie.*Nov. 15, 1893.
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South-
Western Rail-
way Co. v.
Bain.MARCUS BAIN, Respondent (Respondent).—*W. Campbell—M'Clure.*

Railway—Mines and Minerals—Freestone—Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 70.—Held that the exception of “mines of coal, ironstone, slate, and other minerals,” in the 70th section of the Railway Clauses Consolidation Act, 1845, from conveyances of land to railway companies covers freestone.

Railway—Mines and Minerals—Notice—Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 71.—A quarry-master having given notice to a railway company, under the 71st section of the Railways Clauses Consolidation Act, 1845, that he intended to work certain freestone belonging to him under the company's line, the company brought a note of suspension and interdict, averring, *inter alia*, that in the ordinary course of working the quarry the freestone in question would not be worked for many years, and that the notice had not been *bona fide* given, but was merely intended to raise up a fictitious claim against the company. Held (*rev. judgment of Lord Stormonth-Darling*) that these averments were relevant, and a proof allowed.

2D DIVISION.
LdStormonth-
Darling.

ON 16th December 1892 Marcus Bain, tenant of the Haughyett Quarry, in the parish of Mauchline, Ayrshire, gave notice to the Glasgow and South-Western Railway Company, under the Railways Clauses Consolidation Act, 1845,* that after thirty days he would proceed to work certain freestone rock lying under the railway company's main line, alleging that this rock formed part of the subjects under his lease.

The railway company brought a note of suspension and interdict to have Bain interdicted from proceeding under the notice.

The note having been passed and interim interdict granted, a record was made up.

The railway company did not state that the conveyance of the lands

* The Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 70, enacts,—“The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, except as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby.”

Section 71 enacts,—“If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines, or any parts thereof, should be left unworked, and if they be willing to make compensation for such mines and minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier, of such their desire, and shall in such notice specify the parts of the mines under the railway or works or within the distance aforesaid which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner, lessee, or occupier, shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, and for all loss or damage occasioned by the non-working thereof to the owner, lessee, or occupier thereof respectively. . . .”

in which the rock was situated in their favour contained an express conveyance of the mines and minerals therein, but they maintained that the rock was not included among the minerals excepted from their conveyance by the 70th section of the Railway Clauses Act, 1845. They further averred that Bain was not entitled to work the rock in respect it was not included in his lease. They then made this averment—(Stat. 5) “ . . . In any event the respondent was not entitled to give the said notice, and is not entitled to act thereupon. It is believed and averred that his intimation was given merely with a view of exacting a payment from the complainers to which he is not entitled. The lessee is bound under the said lease, and at common law, to work the Haughyett Quarry in a regular and proper manner. . . . If he works in accordance with the said stipulation he will carry forward the workings on which he is at present engaged in the opposite direction from the complainers’ railway and works. The stone in the vicinity of these workings is of the same or superior quality to that which is immediately alongside of and under the complainers’ railway works and lands, and is much more accessible and less expensive to work than the stone last mentioned. If the respondent proceeds with the working of the quarry in accordance with the said lease he would not in any event, whatever might be the rights of parties in the said rock, be in a position to give notice to the complainers in terms of section 71 of the Railways Clauses Act, 1845, for very many years. It is believed, however, that with a view of rearing up a fictitious claim against the complainers, and not in the regular and workmanlike manner of working the present quarry in terms of said lease, the respondent proposes to open a new quarry at some distance from Haughyett Quarry, and in the immediate vicinity of the complainers’ line and fence, and altogether clear of the works and outside the fences of the present quarry, and that only for the purpose of obtaining access to the rock under the complainers’ railway works and lands.”

The railway company pleaded;—1. The rock in question being the property of the complainers, . . . the respondent is not entitled to interfere therewith, and the note of suspension ought to be granted. 2. The complainers are entitled to the remedy asked in respect (1) that the rock in question is not within the lease. . . . 3. The respondent’s intimations and workings not being in the ordinary and regular course of working the quarry, but merely devised to rear up a fictitious claim against the complainers, they are entitled to interdict as craved.

Bain denied the company’s averments, and pleaded;—2. The complainers’ averments are irrelevant and insufficient in law to support the prayer of the note. 3. In respect that the complainers, after due notice from the respondent, have failed to purchase the said mine of freestone, the respondent is entitled to work the same.

On 20th July 1893 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—“ Finds that by virtue of section 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, the complainers have no right to the freestone under the portion of their land referred to on record, and repels their first plea in law: Finds, further, that they have not made on record any averments relevant to be admitted to probation; therefore recalls the interdict formerly granted: Refuses the note of suspension and interdict, and decerns.”*

* “OPINION.—The respondent is assignee to a lease for twenty-five years from Whitsunday 1882 of the Haughyett Freestone Quarry, on the estate of Ballochmyle, in Ayrshire. Part of the freestone included in the lease lies under and adjacent to the complainers’ line of railway, and the respondent has given notice of his intention to work the freestone under the line by open-cast

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The railway company reclaimed. At the hearing they stated that they desired a proof of their averment that the rock in question did not fall within the lease, and on the question of *bona fide* intention to work they referred to the *Midland Railway v. Robinson*, L. R., 37 Chanc. Div. 386, 15 App. Cas. 19.

workings from the surface downwards. The purpose of this note is to interdict him from doing so, and the first plea stated by the complainers is to the effect that freestone does not fall within the description of 'mines of coal, ironstone, slate, or other minerals' excepted from the general conveyance of their lands by virtue of the 70th section of the Railway Clauses Act of 1845. It is not said that, in considering this plea, any aid can be derived from a parole proof, and I am asked to dispose of it on the terms of the statute, interpreted, as these have been, by numerous decisions.

"Now, the state of the authorities is this: There is an express decision in Scotland (*Jamieson v. The North British Railway Company*, 6 S. L. R. 188) that freestone does fall within the exception in the 70th section. It was a judgment of Lord Kinloch not reclaimed against, but it was quoted with approval by Lord Adam in giving the leading opinion in *Nisbet Hamilton v. The North British Railway Company*, 13 R. 454 (at p. 461). There is also an expression of opinion by Lord Watson (*obiter* no doubt, but still entitled to great weight) in *Magistrates of Glasgow v. Farie*, 13 App. Ca. at p. 679, in these terms:—'The important question still remains, what are the minerals referred to, other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata.' More important still, there is a judgment in the House of Lords, pronounced so recently as December 1889, in *Midland Railway Company v. Robinson*, 15 App. Ca. 19, to the effect that the section of the English Railways Clauses Act, which is couched in precisely the same terms as section 70 of the Scottish Act, includes not only beds and seams of minerals got by underground working, but also such as can only be worked by open or surface operations, and that limestone is a mineral within the meaning of the section.

"I am unable to see any distinction in principle between limestone and freestone. The only distinction suggested by Mr Guthrie was that limestone is worked for the purpose of extracting from it the mineral substance lime, while freestone is worked for the purpose of using the stone itself. But I find no trace of any such distinction in the opinions of the noble and learned Lords, nor do I think that the purpose for which the substance is worked can be of any materiality. The real point of the decision is that a substance may be within the section though it is got by quarrying and not by subterranean mining.

"The only decisions which can be placed against this chain of authorities are *Menzies v. Earl of Breadalbane* (1822), 1 Sh. App. 225, and *Duke of Hamilton v. Bentley* (1841), 3 D. 1121. In the first of these it was decided that a reservation by a superior in a feu-contract of 'the haill mines and minerals' in the lands did not give the superior right to a freestone quarry. The second case simply followed the first. Both were fully in view of the House of Lords in *Farie's* case, and Lord Watson explains at pp. 674-5 of 13 App. Ca. why a case construing a reservation in a feu-contract is not of much assistance in construing an Act of Parliament. For one thing, it is obvious that the mention of slate in the 70th section gives a clue to the construction of the phrase 'other minerals,' which is altogether wanting in a general reservation of 'mines and minerals.'

"For these reasons I am very clearly of opinion, both on authority and on a sound construction of the statute, that the freestone in this case (which is admitted to be of commercial value) is within the exception of the 70th section.

"But then the complainers say (and this is their second ground for demanding interdict) that there is no *bona fide* desire or intention on the part of the respondent to work the freestone, and that his notice is a mere device to extract money from the complainers. Of these allegations they demand a proof.

LORD JUSTICE-CLERK.—The question which seems to have been principally discussed in the Outer-House was whether freestone falls within the definition of the Act of Parliament of the things excepted from the conveyance, so as to make it incompetent for the railway company to make any use of it. The words of the Act are, "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except only" and so on. It is quite plain that these words must include a great many things as minerals which are not expressly named, and that those which are named are mentioned for the purpose of shewing the kind of material intended to be reserved by the statute. Now slate is one of the things which are expressly mentioned, but slate is not in the ordinary sense a mineral; it is a thing quarried out of the ground to be used for building purposes just as stone is; and accordingly in the case of *Farie*, in the House of Lords, it appears to have been regarded as impossible to exclude freestone and limestone when slate was included. On that part of the case, therefore, I adhere to the judgment of the Lord Ordinary.

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It turns out now that the railway company have two other pleas on which they desire to found. In the first place, they say that the freestone underneath their line is not within the respondent's lease; and secondly, they aver that the tenant of the quarry, in giving notice that he intends to work this freestone, has no *bona fide* intention of working the stone, but has given notice merely as a device for obtaining compensation from the railway company. These are questions which cannot be decided without evidence, and accordingly I think that the case should go back to the Lord Ordinary for the purpose of evidence being taken.

LORD YOUNG.—I agree with the Lord Ordinary with regard to the freestone under the railway, that it is not in the title of the railway company. I construe the Act of Parliament as he does.

The only other point I shall notice is as to the *bona fides* of the respondent in giving the notice he did to the railway company. That point was insisted in before the Lord Ordinary, and he gives a special finding about it in his interlocutor. The Lord Ordinary finds that the complainers have not made on record any averments relevant to be admitted to probation. I am of opinion that the complainers have made averments relevant to be admitted to probation, and I therefore think we should send them to proof.

LORD RUTHERFURD CLARK and **LORD TRAYNER** concurred.

"Now, so far as they merely say that the respondent has other stone in his quarry which he might work less expensively and with more advantage to himself than the stone under the railway, I do not think that their averments are relevant. The respondent's proposal may be ever so capricious and vexatious, but if he has a right to work the stone, and a *bona fide* intention to do so, I do not see that he can be prevented. The complainers on record go a step further. They say that he intends to work the stone by opening a new quarry, and that he has no right under his lease to do so. If the complainers had adhered to this statement I should not have disposed of the case without requiring the respondent to make his right clear, either by reference to the lease, or, if necessary, by producing evidence of the landlord's consent to the proposed operations. But Mr Guthrie stated at the bar that he did not maintain that the terms of the lease presented any obstacle to the proposed operations, and I am therefore in a position to dispose of the case by recalling the interim interdict and refusing the note."

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THE COURT found in terms of the first finding of the Lord Ordinary's interlocutor: *Quoad ultra* recalled the same: Remitted to the Lord Ordinary to allow the parties a proof of their averments as to (1) the minerals not being within the lease assigned to the respondent, and (2) the respondent not having a *bona fide* intention to work the said minerals in terms of section 71 of the Railways Clauses Consolidation Act, 1845.

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Nov. 16, 1893.
Marquis of
Breadalbane
v. Whitehead
& Sons.

MARQUIS OF BREADALBANE, Pursuer (Reclaimers).—*W. Campbell—Ure.*
J. WHITEHEAD & SONS, Defenders (Respondents).—*Johnston—*
John Wilson.

BEN CRUACHAN GRANITE COMPANY, LIMITED, AND LIQUIDATORS THEREOF,
Defenders (Respondents).—*C. J. Guthrie.*

Lease—Exclusion of assignees except with consent of landlord—Landlord's right to withhold consent.—The proprietor of a granite quarry let it to a company, the lease containing a clause "expressly excluding (except with the consent of the proprietor in writing) assignees, legal or conventional. . . ." The company having gone into liquidation, the landlord's agents wrote a letter to the liquidators intimating that he was willing to consent to the sale of the lease, but on the condition "that the assignee must be a person approved by him." The liquidators thereafter sold the lease, and granted an assignation to the purchasers without the landlord's approval. In an action by the landlord for reduction of the assignation, the defenders averred that the landlord in refusing to recognise the defenders as assignees "is acting in fraud of his arrangement with the liquidators," and that "the true reason of the pursuer's refusal is this—that he has come under some obligation to give a lease of the quarry to" another person. "It is solely for the purpose of implementing this obligation that the pursuer is unfairly and unreasonably withholding his approval of the assignees tendered by the liquidators."

Held (rev. judgment of Lord Kyllachy) that as the assignation had been granted to assignees not approved by the landlord, it fell to be reduced.

Duke of Portland v. Baird & Co., Nov. 9, 1865, 4 Macph. 10, followed.

1ST DIVISION.
Ld. Kyllachy.

By lease dated 11th and 25th May 1885, the Marquis of Breadalbane let to the Ben Cruachan Granite Company, Limited, for twenty years, a granite quarry belonging to him, "but expressly excluding (except with the consent of the proprietor in writing) assignees, legal or conventional, and subtenants, also creditors or managers for creditors, in any way or shape (including liquidators). . . ."

On 7th January 1892 the company went into voluntary liquidation, and John Wilson and George Duke Stirling were appointed liquidators. With the consent of the Marquis, they remained in possession of the subjects till March 1893.

On 11th March Messrs Davidson & Syme, agents for the Marquis of Breadalbane, wrote to the liquidators as follows:—"Dear Sirs,—Referring to your call here the other day, we have since been in communication with Lord Breadalbane and his factor. His lordship, as you would expect, is averse to doing anything which would be unjust to the creditors of the present company, but he, and the factor also, have been much troubled with the way in which that company have implemented the obligations of the lease. While, therefore, his Lordship is willing to consent to the lease being sold, it must be on the conditions which we are now to state,—(1) The assignee must be a person approved by him or his factor, and the assignee must of course undertake to implement the whole obligations and conditions of the lease. . . ."

On 15th March the liquidators exposed to sale by public roup their

whole right and interest under the lease, and it was purchased by J. Whitehead & Sons, granite merchants, Aberdeen, and an assignation of the lease, dated 30th March and 1st April, was granted by the sellers to the purchasers. The Marquis of Breadalbane refused to consent to the lease being transferred to the assignees, but they entered into possession of the quarry, and asserted their right to continue to work it.

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In these circumstances, upon 4th May 1893, the Marquis raised an action against the Ben Cruachan Company and its liquidators, and also against J. Whitehead & Sons, for reduction of the assignation, and for decree of removing as against Messrs J. Whitehead & Sons.

The pursuer, after narrating the lease and letter of 11th March, averred that prior to the sale the existence of the first condition contained in the letter was known to John Whitehead, a partner of the firm, and that the pursuer had rejected the firm as tenants after inquiry and consideration.

The defenders J. Whitehead & Sons averred;—"That letter (11th March) was obtained by the liquidators, and granted by Messrs Davidson & Syme in view of the intended exposure by them of the lease of the quarries and plant to sale by public roup, and for the special purpose of securing that the pursuer would not reject as a tenant under the lease of the quarries any suitable party who might acquire the lease and plant at the sale. It was on that footing that the liquidators proceeded to expose the lease and plant, and it was on that footing that the defenders became purchasers of the lease and plant at the sale."

The defenders had further submitted to Messrs Davidson & Syme "particulars regarding their financial position which put beyond doubt their sufficiency as tenants. . . . The pursuer, however, refused to give his approval or to recognise" the defenders as tenants. (7) "This refusal by the pursuer was most unjust, and was a gross abuse of any right of approval reserved to him under the said letter to the liquidators of 11th March. In refusing to recognise these defenders as assignees, the pursuer is acting in fraud of his arrangement with the liquidators embodied in the said letter, and in bad faith towards these defenders. The true reason of the pursuer's refusal is this—that he has come under some obligation to give a lease of the quarry to" another person. "It is solely for the purpose of implementing this obligation that the pursuer is unfairly and unreasonably withholding his approval of the assignees tendered by the liquidators."

The pursuer pleaded;—(1) The assignation set forth in the summons ought to be reduced, in respect that it was granted without the approval of the pursuer having been obtained to the assignee named therein.

Both defenders pleaded that the pursuer's averments were irrelevant, and that the pursuer was barred by his actings from insisting in the action, the pleas in law for the defenders J. Whitehead & Sons being as follows:—(1) No relevant case. (2) These defenders are entitled to absolver, in respect—(a) That the pursuer, by reason of his actings, is barred by personal exception from insisting in the present action. (b) That, under the said letter of 11th March the pursuer is not entitled to reject capriciously, as assignees of the said lease, the defenders, who purchased the lease on the faith of the said letter. (c) That, in refusing to give his approval to the said assignation in favour of these defenders the pursuer is acting in bad faith and in fraud of his arrangement with the liquidators.

On 11th September the Lord Ordinary (Kyllachy), before answer, allowed parties a proof of their respective averments, and to the pursuer a conjunct probation.*

* "NOTE.—The Lord Ordinary has had difficulty in this case, and has

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The pursuer reclaimed, and argued ;—The Lord Ordinary had erred in allowing a proof. Under the lease itself the landlord was quite entitled to reject the assignees capriciously if he chose, and without assigning any reason for so doing.¹ The case of *Wight v. Earl of Hopetoun* in no way conflicted with this doctrine of law. Indeed, that case was entirely different. In it the lease was one which in terms gave to the tenant a most valuable estate of a very different kind from that of a tenant under an ordinary agricultural lease. The tenant was practically the proprietor of the subject, and it was natural that a clause requiring the landlord's consent to an assignation of the lease should in such a case receive a different construction.² The landlord had a similar right under the letter.

Argued for the defenders ;—It was doubtful whether under the lease the pursuer could capriciously and without good reason assigned reject them as tenants.³ That he was acting capriciously in so doing was clear, for they were perfectly eligible tenants. But apart from the lease, in his letter of 11th March he had authorised the liquidators to expose the subjects, and had thereby induced the public to bid for them. It was out of the question for him to go back now upon this letter. The Lord Ordinary was right in allowing a proof⁴ as to the defenders' averments to the effect that his refusal to accept them as assignees was not due to any *bona fide* disapproval of them as suitable tenants.

LORD PRESIDENT.—I do not think that the Lord Ordinary's judgment can stand.

The action is one to remove from the occupancy of the quarry the Messrs Whitehead, the principal defenders in the action, and they in defence claim right to retain the tenancy under a lease which expressly excludes assignees, except with the consent of the proprietor in writing.

Now, if the question stood upon the lease alone, it would be impossible to maintain the defenders' contention, looking to the decision in the case of the *Duke of Portland*. But then it was said that the Messrs Whitehead are entitled to defend their possession on the ground that the landlord has taken up a less strong position by the letter of 11th March 1893. In that letter—his original tenants having gone into liquidation—his Lordship's agents said that while he "is willing to consent to the lease being sold, it must be on the con-

hesitated a good deal about allowing a proof. He is not prepared to hold that the pursuer was bound, under the terms of his agents' letter, to assign reasons for his disapproval of the assignees, or to enter into the question whether those reasons were good or bad. But the Lord Ordinary thinks that he was bound to consider the assignees on their merits, and to accept or reject them according to his honest opinion as to their suitability : and the question really is whether the defenders' averments do not (whether well or ill founded) come to this, that the pursuer did not so proceed, but rejected the defenders simply because he had come under engagements to another applicant. The Lord Ordinary thinks that the defenders' averments may be so read ; and being so, that they at least raise a question which it is not desirable to decide without knowing the facts. He has therefore allowed a proof before answer."

¹ *Duke of Portland v. Baird & Co.*, Nov. 9, 1865, 4 Macph. 10 ; *Muir v. Wilson*, Jan. 20, 1820, F. C. ; *Bell on Leases*, vol. i. 181, note.

² *Duke of Portland v. Baird & Co.*, Nov. 9, 1865, 4 Macph. 10, per Lord Justice Clerk (Inglis), p. 19.

³ *Wight v. Earl of Hopetoun*, Feb. 9, 1855, 17 D. 364, 27 Scot. Jur. 158.

⁴ *Houldsworth v. Brand's Trustees*, May 18, 1875, 2 R. 683, per Lord Ormisdale, p. 694.

ditions which we are now to state,—(1) The assignee must be a person approved by him or his factor, and the assignee must of course undertake to implement the whole obligations and conditions of the lease.”

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Now, I cannot say that that materially alters the position of matters from what it would be under the lease itself,—that is to say, I think that the right of the landlord in a question of approving or disapproving of an assignee stands under this letter just as it would have done under the original lease. It is to be noted that the occasion of the letter, and the rest of its contents, make it sufficiently plain that Lord Breadalbane is here referring to the lease as it stood ; but, even suppose this condition to be read as, in terms, something separate from the lease, I do not think that in quality it differs from the various clauses as to approval of assignees which are discussed by the Lord President in the case of the *Duke of Portland*.

Now, the law laid down in that case is certainly very distinct, and my objection to the Lord Ordinary's interlocutor is this, that I do not think his Lordship's interlocutor and note can be reconciled with the law as settled in the case. It is true that the condition in the *Duke of Portland's* case was a condition where assignees generally required to be approved of or consented to by the landlord, but the whole tenor of the judicial observations there, taken in connection with the passage in Mr Bell's Commentaries, to which reference is made by the Lord President, seems to shew plainly enough that a variance in phrase will not affect the substance of the matter, and that in whatever form the thing is referred to the decision of the landlord, his approval is to be given or withheld according to his arbitrary wish.

That is laid down in such extremely distinct terms in several passages in the Lord President's judgment, which have been read from the bar, that I do not think it necessary further to emphasise it. But in a matter of this kind it is certainly of great importance that we should adhere to a decision which puts in peremptory and intelligible terms the rule of law which is applicable to cases of this kind, and which will not be altered by some unimportant variation of expression.

Now, in the present case there can be no doubt of this fact, that the present defenders are not approved by the landlord ; and the question I put again is, what is their title to hold under this lease ? Neither under the lease nor under the letter do they meet the condition under which alone an assignee can maintain right to hold the subjects, and that is that he is approved by the landlord.

Now, what is said in the record by the defenders as to the position of the landlord ? They say it is very bad of him not to approve of the tenant. That the liquidator proceeded to sell the subjects on the footing that he would present an eligible tenant, and that he has presented such an one. I am perfectly willing to accept unreservedly all that can be said in praise of the defenders. I take the view that Lord Breadalbane, for reasons good or bad unconnected with the status or responsibility of these gentlemen, does not want them, but prefers somebody else ; and I ask how does the fact that they have been the highest bidders at the sale, but are not approved by him, put them in the position of being in the sense of this lease tenants approved by the landlord ? It may be that the liquidators who entered into this bargain may have some cause of complaint against the landlord. Of that I say nothing. We have nothing to do with it, but with the question merely whether the defenders who claim possession of this quarry are entitled to it under the lease and this

No. 30. letter; and I say they do not possess the essential qualification, viz., of being
 Nov. 16, 1893. assignees approved by Lord Breadalbane.
 Marquis of Therefore it seems to me that the Lord Ordinary's judgment cannot stand.
 Breadalbane His Lordship thinks that Lord Breadalbane "was bound to consider the assignees
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Now, can that be said, after the decision in the *Duke of Portland's* case, to represent the law? It seems to me to be a revival of the doctrine which the Lord President in that case pronounced to be finally exploded, viz., the doctrine that the landlord was not entitled arbitrarily and out of mere caprice to withhold his consent.

If I am right in thinking that that doctrine of the Lord President's applies to a case where the landlord has reserved right to approve or disapprove as regards the individual presented to him, as well as on the general question of assignation, then it is plain that the Lord Ordinary's judgment is not reconcilable with the settled law upon the subject.

The subject-matter of proof, the Lord Ordinary says, would be whether Lord Breadalbane "rejected the defenders simply because he had come under engagements to another applicant."

I cannot see how the result of that proof, one way or other, would put the Messrs Whitehead into the position of being approved by Lord Breadalbane.

Accordingly, I think the action against them for reduction and removing must prevail.

LORD ADAM.—I am of the same opinion. The question is whether the Messrs Whitehead have a good title to retain possession of these quarries. They plead their possession under the assignation, but no assignation in their favour can be a valid or good title of possession unless they can shew that it has the approval of the landlord.

As matters stood under the original lease, assignees were expressly excluded, but in the letter on which the defenders found the expression is that the assignees must be approved by the landlord. It was put to us by Mr Johnston that if we were called upon to construe the meaning of this expression for the first time, we should probably come to the conclusion that the landlord is bound to consider and reject the assignees on their merits under a lease expressed in such terms, and that the landlord would not have a right capriciously to reject such an assignee, but would be bound to give his reasons for so doing. That may be so,—I do not say that it is,—but the answer is that the parties to that lease did not come to consider it for the first time. No doubt Lord Breadalbane was advised as to the meaning of the expression as determined by previous decisions.

Now, I agree with your Lordship that it is not to be questioned in our law that where you have an exclusion of assignees except with the consent of the landlord, that gives him an absolute right to reject without reason assigned the person tendered to him.

I agree with your Lordship that Lord Breadalbane did not mean to make any difference in his powers in the matter by using a different expression in the letter from what was used in the lease, because to my mind they mean the same thing.

It seems to me that where an assignee must be a person approved by the

landlord, that is tantamount to an express exclusion of assignees. What is the difference where a landlord is bound to give no reason for non-approval between saying that assignees are excluded, and saying that they shall only be allowed with the approval of the landlord? The one means exactly the same as the other.

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Even assuming that by refusing or by not considering these proposed assignees the landlord may have been guilty of breach of contract with the liquidators of the company, and may be responsible to them in damages, I cannot see how that can entitle these assignees to say that they have his consent and approval.

LORD M'LAREN.—I am unwilling to disturb an interlocutor of the Lord Ordinary allowing proof where he has felt that further inquiry is necessary, but in this case it appears to me that a relevant case for reduction has been stated by Lord Breadalbane, which entitles him to decree unless met by a proper counter case, and that no relevant counter case has been stated. In other words, if all the defenders' averments were admitted or proved, they would not avail to obviate the conclusions of the action. The case for the proprietor is that under the lease of the Ben Cruachan Granite Quarries he accepted the tenants as personally bound in terms which are very distinctly expressed, viz., assignees are expressly excluded except with the proprietor's consent and approval. The company having gone into liquidation, the proprietor gave a qualified assent to a sale, subject to his approval of the purchaser. The purchaser not having obtained his approval, the proprietor desires that the lease should be reduced and the possession terminated. Now, the right of the tenant under this lease was a right to assign entirely dependent on the pleasure of the landlord. When the liquidator approached Lord Breadalbane, and applied for permission to sell, his Lordship might have said,—“I object to your selling on any conditions; I do not intend that the property should go to your assignee, as I mean to look out for a tenant for myself.” That was his legal position, because I think the result of the *Duke of Portland's* case is that where an exclusion of assignees is qualified by the expression “except with the approval of the landlord,” the reference to the approval of the landlord has no legal effect at all. Of course even where assignees are in terms excluded, it is always open to the landlord, on the tenant's application, to accept an assignee, and this is all the right which a tenant has under a reference to the landlord's consent or approval, because the landlord is not bound to give his reasons for withholding his approval, nor does it appear to me that he need have any reasons.

But then I am not quite prepared to apply that strict rule of construction to an undertaking given by the landlord or those representing him when the matter passes into the phase of negotiation. In this case the landlord has not taken up the extreme position that he would give no consent to an assignee. On the contrary, the letter of Lord Breadalbane's agents, which is founded on in the pursuer's fourth condescendence, and which is printed elsewhere, states that Lord Breadalbane is willing that the creditors should take some benefit by the sale of the lease, but that the sale must be subject to certain conditions, one of which is that the selection of a purchaser is to be subject to his approval.

Now, I do not think that it was open to the pursuer, after having authorised that letter, to stop the sale by saying, “I have changed my mind, and give you notice that I shall not consent to any sale.” I think the right of the liquidator under that letter was a right to sell on the chance that the purchaser would be

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approved, and that the landlord came under a corresponding obligation to consider any name that might be submitted to him. I do not say that he was bound to give his reasons any more than he would be in the ordinary case, but to my mind there is a distinction between the two cases, because having agreed to a sale for the benefit of the creditors, I think that Lord Breadalbane could not refuse at least to consider the qualifications as tenant of any nominee who might be proposed by the liquidator.

Now the reason why I have gone over the points of the case, following very much the line of illustration which your Lordships have taken, is that if, as was suggested at the bar, Lord Breadalbane after authorising the letter of 11th March had gone and let the property to another tenant without awaiting the result of the sale, I should have thought there was here a relevant case for inquiry, because I think the pursuer would not have been within his legal rights if, by assigning to another, he had disabled himself from giving fair consideration to the claim of the purchaser from the liquidator. But then I do not find any statement raising a defence of this kind within the defenders' case. In answer to an inquiry as to the ground of defence in this relation we were referred to statement 7 of the defences—"The true reason of the pursuer's refusal is this—that he has come under some obligation to give a lease of the quarry to Mr Anderson or his nominees."

Now I think that averment quite consistent with this meaning, that having considered the sale to the Messrs Whitehead and rejected it, Lord Breadalbane came under an obligation to Mr Anderson, and of course if that is the meaning of the statement, it is no defence to this action. If it had been intended to make such a case as according to my suggestion would be a good answer, viz., that the landlord had disabled himself from giving his consent, I think it was incumbent upon the defenders to make this quite clear, and to put the facts before us so far as they had come to their knowledge.

For these reasons, which are in all essential respects identical with those of your Lordships, I think the interlocutor should be recalled, and decree given in terms of the conclusions of the summons. I give no opinion as to what right the liquidator may have with reference to any possible future sale, because that case is not before us.

LORD KINNEAR was absent.

THE COURT recalled the Lord Ordinary's interlocutor and reduced, declared, decerned, and ordained in terms of the conclusions of the summons.

DAVIDSON & SYME, W.S.—ALEXANDER MORISON, S.S.C.—R. C. GRAY, S.S.C.—Agents.

No. 31.

ROBERT MACDOUGALL, Pursuer (Respondent).—*Comrie Thomson*—*W. Thomson.*

Nov. 21, 1893.
Macdougall v.
M'Nab.

RICHARD M'NAB AND ANOTHER, Defenders (Reclaimers).—*Guthrie Smith*—*J. A. Reid.*

Reparation—Wrongous use of diligence—Bank—Cheque.—Young, a writer in Glasgow, who had been instructed by a client to recover the sum due by Macdougall under a decree on which a charge expired on 29th December, on that day wrote to Macdougall, who lived in Dunoon, that unless the debt was paid next day a poiding would be executed, and payment not having been made, he, on 31st December, instructed a sheriff-officer to execute a poiding of

Macdougall's furniture in Dunoon. On 3d January Young received from Macdougall a cheque for the amount due, but on presenting it at the bank he was informed that there were no funds to meet the cheque. He accordingly returned it to Macdougall. Macdougall returned the cheque to Young next day, 4th January, with a letter intimating that there were now funds in the bank. The cheque reached Macdougall's office about two o'clock on the 4th January, when he was absent on business, but his clerk ascertained from the bank that there were funds to meet the cheque, and Young was informed of this on his return to his office after bank hours that day. Next day, at about eleven o'clock, he presented the cheque (which was crossed) at his own bank with instructions to have it specially presented at Macdougall's bank. This was done, and Young was informed about two o'clock that day that the cheque had been paid. He then wrote to the sheriff-officer countermanding the pointing. It had, however, been executed about one o'clock that day. Founding on these circumstances, Macdougall brought an action of damages for illegal pointing against Young and his client.

The Lord Ordinary (Kincairney) found Macdougall entitled to damages, on the ground that, in the circumstances, it was Young's duty on the afternoon of the 4th January either to countermand the pointing or to return the cheque.

On a reclaiming note, *held (rev. the judgment of the Lord Ordinary)* that Young's retention of the cheque on 4th January imported merely the duty of duly presenting it for payment, and, if paid, of duly countermanding the pointing, that he had in fact so presented the cheque and countermanded the pointing, and therefore that the defenders fell to be assoilzied.

On 30th March 1893 Robert Macdougall, property-agent, Glasgow, and residing at Dunoon, brought an action of damages for illegal pointing against Richard M'Nab, plumber, Innellan, and T. C. Young, writer, Glasgow.

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cairney.

The facts, as ascertained by a joint minute of admissions, were as follows:—M'Nab held a decree for £45, 9s. 5d. against Macdougall, and instructed Young to recover its amount. Young caused a charge to be given to Macdougall, which expired on 29th December 1892. On that day he wrote to Macdougall intimating that the charge expired that day, and informing him that unless payment was made by twelve o'clock next day he would require to give instructions to have a pointing executed. Payment was not so made, and on 31st December Young instructed a sheriff-officer to point the furniture in Macdougall's house at Dunoon.

On 3d January Young received the following letter from Macdougall:—"Herewith please find cheque for £45, 9s. 5d., being amount decreed for, with expenses herein, the decree for which please send to me at your convenience." This letter, although dated 31st December (Saturday), was not posted until 2d January. On inquiry at the British Linen Company's Bank, on which the cheque was drawn, Young was informed that there were no funds to meet it. He therefore, on the same day, telegraphed to Macdougall "cheque presented—no funds," and sent a letter to the same effect, enclosing the cheque. Young also, on 3d January, wrote to the sheriff-officer informing him about the cheque, and adding that he supposed "you will have executed the pointing ere this. If not, please do so at once." On the afternoon of the same day, after sending off these letters, Young received a letter from Macdougall, dated that day, explaining why no funds had been provided for the cheque, and requesting that the cheque should be held over until the next day, the 4th, when funds would be provided. Young replied that the cheque had been already sent off.

On 4th January Young received the following letter, dated that day, from Macdougall:—"I am sorry there should have been any hitch about the cheque. Ample funds now at credit, and I return you cheque, which

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please present again." This letter reached Young's office about two o'clock, when he was absent at a funeral. His clerk went to the bank, and ascertained that there were then funds to meet it. Young returned to his office about five o'clock, when he was informed of these circumstances. He took no steps that day with reference to the poiding. The cheque was a crossed cheque.

On 5th January, between ten and eleven o'clock in the morning, Young sent the cheque to his own bank, the Commercial Bank of Scotland, with a request that it should be presented "specially" at the British Linen Company's Bank. In compliance with that request it was presented about that hour, and paid. The officials of the Commercial Bank did not inform Young of the payment until two o'clock on the 5th, and Young then wrote to the sheriff-officer intimating the settlement, and desiring that the decree should be returned. The poiding had, however, been executed at one o'clock of that day.

The pursuer pleaded;—(1) The defenders having wrongfully poided the pursuer's furniture, they are bound to compensate him for the loss and injury thereby sustained, with expenses. (2) The pursuer, at the time of the poiding, not being indebted to the defender M'Nab in any sum, the use of the diligence complained of was unjustifiable.

The defenders pleaded;—(3) The whole procedure under the said decree having been legal and regular, the defenders should be assolizied. (5) The pursuer having by his own actings caused the proceedings complained of, the defenders should be assolizied.

On 29th July 1893 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Repels the pleas in law for the defenders: Finds that on 5th January 1893 the goods of the pursuer were wrongfully poided on the instruction of the defenders, and that the defenders are liable in damages in respect thereof: Assesses said damages at £20, in terms of the joint minute, No. 43 of process, and decerns against the defenders for payment thereof to the pursuer: Finds the pursuer entitled to expenses," &c.*

* "OPINION.— . . . While I think the question a very narrow one, I have formed the opinion that the poiding was wrongous, and that the pursuer is entitled to decree for £20, the amount at which the parties have assessed the damage by the joint minute. I think it was the duty of Young to countermand his instructions to poid on the afternoon of the 4th of January, after he had received the cheque for the second time, had ascertained that funds had been placed in the pursuer's bank to meet it, and had retained the cheque in order to present it for payment. I am not prepared to decide against the defenders on any other ground.

"No question has been raised as to the amount of the cheque. It has not been said that it was insufficient because it did not include the expense of the diligence. There is no point of that kind in the case. Had the amount of the cheque been paid in cash, that would admittedly have been sufficient.

"I think the cheque was negotiated with due despatch. Young cannot be blamed for delay in obtaining payment.

"Young was quite within his rights when, on the 3d of January, he returned the cheque, and renewed, as he did, his instructions to the sheriff-officer to proceed with the poiding.

"He would have been within his rights had he returned the cheque again on the 4th. But he did not do so. He cannot be blamed for not having been in his office from one until five o'clock. But when, at five o'clock, he was informed that the cheque had been returned, he was, I think, put to consider and decide whether he would return it or retain it.

"Had the pursuer at that time sent payment in cash, I do not think it could have been disputed that Young would have been bound immediately to certify the sheriff-officer, and to instruct him not to poid, if he had not already

The defenders reclaimed. The arguments of the parties sufficiently appear from the opinions of the Lord Ordinary and the Court. No. 31.

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done so ; and if this had been a case of cash payment, I think there can be no question that the defenders would have been liable in damages although they were not aware that the diligence had been executed after payment. Some material difficulty in countermanding the diligence might make a difference. A question might be raised if it could not be done except by telegram, but in this case there was no difficulty.

“But I agree in the contention for the defenders that this cheque was not equivalent to a payment in cash. It did not discharge the debt, and, had it been dishonoured, the debt would have remained due, and the diligence would have been available. The case of *Davis v. Gyde*, 27th January 1835, 2 Adol. and Ellis, 623, may be an authority to that effect, although the grounds of judgment are in part founded on technical English rules, the reasonableness of which has not been apprehended in the Scotch Courts. The American case of *Burnet v. Smith*, July 1885, 64 American Dec. 290, quoted by the defenders, is to the same effect. But the same law is laid down in Bell's Prin. sec. 127, and I see no reason to doubt it.

“The defenders further maintained that nothing short of a tender in money, or what was equivalent to money, could oblige a creditor to abstain from or stop his diligence. That proposition may be admitted generally, but cannot be affirmed without qualification. The defenders quoted in support of it *Inglis v. M'Intyre*, 14th February 1862, 24 D. 541. But I do not think that case in point. It was there held that a tender of payment made to the sheriff-officer, coupled with a condition which the debtor had not a right to adject, did not oblige or entitle the sheriff-officer to stop the execution of his diligence.

“Although a cheque is not equivalent to a payment in money, it is not, if it be retained, to be disregarded entirely. ‘Until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, or to sue the debtor as if he had given no security’—per Lush J. in *Currie v. Misa*, 1875, L. R., 10 Exch. 153.

“It appears to be settled in England that a cheque or bill accepted, although it be not absolute payment, is conditional payment ; the condition being that it shall become absolute payment when honoured, and that, on the other hand, the debt shall revive if the cheque be not honoured. *Currie v. Misa*, *supra* ; Byles on Bills, 15th ed., 372 ; Chitty on Bills, 127 ; Chalmers on Bills, 305. I do not know that that principle has been expressed in any Scotch judgment, but I think that I ought, on such a point, to follow the English authorities, there being, so far as I know, nothing repugnant in our own decisions.

“Now, I think it ought to follow that diligence in execution should cease during the time when the cheque or bill bears the character of payment, and apparently, according to the English authorities, the cheque or bill has, as a general rule, that effect.

“But it has not in every case received that effect, and the defenders maintain that it has been decided in England that it does not suspend diligence, and they quoted, as authorities for that proposition, *Davis v. Gyde*, *supra*, recognised in *Belsham v. Buchan*, 1851, 11 C. B. 191, 201 ; and also in Byles on Bills, 374. So far as I have been able to discover, this exception to the general rule has been admitted chiefly or only in questions between landlord and tenant, it being, apparently, held that a landlord is entitled to distrain, notwithstanding that he has received a note or cheque from the tenant. But this exception from the general rule appears to have been deduced from certain distinctions, known in the law of England, but unknown to the law of Scotland, between the degrees of debts of different characters. I have much difficulty in following the reasons for this limited exception to the general principle. I observe that Mr Chalmers suggests the propriety of reconsidering the judgments by which it has been established (*Chalmers on Bills*, 307), and if I can judge from the notes at the close of the American report which was quoted, the exception does not appear to be received in America. It was decided expressly

No. 31. LORD JUSTICE-CLERK.—It is important here to attend strictly to the history of what happened. It appears that an account was due by the pursuer, Macdougall, who is a property-agent in Glasgow, having a house at Dunoon, to the defender M'Nab, a plumber in Innellan, for the amount of which M'Nab held a decree, upon which there was an expired charge. M'Nab instructed the defender Young, a writer in Glasgow, to take proceedings to make the charge good, and Young being so instructed employed a sheriff-officer to make the charge good by poinding. On 29th December Young wrote to Macdougall intimating that the charge expired that day, and that they would require to give instructions to point on the following day unless the amount were paid by twelve o'clock. On the 31st Macdougall wrote to Young in these terms:—"Herewith please find cheque for £45, 9s. 5d., being amount decerned for, with expenses herein, the decree for which please send to me at your convenience." Now, that letter, although dated 31st December, did not reach Young until the 3d January, as is proved by the post-marks on the envelope. On inquiry at Macdougall's bank Young was informed that there were no funds to meet the cheque, and accordingly he telegraphed to Macdougall,—“Cheque presented, no funds,” and sent a letter to the same effect, enclosing the cheque. Now, that to the ordinary business mind was a very unsatisfactory state of matters. But on 4th January Macdougall writes to Young,—“I am sorry there should have been any hitch about the cheque. Ample funds now at credit, and I return you cheque, which please present again.” So that Young received the cheque back again with a request to present it again. It so happened that when this letter enclosing the cheque reached Young's office he was absent at a funeral, and he did not return to the office until five o'clock in the afternoon, after bank hours. His clerk, however, had gone to the bank and had ascer-

in *Judge v. Fiske*, 1844, 42 American Decisions, 380, that the acceptance of a promissory-note suspends the landlord's right of distress.

“I do not say that the acceptance of a note for rent would affect any security which the landlord might have. It has been held not to affect his right of hypothec—*Swinton v. Stewart*, 25th June 1766, 5 B. S., 477. But the question now is as to a diligence in execution.

“The rule adopted in England seems in accordance with reason and principle. I cannot imagine that if a creditor accepts a bill, say at a few days' date, for his debt, as conditional payment of it, he could immediately commence diligence in execution, or (which is the same thing) would not be bound to stop diligence already ordered while the bill was current, and a bank cheque is by definition a bill of exchange drawn on a banker, payable on demand (*Bills Act*, 1882, section 73). It seems to me that when a debtor's bill or cheque is not returned, he is entitled to think himself safe from diligence until the bill is matured or the cheque presented. If the pursuer's cheque had been returned immediately, he would have had an opportunity of paying in money, and so of avoiding the damage to his credit caused by the poinding.

“It is true that, if this be the effect of retaining a cheque, the creditor or his agent who holds a decree with an expired charge incurs a certain risk, but if he has no confidence in his debtor his remedy appears to be to refuse to have anything to do with the cheque.

“Entertaining these views, I do not require to consider whether Young might or ought to have done more than he did on the 5th of January. It was no doubt possible for him to have got the money into his hands by ten or eleven o'clock on the morning of that day, and he might then have stopped the poinding by telegram. But on the whole, if I had held that it was not his duty to countermand on the afternoon of the 4th of January, I think he could not be subjected in damages for anything he did or failed to do on the 5th.”

tained that there were then funds in the bank to meet the cheque, but Young, having returned to the office after bank hours, of course could not get the money that day. In these circumstances he had to consider what he would do. He came to the conclusion that he ought not to take any steps until he knew what the result of presenting the cheque next day might be. His clerk, no doubt, had ascertained when he called on the 4th that there were then funds in the bank, but there was nothing to prevent someone else from coming forward and laying an embargo on these funds, and thus making them unavailable to the defender before the cheque could be presented. It was reasonable, therefore, that he should come to the conclusion not to stop the diligence until he knew how the cheque stood and had got the money. It is indeed clear that he was under the belief that the poiding had been already executed, for he on 3d January had written to the sheriff-officer a letter in which he said,—“We suppose you will have executed the poiding ere this.” It is quite plain, therefore, that he saw no ground for taking steps on the 4th, as he evidently thought that the poiding had already been carried through. When the cheque was presented on the 5th it was found to be good for the money, and he accordingly wrote on that day to the sheriff-officer informing him that the matter had been settled. It turned out that the poiding was not executed until one o'clock on the 5th, and it was said that he might have telegraphed to the officer to stop the poiding. But his belief that the poiding had been already executed was, I think, sufficient to account for his not telegraphing, and in any case, I do not think that he was bound to telegraph.

In these circumstances, I am unable to see anything in Mr Young's conduct sufficient to subject the defenders in damages for the wrongous use of diligence. I say nothing against Macdougall, although his position was, unfortunately for him, suspicious. But it is clear that Young was bound to do his best for his client. It was to be regretted that he did not get the cheque till five o'clock on the 4th, but that did not arise from anything out of the ordinary course of business. It was a pure accident, for which I am unable to hold him responsible. On the whole matter I think that the interlocutor of the Lord Ordinary should be recalled and the defenders assoilzied.

LORD RUTHERFURD CLARK.—I am of the same opinion. The Lord Ordinary holds the defenders responsible on no other ground but this, that when Mr Young on his return to his office on the afternoon of the 4th January ascertained from his clerk that there were funds in the bank to meet the cheque, it became his duty at once to countermand the diligence. I am unable to assent to that view. I do not think that he would have been doing his duty to his client if he had so acted. Although he was told that there was money in the bank when the clerk called, there was no certainty that it would be available to meet the cheque when it was presented next morning. I think that he was entitled to allow the diligence to proceed until he got the money.

LORD TRAYNER.—I am of the same opinion. The Lord Ordinary thinks—and I agree with his Lordship—that no fault is to be attributed to Mr Young down to five o'clock on the afternoon of the 4th January. But the Lord Ordinary's view is that it then became the duty of Mr Young either to return the cheque or to countermand the diligence. I am unable to agree with the Lord Ordinary in this opinion. I think that it is quite plain that Mr Young did not retain the cheque on the afternoon of the 4th January in the sense that he

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No. 31. accepted it as equivalent to money. He had got a cheque, which he had already unsuccessfully presented for payment, with a request that he would present it again. He does present it with due despatch next day and it is paid, but I think that he would have been wanting in his duty to his client if he had accepted it on the 4th as equivalent to payment, and I concur with Lord Rutherford Clark in thinking that he was not bound to countermand the diligence because he had ascertained from his clerk on the 4th that there were funds in the bank to meet the cheque when the clerk called there, for there was no certainty that when the cheque was duly presented next day there would still be funds to meet it.

LORD YOUNG was absent.

THE COURT recalled the interlocutor of the Lord Ordinary and assolized the defenders.

THOMAS M'NAUGHT, S.S.C.—ADAMSON & GULLAND, W.S.—Agents.

No. 32. JOHN BLAIKIE AND OTHERS, Petitioners.—*Ure—Cook.*
 Nov. 21, 1893. ARCHIBALD COATS AND OTHERS, Respondents.—*Dickson—M'Lennan.*
Company—Rectification of register—Shares allotted as promotion money—
Petition—Competency—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 35.—Shareholders of a company presented a petition under the 35th section of the Companies Act, 1862, for rectification of the register of the company by deletion therefrom of the names of certain shareholders, in respect that their shares had been illegally allotted to them as promotion money. The respondents lodged answers in which they denied the petitioners' allegations, stated facts and circumstances tending to shew that they had given good consideration for their shares, and pleaded that the petition was incompetent.

The Court held that petition under the 35th section was an inappropriate and inconvenient way of dealing with the statements contained in the petition and answers, and sisted process in order to enable the petitioners to raise an action of reduction in ordinary form.

Observed (*per* Lord M'Laren) that the jurisdiction conferred by the 35th section was not intended to be substituted for the ordinary jurisdiction of the Court, where the matters in controversy depended upon fact, and raised questions extrinsic to the proper object of the petition—the rectification of the register.

1ST DIVISION. UPON 14th October 1893 John Blaikie, James Moore Dickey, and William Niven, shareholders in the British Mexican Railway Company, Limited,* presented a petition under section 35 of the Companies Act,†

* One of the objects of the company as provided in the memorandum of association was,—“To adopt and carry into effect, either with or without modification, an agreement dated 11th May 1892 entered into and made between James Moore Dickey . . . as representing and on behalf of the Chihuahua Eastern Railway Company . . . and Charles Knight Rutherglen . . . on behalf of this company.”

† The Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 35, provided,—“If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, . . . as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court

1862, for rectification of the register of shareholders by the deletion of the names of Archibald Coats, George Coats, James Adam, Neil Buchanan, and James Hamilton Dunn, as holders of fully paid-up shares of the company, of the nominal value of £128,000. No. 32.
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The petitioners set forth that the British Mexican Railway Company, Limited, was duly formed and registered in August 1892, the subscribers of the memorandum and articles of association being the five respondents and a Miss Jennie Young, and that by deed of adoption and confirmation, dated 9th November 1892, the contract and agreement referred to* in the memorandum of association, as of date 11th May 1892, was adopted, ratified, and confirmed by the company, the whole of the respondents and Miss Young being at this time directors of the company.

The petitioners further averred that the respondents were promoters of the company, and that while "the said contract and agreement bore *ex facie* that the consideration for the sale and transfer therein contained should be £300,000, payable in fully paid shares, as therein mentioned, that did not represent the real transaction between the parties. The true price for the said sale and transfer was only £171,000, payable in 17,100 shares of £10 each representing that amount. Messrs Archibald Coats, George Coats, and the other promoters desired that the transaction should be carried out in name of Rutherglen, on the footing that the nominal price to be paid for the said sale and transfer should be 30,000 shares of the company, while Dickey should undertake to reconvey to the promoters the 12,900 shares representing the difference between the price nominally and the price really paid to the vendors. Of these 12,900 shares Messrs Archibald and George Coats were to get 6250 shares each, and the other promoters 100 shares each. Mr Dunn accordingly prepared an agreement between Mr George Coats on behalf of the promoters, and Mr Dickey on behalf of the vendors, giving effect to this

that the register may be rectified; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained: The Court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the Court, if a Court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by 'The Common Law Procedure Act, 1854,' shall lie."

* Under this contract and agreement the petitioner Dickey, as representing and on behalf of the Chihuahua Eastern Railway Company, sold to Rutherglen, as trustee for the British Mexican Railway Company, a contract and concession from the Executive of the Republic of Mexico for the construction of a railroad and relative works, with the lands, rights of way, and other rights and interests therein described, and also the vendor's right to and interest in the subsidies granted by the Mexican government under the concession to the extent of 7000 dollars for each kilometre constructed.

It was provided by the contract and agreement that the consideration for the sale and transfer therein contained should be £300,000 sterling, to be paid and satisfied by delivery to the vendors or their nominees of 30,000 fully paid-up shares in the British Mexican Railway Company of £10 sterling each.

No. 32. arrangement, and this agreement was signed of even date with the said contract and agreement of sale.

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"The said shares were not issued to James Moore Dickey, nor by him transferred in manner above provided; but the said James Moore Dickey, by letter, agreed to the allotment being made to the parties direct, and they were accordingly entered upon the register, and still stand there, as proprietors of fully paid shares in the said company to the amount above specified."

They further averred that they had recently become shareholders, and learned that the above transaction was illegal; that the respondents were all present when the price of £300,000 was fixed, and that the illegal act was entirely unknown to the petitioner Blaikie when he acquired his shares. "No payment was made by any of the said parties for said shares in money or money's worth, and the transaction by which they became holders thereof was purely fictitious. The allotment to them was not authorised by the memorandum or articles of association, or any other contract made before the issue of said shares, and was in violation of the provisions of the Companies Acts, and of the duties of the said parties as promoters of the company. . . . The petitioners do not ask that the name of any other person should be placed upon the register as holder of the said shares. On the contrary, they contend that the issue of the said shares was wrongful and illegal, and that the shares fall now to be regarded as unissued capital in the hands of the company."

Answers were lodged on behalf of the company and of Archibald and George Coats, James Adam, Neil Buchanan, and James H. Dunn.

The respondents set forth a number of complicated transactions with the view of shewing (1) that they were not promoters of the company, (2) that they gave value for their shares, and (3) that the petitioners were barred in the circumstances.

The respondents pleaded, *inter alia*, that the petition was incompetent, that the petitioners' statements were irrelevant and unfounded in fact, and that they had no title to sue.

Argued for the petitioners;—The application was competent. The jurisdiction given by the 35th section to the Court for purposes of rectification of company registers had been the subject of much discussion in England.¹ It was true that in the case of *Ward & Henry*² it had been laid down that the scope and object of the section was solely to provide for correction of errors in the register occasioned by the default of the company and in some English cases, such as *Askew's*³ case, the jurisdiction had been held to be excluded where there was complication, or where there was a question of specific performance, or where the case was more appropriate for trial by jury. But in the latest case,⁴ Lord Cairns' *dictum* had been criticised, and a wider scope had been given to the section. It might be taken as now settled by that case that it was entirely in the discretion of the Court whether a petition between members and alleged members could be dealt with in an application of this summary kind. If in the words of the latter part of the section, "default was made" in entering a shareholder's name on the register from (as here) insufficient cause, then the Court was entitled to remove him, and in doing so to consider any question of title. The present case was in any view of it distinguished from the older English cases, for there was here no complexity. The respondents were not called upon to pay damages; all that was asked

¹ Buckley on the Companies Acts (6th edn.), pp. 98 and 99.

² *Ward & Henry's case*, 1867, L. R., 2 Ch. App. 431, per Cairns, L. J., 440.

³ *Askew's case*, 1874, L. R., 9 Ch. App. 664.

⁴ *Ex parte Shaw*, 1877, L. R., 2 Q. B. D. 463.

was that their names should be deleted from the register. The remedy was a shorter and more convenient one than an ordinary action of reduction, and the Court had thus dealt with cases for rectification of the register in Scotland.¹ The remedy was not excluded by reason of the shares being fully paid up,² and was the appropriate one.³ The challenge had been made as soon as the fraud was discovered, and before any of the shares had been transferred by the respondents. These shares thus ought to be regarded as unissued capital, and in respect of it the names fell to be deleted from the register.

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Argued for the respondents;—The section conferred no jurisdiction to decide a controversy between persons each of whom alleged himself to be a member of a company which took no part in the dispute. It applied only to a controversy between a company on the one side and an alleged member on the other. It occurred in the second part of the Act of 1862, which dealt with the preparation of and keeping up of the register, and Lord Cairns' *dictum* in *Ward & Henry's* case was sound to the effect that petitions under the 35th section were limited to such questions. There was no case in which promotion money had been recovered in a summary manner. The case of *Ex parte Shaw* was really in the respondents' favour, for the procedure was only allowed by the Court because all the parties concurred in desiring it. Moreover, the Judges were careful not to controvert the substantial part of Lord Cairns' judgment in *Ward & Henry's* case. In short, the case was not one appropriate for summary procedure. The answers shewed that there was a grave divergence between the parties upon questions of fact which could only be cleared up properly in an ordinary action of reduction with a proper record.⁴

Arguments were also submitted on the questions of title and relevancy, but it is unnecessary further to refer to them, as they were not considered by the Court.

LORD ADAM.—We have had a very full discussion in this case, and the result at which I have arrived is that it is not a case which is appropriate for being tried and disposed of under the 35th section of the Act. From all I have heard it does not appear to me to be a case fitted for summary procedure of this kind. It is a question between shareholders and shareholders; it is not a winding-up or a case of that kind. It is a case raising questions of fraud and other considerations. It appears to me that in such a case the respondent is entitled to a very precise statement of the allegations of fact which he is called upon to meet, and I do not think we have that here. Upon the whole matter, while I do not say the application is incompetent under the 35th section, I say it is not convenient that the case should be tried under that section, or rather that the 35th section is not appropriate to its trial. Therefore I am of opinion that we should, I do not say dismiss the petition, but keep it alive and sist it

¹ *Klenck v. East India Co. for Exploration and Mining, Limited*, Dec. 21, 1888, 16 R. 271; *Chambers v. Edinburgh and Glasgow Aerated Bread Co., Limited*, July 3, 1891, 18 R. 1039.

² *In re Denton Colliery Co.*, 1874, L. R., 18 Equity, 16; *Carling, Hespeler, and Walsh's cases*, 1875, L. R., 1 Ch. Div. 115, per *Ld. J. Mellish*, 126.

³ *McKay's case*, 1875, L. R., 2 Ch. Div. 1; *Pearson's case*, 1877, L. R., 5 Ch. Div. 336; *Anderson's case*, 1876, L. R., 7 Ch. Div. 75; *Weston's case*, 1879, L. R., 10 Ch. Div. 579; *Nant-y-Glo and Blaina Ironworks Co. v. Grave*, 1878, L. R., 12 Ch. Div. 738; *Mitcalfe's case*, 1879, L. R., 13 Ch. Div. 169.

⁴ *Howe v. City of Glasgow Bank*, July 4, 1879, 6 R. 1194.

No. 32. until we see the result of such reduction or other process as the petitioners may choose to raise.

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LORD M'LAREN.—I am of the same opinion. The hypothesis of the 35th section is that when a mistake has been made in entering the name of someone on the register, or in omitting to make the necessary entry, it can be corrected upon the facts being brought under the notice of the Court.

Now, when the right of the party claiming to be put on the register or to be taken off depends on written documents—it may be on a contract to take shares or a contract to transfer shares, or upon the question whether the directors have the power to decline to accept a transferee, or any other consideration which admits of instant verification from documents—it has undoubtedly been the practice to dispose of such questions under an application presented in terms of the 35th section. We have had cases also under that section that depended on proof—I think only where the proof did not involve matter affecting the constitution of the company—especially where, as in the case of the *Aerated Bread Company*, no interest except that of the shareholder making the application was involved. But while I agree with Lord Adam that the terms of the 35th section are so comprehensive that we should have jurisdiction to entertain and determine the merits of this case in the present application, yet that jurisdiction is not meant to be substituted for the ordinary jurisdiction of the Court where the matters in controversy depend upon fact, and raise questions extrinsic to the proper object of the petition—the rectification of the register.

Probably no precise line can be drawn between the cases that are suitable for disposal in a summary form and those which are more appropriate for trial by action of declarator or reduction, but the present case is clearly one which is unsuited for investigation in a proceeding under the 35th section. In the event of the petitioners' allegations being proved, they will doubtless have a right to have the register rectified, and while on that account they are probably entitled to have this petition kept alive in order that the correction may eventually be made, yet I think the facts set forth are such as can only be properly investigated in an ordinary action, and therefore this proceeding ought to be sisted, leaving the petitioners to seek redress in a different form.

LORD KINNEAR.—I do not think it necessary to express or to form any opinion upon the question whether this proceeding taken alone would be a competent remedy to the petitioners, because I quite agree with Lord Adam and Lord M'Laren that it is an extremely inconvenient and inappropriate form of process for trying the questions which are raised between these parties. I think the defender is well entitled to say,—“If my apparent right is to be challenged upon such grounds as are brought out in argument, and not only those set forth in the petition, it ought to be done by an action in the ordinary form.” I quite agree also that since it may turn out as the result of such an action that rectification of the register may be necessary, it is not desirable to throw out the present petition altogether.

LORD PRESIDENT.—I concur, and would merely add that I understand that in keeping alive the application for the contingencies which Lord Kinnear has referred to, we are not expressing any opinion as to the relevancy of the statements in the petition. It is merely that a ministerial act may require to be

done by the Court—namely, to rectify the register, and accordingly it is not convenient that another petition should be presented with that end. We will sist the petition *in hoc statu*, reserving the question of expenses.

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THE COURT pronounced this interlocutor:—"Having considered the petition and answers, and heard counsel for the parties, sists process."

SIMPSON & MARWICK, W.S.—J. MURRAY LAWSON, S.S.C.—Agents.

OWEN MILNE, Pursuer (Respondent).—*Comrie Thomson—M^r Watt.*
JAMES ALEXANDER WALKER AND ANOTHER, Defenders (Reclaimers).—*Jameson—A. S. D. Thomson.*

No. 33.

Nov. 21, 1893.
Milne v.
Walker.

Reparation—Slander—Statements in reply to previous attack—Innuendo—Counter issue.—M. wrote a letter to a newspaper in which, after charging various tradesmen, who had been the contractors for the supply of provisions to a school in Rothesay of which M. was governor with having supplied inferior goods, he stated that he had detected W., who had contracted to supply groceries, in trying to send a different, and, he believed, a cheaper brand of coffee than that contracted for. W. replied by a letter to a newspaper in which he made the following remarks upon M.'s letter:—"Every sentence of this contribution mirrors with startling significance the man M. Meant to be an exposure of a number of Rothesay gentlemen, every line exposes the true nature of the man who wrote it. Perhaps none will feel the sting of the letter so much as those whom he so gushingly thanks in the same breath as he levels his vile statements against so many of our prominent townsmen. . . . If I am able to shew that the statement made as regards myself is a consummate lie, the other statements in M.'s letter may be put down in the same category. I hereby charge this man with a deliberate and wilful untruth contained in what he says with reference to my supplying the school with goods."

In an action of damages for slander by M. against W., and also against the publisher of the letter, the pursuer averred that by the letter the defender had represented that the pursuer "had no regard for truth and was a liar." The Court held (1) that the letter as innuendoed was more than a reply to the pursuer's charge, and that the pursuer was entitled to an issue whether the statement in the defender's letter represented that the pursuer had no regard for truth and was a liar; (2) that the defender was not entitled to a counter issue, whether the pursuer's statement regarding the coffee contract was a lie, as not fully meeting the pursuer's issue.

On 3d October 1892 Owen Milne, who had been for seventeen years superintendent of the Bute Certified Industrial School at Rothesay, was dismissed from his post by a majority of the directors of the school in consequence of certain charges which had been made against him. A report of the meeting was published in the local newspapers.

1st Division.
Lord Kin-
cairney.

On 7th December Milne wrote a letter which was published in the *Rothesay Express*, in which he denied the truth of the charges which had been brought against him, and complained that he had been given no opportunity to rebut them. The letter charged various tradesmen, whom he named, with having supplied the school with provisions of an inferior quality. It contained the following passage about Bailie Walker, one of the directors,—"I notice from the newspapers that Bailie Walker was profuse in his attacks upon me . . . Although a director, he has been a contractor for the supply of groceries to the school. At the commencement of his present contract I detected that he was trying to send a different brand of coffee from what was contracted for, and I believe a cheaper brand, and I had to call upon him to take it back and insist that

No. 33. he adhere to his contract. He did so with a bad grace, and probably this accounts for the animus which he now displays towards me.”
 Nov. 24, 1893.
 Milne v. Walker.

On 10th December a letter from Bailie Walker was published in *The Buteman and Advertiser for the Western Isles*, of which newspaper William Archibald Wilson was the publisher. The letter contained the following:—“Sir,—When Mr Milne rushed into print a few weeks since with statements which on the very face of them bore the impress of apparent untruths, many in the community thought that he would have been advised in his own interest to write no more in the same vicious strain of vituperation, but if he did get such advice he has not benefited by it, as again your mid-weekly contemporary contains two columns of the most extraordinary composition which perhaps has ever appeared in any newspaper. Every sentence of this contribution mirrors with startling significance the man ‘Milne.’ Meant to be an exposure of a number of Rothesay gentlemen, every line exposes the true nature of the man who wrote it. Perhaps none will feel the sting of the letter so much as those whom he so gushingly thanks in the same breath as he levels his vile statements against so many of our prominent townsmen. Perhaps the best way to deal with a person guilty of writing such letters would be to treat him with silent contempt, more especially as there is not an individual named by him, whether directors of the school or shopkeepers who had occasion to expose his methods, who cannot well afford to adopt this course. But silence is sometimes misinterpreted, and if I am able to shew that the statement made as regards myself is a consummate lie, the other statements in ‘Milne’s’ letters may be put down in the same category. I hereby charge this man with a deliberate and wilful untruth, contained in what he says with reference to my supplying the school with goods. He says that at the commencement of the contract he detected me in supplying a cheaper brand of coffee. This is a deliberate lie.”

In consequence of the statements in this letter, Milne, on 7th February 1893, raised an action of damages against Walker and Wilson.

The pursuer averred;—“The letter falsely, maliciously, and calumniously represents, and was intended by the writing and publication thereof to represent, that the pursuer had no regard for truth, and was a liar.”

The defenders admitted writing and publishing the letter complained of.

They pleaded, *inter alia*;—(1) The statements of the pursuer are irrelevant, and insufficient in law to support the conclusions of the action. (4) The said letter being a fair reply to the attack made by pursuer in the public prints upon the writer thereof, and having been published in good faith, and upon a matter of public interest, no action lies for its publication. (5) *Veritas*.

The pursuer proposed the following issue for the trial of the cause against both the defenders,—“Whether the said statement is, in whole or in part, of and concerning the pursuer, and falsely and calumniously represents that the pursuer has no regard for truth and is a liar, or makes similar false and calumnious representations of and concerning the pursuer, to the loss, injury, and damage of the pursuer?”

The defenders proposed this counter issue,—“(1) Whether pursuer’s statement in his letter published in the *Rothesay Express* newspaper of 7th December 1892, that he had detected the defender Walker, at the commencement of his contract for the supply of groceries to the Bute Certified Industrial School at Rothesay, trying to send a different and cheaper brand of coffee than what he had contracted to supply was a lie?”

On 18th July the Lord Ordinary (Kincairney) approved the issue for No. 33. the trial of the cause, and disallowed the proposed counter issue.*

The defenders reclaimed, and argued;—The pursuer was not entitled Nov. 24, 1893. *Milne v. Walker.* to issues here, for by his letter of 7th December he had provoked an attack and must expect a sharp retort.¹ In any view, the letter complained of would not bear the innuendo sought to be put upon it. The pursuer was, it was true, stated in the letter to have told lies, but he had

* "OPINION.— . . . The first question arising in the present case is, whether the pursuer is entitled to innuendo the portion of Walker's letter of 10th December, quoted in the first schedule, as representing that the pursuer Milne is a person who has no regard for truth and is a liar. I am of opinion that the innuendo is legitimate.

"The letter as I read it asserts that Milne's statements about Walker were consummate and deliberate lies. If that had been all which the letter said, it would not, in my opinion, have warranted the innuendo. But then the letter further says that Milne had made 'vile statements' against many prominent townsmen. What these vile statements were I do not know; and then he says that if the statement about himself were shewn to be a lie, the other statements might be put down in the same category. That apparently means that these vile statements were deliberate lies. Further, he says that every sentence of Milne's letter 'mirrors with startling significance the man Milne.' This language is figurative, but it is not extravagant to represent it as meaning that these vile statements, which were consummate and deliberate lies, were characteristic of Milne, and what is that but asserting that Milne had no regard for truth and was a liar? I therefore consider the innuendo admissible.

"To publish of a man in the newspapers that he has no regard for truth and is a liar is certainly *prima facie* actionable.

"But it is said that this part of the letter complained of is a fair reply to Milne's letter charging Walker with dishonestly furnishing inferior goods, and that therefore on the authority of *Gray v. The Society for the Prevention of Cruelty to Animals*, 18th July 1890, 17 R. 1185, it would not warrant any action. I understand the law on that subject to be that publications in answer to a public attack, meeting that attack and vindicating the character of the person attacked, are not actionable; but I also understand that this privilege does not extend to charges unconnected with that reply or vindication. If, for example, A should charge B with theft, a denial by B of the charge would not warrant an action of damages by A however vigorous or gross the language might be in which B's denial was couched. But if B should go on to charge A with theft, that would be actionable, and would not be protected or privileged to any extent on account of A's previous attack.

"In this case Walker was entitled to deny Milne's charge and to do so in whatever language he might think most becoming. But when he went on to charge Milne with having told other lies, it appears to me that he went beyond the bounds of fair reply and retort, and therefore out of the bounds of privilege. My opinion, therefore, is that the case of *Gray* does not apply, and that the pursuer is entitled to make the present demand.

"And because I think that Walker's charge goes beyond the bounds of fair retort and of privilege, I think that the pursuer is not bound to put malice in his issue. But I do not express any opinion on the question whether ultimately he may be held bound to prove malice.

"I think that the defender's first counter issue must be disallowed as not coming up to the pursuer's issue. I do not affirm that an issue of *veritas* must in all cases echo the innuendo or come up exactly to the pursuer's issue. But it must, I think, assert the truth of that part of the accusation complained of which is slanderous and actionable—*Bertram v. Pace*, 7th March 1885, 12 R. 798."

¹ *Gray v. Society for Prevention of Cruelty to Animals*, July 18, 1890, 17 R. 1185.

No. 33. not been called a liar, and even if he had been, that was not actionable.¹ It was a complete straining of the terms of the letter to say that they amounted to an assertion that the pursuer was a habitual liar. The language used may have been vehement, but it was in the circumstances justified. Even if an issue were granted, malice must be put into it. The counter issue should have been allowed. The defenders were willing to amend it by inserting the adjective "deliberate" before "lies," but they were not ready, nor could they fairly be asked, to take upon themselves the burden of proving that the statements made by the pursuer in his letter about other people were lies, or that the pursuer was a liar by habit and repute. A counter issue need not echo the *ipsissima verba* of the issue. It was sufficient if it substantially met, as it did here, the substance² of the pursuer's charge. The case of *Bertram v. Pace*,³ founded on by the Lord Ordinary, had no application, because there the counter issue was disallowed on the ground that it did not impute dishonesty to the pursuer, and therefore did not cover the alleged slander.

Nov. 24, 1898.
Milne v.
Walker.

Argued for the pursuer;—The letter was capable of the innuendo put upon it, and the issues must be allowed. The defender Walker was perfectly entitled to reply to the charge brought against him of cheating, but he was not entitled to proceed to make an attack on the pursuer's general character. Any privilege there was only extended to such retorts as were fairly an answer to the previous attack.⁴ Anyone reading the letter complained of would receive the impression that the writer intended to convey the meaning that the pursuer was a person addicted to the vice of lying. The counter issue was clearly inadmissible. It must substantially meet the pursuer's issue, and this it did not.

At advising,—

LORD PRESIDENT.—If it had been clear that the passage in the first schedule could not be read as meaning more than an emphatic and indignant denial of the charge brought against the defenders in the matter of the coffee, no issue could have been allowed. But the pursuer says that the passage does mean more,—that, not content with repelling the accusation against himself, the defender goes out of his way to accuse the pursuer of general mendacity. At this stage we have not to determine which of those two readings is the true one. That will be for the jury to say, and it is quite an open question. But it being an open question,—the language admitting of either construction, according to the surrounding facts,—I do not think that we can refuse to let the pursuer go to trial. I think that the first and second issues may be approved as they stand.

In this view, it is plain that the counter issue will not do. It ignores the whole sting of the pursuer's issues. If the pursuer complained merely that his accusation of the defender had been called a lie, this counter issue would have been very appropriate; but then in that case we should not have given the pursuer an issue at all.

I understood the defenders' counsel to state that they were not prepared to

¹ *Watson v. Duncan*, Feb. 4, 1890, 17 R. 404.

² *Carmichael v. Cowan*, Dec. 19, 1862, 1 Macph. 204, 35 Scot. Jur. 95; *Torrance v. Weddel*, Dec. 12, 1868, 7 Macph. 243, 41 Scot. Jur. 149; *M'Iver v. McNeill*, June 28, 1873, 11 Macph. 777; *Mackellar v. Duke of Sutherland*, Jan. 14, 1859, 21 D. 222, 31 Scot. Jur. 563; *Hamilton v. Hope*, March 27, 1826, 4 Murray, 222.

³ *Bertram v. Pace*, March 7, 1885, 12 R. 798.

⁴ *Odgers v. Libel*, p. 232; *Gray v. Society for Prevention of Cruelty to Animals*, July 18, 1890, 17 R. 1185, per Lord Shand, p. 1198.

propose a counter issue undertaking to prove specifically the untruth of statements of the pursuer relating to others than the defender.

LORD ADAM concurred.

LORD M'LAREN.—The only question of principle in this case is that of the relation of the counter issue to the issue proposed by the pursuer. It has been sometimes said to entail hardship on the part of a defender in an action of damages for slander that, when the pursuer puts an extravagant meaning on the defender's words, the latter is under the necessity of justifying the alleged libel in the sense which the pursuer has put upon it instead of in the sense in which the defender says the words complained of were used. This difficulty has been sometimes met by giving the defender a counter issue negating the substance of the innuendo suggested by the pursuer without negating all the expressions which the pursuer has chosen to put into it. I agree with your Lordship that the better course is to make the principal and counter issues meet wherever that can be done, and I think it generally can be done by such a modification of the innuendo in the principal issue as will fairly raise the defender's case, and not put upon him a burden which he should not be called upon to bear. I feel greatly the force of your Lordship's observation during the discussion that the jury might have difficulty in shaping their verdict if the issues of the parties were so framed that neither completely countered the averments of the other.

LORD KINNEAR was absent.

THE COURT adhered.

CARMICHAEL & MILLER, W.S.—F. J. MARTIN, W.S.—Agents.

ANDREW BAXTER, Pursuer (Respondent).—*Comrie Thomson—Crabb Watt.*

No. 34.

JAMES ABERNETHY & COMPANY, Defendants (Appellants).—*Glegg.*

Nov. 25, 1893.
Baxter v.
Abernethy &
Co.

Reparation—Master and Servant—Personal injury—Liability at common law.—In an action at common law for damages for personal injury by a workman against his employers, the pursuer averred that on the occasion in question he was ordered by the defenders' foreman to assist in replacing a small travelling crane, in the defenders' works, in its proper position on its rails, which ran upon beams about fifteen feet from the ground; that in order to do this the pursuer had to stand on one of these beams and hang on by his hands to a beam about five feet higher, on which another and larger crane travelled; and that while he was in that position the larger crane moved along its rails and passed over his left hand injuring it severely. The pursuer further averred that the smaller crane was, to the defenders' knowledge, unfit for the use to which the defenders put it, and was, in consequence, when in use, almost invariably displaced from its rails; that the defenders, although they were well aware that this was a matter of daily occurrence, provided no proper appliances for replacing the crane, in consequence of which the workmen were compelled to adopt the dangerous means of doing so through which the pursuer had met with the accident; that in obeying the foreman's orders the pursuer relied, and was entitled to rely, on proper arrangements being made by the defenders for insuring his safety when engaged in the dangerous work he was ordered to do; but that the defenders took no precautions whatever for his safety, and neither gave warning to the man in charge of the upper crane that the pursuer was to be in the position in which he was put, nor gave intimation to the pursuer that the upper crane was to be moved.

The Court *dismissed* the action as irrelevant, on the ground that, on the pur-

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Aberdeen,
Kincardine,
and Banff.

suer's own shewing, the moving of the upper crane—the proximate cause of the accident—was due to the fault of one or other of his fellow-workmen.

IN January 1893 Andrew Baxter, boilermaker, Aberdeen, raised an action in the Sheriff Court at Aberdeen against James Abernethy & Company, engineers and boilermakers, Ferryhill Foundry, Aberdeen, for damages at common law, on account of injuries sustained by him when in their employment.

The pursuer averred;—(Cond. 2) "On Friday, 11th December 1891, pursuer was engaged as a boilermaker in the defenders' service at their works at Ferryhill, Aberdeen. He was subject to the orders of George Andrews, the foreman of the defenders' boilermaking department." (Cond. 3) "The defenders use a small travelling crane for the purposes of their work, and on the afternoon of said 11th December 1891 this crane had got displaced from the rails upon which it travels. The pursuer was ordered by the said George Andrews, his foreman, to assist in placing this crane in proper position on its rails by means of a sling. In order to do so the pursuer had to climb up to the rails, which run upon beams about fifteen feet from the ground. The pursuer had to stand on one of these beams and hang on by his hands to a beam about five feet higher, on which another and larger crane travels. While in that position the larger crane was moved along its rails and passed over the pursuer's left hand and severely injured same. . . . Explained that the smaller crane was, to the defenders' knowledge, defective and unfit for the use to which the defenders put it. In consequence of its insufficiency, the strain placed upon it in the raising and carrying of plates, &c., almost invariably caused it to be displaced from the rails. The defenders took no means to remedy such defect, and, in consequence, the workmen employed at the job for which such small crane had to be used, necessarily had to replace same on the rails. The defenders, however, although they were well aware that this was matter of daily occurrence, provided no proper means or appliance for the work of replacing the crane, and in consequence of the want thereof the workmen, such as pursuer, were compelled to adopt the means before narrated, which involved risk and danger that would have been entirely obviated had the defenders either remedied the original defect in the said crane or provided proper appliances for replacing same when displaced." (Cond. 4) "The said accident, and the injuries thereby caused to the pursuer, were due to the negligence of the defenders, or of their said foreman, or of others of their servants, for whom they are responsible. In obeying the said foreman's orders the pursuer relied, and was entitled to rely, that proper arrangements would be made by the defenders for insuring his safety while engaged in the dangerous work he was ordered to do, and, in particular, that the upper crane should not be used. The defenders, however, took no precautions whatever for the pursuer's safety, and gave no warning or intimation to the man in charge of the upper crane that the pursuer was to be engaged in the position he was put; and they further gave no warning or intimation to the pursuer that the upper crane would be used."

The pursuer pleaded;—(1) The pursuer having been injured through the fault of the defenders, or of those for whom they are responsible, he is entitled to reparation from the defenders. (2) The defenders having ordered the pursuer to execute difficult and dangerous work, were bound to take reasonable precautions for his safety, and they having failed to do so, and he having been thereby injured, the defenders are liable to him in reparation. (4) The pursuer having been injured through the defective condition of the defenders' plant, in consequence of the danger

and risk to which they unnecessarily exposed him, is entitled to reparation as claimed. No. 34.

The defenders pleaded ;—(2) The pursuer's averments being insufficient to support the action at common law, it should be dismissed, with expenses. Nov. 25, 1893.
Baxter v.
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Co.

On 19th April 1893 the Sheriff-substitute (Brown) sustained the second plea in law for the defenders, and dismissed the action.

On appeal the Sheriff (Guthrie Smith), on 18th October, recalled his Substitute's interlocutor and allowed a proof.

The defenders appealed, and argued ;—The action was one at common law only, and consequently the pursuer was not entitled to prevail unless he could shew that the proximate cause of the accident was due to the fault of the defenders, and no such case was here averred. The pursuer's case apparently was that the accident was due to the fault of the foreman, but a foreman was, at common law, simply a fellow-workman ; therefore the fact that the foreman was in fault was nothing to the point, there being no averment that the defenders were in fault in having chosen an incompetent foreman. The pursuer attempted to bring his case within the rule that employers would be liable if they knowingly permitted a defective system of working. Here also the pursuer's case failed, for, according to his own shewing, the defective system of working, assuming it to have existed, would not have caused the accident but for the fault of the foreman ; but a defective system of working, or defective plant, would not render an employer liable at common law if the defect would not have produced the accident but for a breach of duty on the part of a fellow-workman, for in such a case it was the breach of duty which was the proximate cause of the accident.¹ In truth, however, there was no proper averment of a defective system of working, but merely an averment of machinery going out of order in a way that was inevitable in establishments like this.

Argued for the pursuer ;—The pursuer had stated a relevant case. If this had been the first instance of the smaller crane going out of order, a different class of case would have been presented ; but what the pursuer averred was that the smaller crane was constantly going out of order and that its defective condition was known to the defenders. They ought, therefore, either to have had the smaller crane removed or thoroughly repaired, or to have provided an efficient system of signals whereby accidents like the present would have been prevented. They had consequently either provided defective plant, or had permitted a dangerous system of working, and for either of these things employers were liable at common law if injuries resulted to their employees therefrom.²

LORD JUSTICE-CLERK.—The pursuer makes certain averments in regard to two things in the works of the defenders—first, that the small travelling crane, which ran below the rails of the larger crane, sometimes became displaced, that this happened from time to time ; and second, that when it did so it was necessary to replace it by means of a sling, that he was engaged in replacing it, and that while so engaged he had, in order to steady himself, to put up his hand on the beam on which the larger crane ran. He avers that while in that position the larger crane was moved forward and injured his hand. He further avers that

¹ Robertson v. Linlithgow Oil Company, Limited, July 18, 1891, 18 R. 1221.

² Grant v. Drysdale, July 12, 1883, 10 R. 1159 ; Murdoch v. Mackinnon, March 7, 1885, 12 R. 810 ; McGuire v. Cairns & Company, Feb. 28, 1890, 17 R. 540.

No. 34. the accident happened through the fault of the defenders. This case is one at common law only. Therefore, unless he makes such statements as shew that the defenders were to blame as regards the proximate cause of the accident he cannot succeed.

Nov. 25, 1893.
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Co.

Now, the proximate cause of the accident was the moving of the larger crane. That must have been done by a fellow-workman or the foreman, who at common law is a fellow-workman. I therefore am of opinion that the pursuer has stated no relevant case at common law. In any workyard there may be part of the machinery not in perfect working order, and if anything does go wrong someone may require to readjust it, and if someone does something carelessly an accident may happen. But if there was carelessness here, it was that of a fellow-servant for whom the master is not responsible, the pursuer having no claim under the Employers Liability Act.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK.—I am very clearly of opinion that the case is irrelevant.

LORD TRAYNER concurred.

THE COURT sustained the appeal, recalled the interlocutor of the Sheriff, dismissed the action, and decerned.

WISHART & MACNAUGHTON, S.S.C.—J. & A. F. ADAM, W.S.—Agents.

No. 35. MRS TINNIE OR SMITH AND OTHERS, Pursuers (Appellants).—*Ure—Deas.*
WILSONS AND CLYDE COAL COMPANY, LIMITED, Defenders (Respondents).
—*Comrie Thomson—Salvesen.*

Nov. 25, 1893.
Smith v. Wil-
sons and Clyde
Coal Co.,
Limited.

Process—Reparation—Action of damages for death of father at instance of widow and certain only of the children—Intimation to remaining children.

1st Division.
Sheriff of
Lanarkshire.

IN an action raised in the Sheriff Court at Hamilton at the instance of Mrs Janet Tinnie or Smith, widow of David Smith, contractor, and four minor children against Wilsons and Clyde Coal Company, Limited, for damages on account of the death of David Smith, the defenders, after the case had been appealed to the Court of Session for jury trial, lodged a minute in which they stated, *inter alia*, that since the record was closed they had ascertained that some of the children of the deceased had not been made parties to the action. They moved the Court that intimation of the dependence of the action should be made to these children, who, it was stated at the bar, were *sui juris* and resident in this country. The pursuers did not oppose the motion. The Court appointed intimation to be made "to the children of the deceased . . . other than those who are pursuers in the action, in order that they may crave themselves to be sisted in the action within eight days, if so advised."

SIMPSON & MARWICK, W.S.—WINCHESTER & FERGUSON, W.S.—Agents.

No. 36. CHARLES WILLIAM WAINWRIGHT AND ANOTHER, Claimants (Appellants).
—*Guy—Blackburn.*

Nov. 27, 1893.
Wainwright
v. Aiken.

WILLIAM AIKEN, Respondent.—*A. J. Young—Macaulay Smith.*

County Franchise—Joint occupancy—Value—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), secs. 6 and 14—Representation of the People Act, 1884 (48 Vict. c. 3), secs. 5, 11, and 12.—Held, upon a construction of the Registration Statutes, that in order to entitle joint tenants and

occupants to be registered as voters in respect of lands and heritages held by them jointly, it is necessary that the value of the subjects should be sufficient when divided amongst them to give to each a sum of not less than £14. No. 36.

Nov. 27, 1893.

Wainwright
v. Aiken.

At a Registration Court for the western division of the county of Renfrew, held at Paisley on 6th October 1893, Charles William Wainwright, law-clerk, Glenpatrick, claimed to be enrolled on the Register of Voters for that division as joint tenant and occupant of a house situated at Glenpatrick, in the Abbey Parish of Paisley (Elderslie Electoral Division).

Registration
Appeal Court.
Lord Kinnear.
Lord Trayner.
Lord Kin-
cairney.

It was admitted (1) that the claimant and his brother, William Herbert Wainwright, had been joint tenants and occupants of the premises for the qualifying period, and (2) that the rent of the premises was £20.

William Aiken, bank accountant, Morton Terrace, Bridge of Weir, a voter on the roll, objected to the claim being admitted, on the ground that the claimant's interest in the subjects was of less annual value than £14.

The Sheriff (Cheyne) rejected the claim, and the claimant thereupon craved a case, in which the Sheriff set forth the above facts and stated the following question of law for the determination of the Court:—"Is one of two joint tenants of subjects situated in a county entitled to be enrolled as a voter in the county when his interest in the subjects is £10 per annum?"

Argued for the appellant;—Before the passing of the Representation of the People Act, 1884, in order to entitle one of two or more joint tenants to vote in respect of the occupation franchise, it was necessary (sections 6 and 14 of the Representation of the People Act, 1868*) that his individual interest in the joint tenancy should be of the yearly

* The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), sec. 6, enacted,—“Every man shall be entitled to be registered as a voter, and, when registered, to vote at elections for a member to serve in Parliament for a county who . . . is qualified as follows,—that is to say, . . . (2) is and has been during the twelve calendar months immediately preceding the last day of July in the actual personal occupancy as tenant of lands and heritages within the county of the annual value of £14 or upwards as appearing on the Valuation-roll of such county. . . .”

Sections 13 and 14 of the Act contained certain “Supplemental Provisions” for certain “incidents of franchise.” Section 14 provided,—“ . . . Where any such lands and heritages shall be owned, held, or occupied by more persons than one as . . . joint tenants and joint occupants of the same, as the case may be, . . . each of such joint tenants and joint occupants shall . . . be entitled to be registered and to vote, provided the annual value of the said lands and heritages, as appearing on the Valuation-roll, held and occupied by them shall be sufficient, when divided by the number of such joint tenants and joint occupants, to give to each of them a sum of not less than £14, but not otherwise.”

The Representation of the People Act, 1884 (48 Vict. c. 3), sec. 5, enacted,—“Every man occupying any land or tenement in a county or burgh in the United Kingdom, of a clear yearly value of not less than £10, shall be entitled to be registered as a voter and, when registered, to vote at an election for such county or burgh in respect of such occupation, subject to the like conditions respectively as a man is, at the passing of this Act, entitled to be registered as a voter and to vote at an election for such county in respect of the county occupation franchise, and at an election for such burgh in respect of the burgh occupation franchise.” Section 11 provided that “this Act, so far as may be consistently with the tenor thereof, shall be construed as one with” the Representation of the People Act, 1868.

Section 12 repealed section 6 of the Representation of the People Act, 1868 (mentioned in schedule 2, part 2 of the 1884 Act). It did not repeal section 14 of the Representation of the People Act, 1868.

No. 36.

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value of £14. By section 5 of the Act of 1884, however, "every man" occupying land in a county of the yearly value of £10 was entitled to vote in respect of his occupancy. These words "every man" were so general as to cover cases not only of sole but joint tenancy. The Legislature had made no distinction between the two. It was true that section 12 of the Act of 1884 repealed the 6th section of the Act of 1868 while it left standing section 14. But then the 14th section could not stand alone. It was dependent on the repealed 6th section, and the two sections must therefore be held to have been repealed together.

Argued for the respondent;—If the view were accepted that the words "every man" in the 5th section of the Act of 1884 meant more than one man, the result would be that four or five persons might acquire the franchise on a single qualification of £10. "Every man" obviously meant each man, and the section only provided a qualification for sole tenants holding subjects of the value of £10. It in no way recognised joint tenants. The provisions as regarded their qualification were to be found in section 14 of the Act of 1868, under which each joint tenant's interest in the joint tenancy must be of the yearly value of £14. The Act of 1884, while repealing section 6 of the Act of 1868 had left the 14th section unrepealed, and the section must apply to the present claim.

LORD KINNEAR.—Under the Representation of the People (Scotland) Act, 1868, every man is entitled to be registered as a voter under the 6th section and to vote at elections, who is qualified in the manner provided by that section, one of the qualifications being that he "is, and has been, during the twelve calendar months immediately preceding the last day of July, in the actual personal occupancy as tenant of lands and heritages within the county of the annual value of £14 or upwards."

Now, that was called in the statute, and has generally been described as, the occupation franchise for voters in counties.

By the 13th and 14th sections of the statute certain supplemental provisions, as they are called in the Act itself, are added, in order to provide for certain incidents of the franchise already given; and one of these incidents provided for by the 14th section is that of a joint occupation. Where lands and heritages are occupied by more persons than one as joint tenants or joint occupants, each of such joint tenants and joint occupants shall be entitled to be registered and to vote, "provided the annual value of the said lands and heritages as appearing on the Valuation-roll, held and occupied by them, shall be sufficient, when divided by the number of such joint tenants and joint occupants, to give to each of them a sum of not less than £14, but not otherwise."

The effect of these two clauses is clear, and no question could have been raised as to the right of joint tenants and joint occupants to vote if the estimated annual value of the lands and heritages which they held or occupied jointly was sufficient, when divided amongst them, to give to each of them a sum of not less than £14, but not otherwise.

Now, the Representation of the People Act, 1884, is, by the 11th section, to be construed as one with the Representation of the People Act, 1868, and by the 5th section of the former Act, which provides for an assimilation of the occupation qualification in counties and burghs, "every man occupying any land or tenement in a county or burgh in the United Kingdom of a clear yearly value of not less than £10 shall be entitled to be registered as a voter."

Now, if that section stood alone there might be a question whether the franchise thereby conferred could be exercised by more than one tenant and occu-

pant of any land or tenement of the clear yearly value of £10. But it is not to be read alone, because by the 11th section the Act is to be construed as one with the Act of 1868. The Act of 1884 repeals the 6th section of the 1868 Act, but leaves the 14th section standing, and reading them together I cannot see room for more than one construction of the two clauses. No. 36.
Nov. 27, 1893.
Wainwright v. Aiken.

The 5th section gives the franchise to tenants and occupants of lands and tenements of the value of £10, but the 14th section of the former Act is to be read along with it, and provides in the clearest terms that each of such joint tenants shall be entitled to be registered on the conditions I have already mentioned, "but not otherwise."

It has been suggested, and there is a good deal of force in the suggestion, that the new £10 franchise was intended to be substituted for the old £14 franchise, and therefore that the incidents which Parliament attached to the old franchise should be extended *mutatis mutandis* to the new. But I do not think we are entitled in construing an Act of Parliament to read out of it plain words which still stand in it; and it is clear that there stands a provision in the case of joint tenants that each is entitled to be registered only when the tenement or land is capable of yielding £14 to each if the annual value were divided. I am therefore unable to differ from the Sheriff.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT refused the appeal.

RUSSELL & DUNLOP, W.S.—E. P. THOMSON, W.S.—Agents.

PETER WHYTE, Appellant.—*Ure*—James Mackintosh.

HUGH WATT, Respondent.—*Dickson*—Pitman.

No. 37.

County Franchise—Notice of objection—Signature of objector impressed by "cyclostyle"—Writ—Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), sec. 4—Representation of the People Act, 1884 (48 Vict. c. 3), sec. 8, subsec. 6. Nov. 27, 1893.
Whyte v. Watt.
A voter objecting to a certain person's name being retained on the Register of Voters, instead of signing the notice of objection in the ordinary way, stencilled his name upon it through a perforated signature he had made on a waxed skin.
Held that the notice was "signed by the person objecting" in the sense of sec. 4 of the Burgh Voters Act, 1856.

Observed that the signature would not satisfy the conditions of the statutes regulating the subscription and attestation of probative deeds.

AT a Registration Court for the county of Midlothian, held at Edinburgh on 9th October 1893, Hugh Watt, solicitor, 107 Princes Street, Edinburgh, a voter on the register, objected to the name of Peter Whyte, residing at 40 Gilmore Place, Edinburgh, being retained on the register. Registration
Appeal Court.
Ld. Kinnear.
Lord Trayner.
Lord Kincairney.

It was stated on behalf of the person objected to that the notice of objection served on him, and the relative notice sent to the assessor of the said county, were invalid, in respect that they had not been signed by the objector in terms of section 4 of 19 and 20 Vict. cap. 58, and according to the forms Nos. 4 and 5 of schedule A annexed to the said Act.

The facts proved with regard to the alleged signature of Hugh Watt were as follows:—Hugh Watt did, with a certain instrument called a stencil-pen, perforate the letters forming his signature upon a prepared waxed skin stretched on a frame. He then placed the notice under the waxed skin, and passed an inked roller over the said waxed skin perforated as aforesaid, and the ink from the roller passing through the perforations in the waxed skin produced the signature on the notice. The

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signature was formed entirely by Hugh Watt; no other person was employed in the operation, and no use was made by Hugh Watt of any stamp, die, or engraved plate in forming his signature. When letters or words have been formed on the said waxed skin by the stencil-pen, sheets of paper to the number of 100 or more can be placed successively under the waxed skin, and upon the inked roller being passed over the waxed skin the letters or words are produced on the sheet of paper immediately under the waxed skin.

The Sheriff (Blair) repelled the objection that the notices were not signed in terms of the Act.

Whereupon Mr J. C. Strettell Miller, W.S., on behalf of Peter Whyte, obtained a case for the Court of Appeal, in which the Sheriff stated the above facts.

The question of law for the determination of the Court was,—“Whether the notices of objection, or either of them, were signed by the said Hugh Watt in terms of section 4 of 19 and 20 Vict. c. 58?”*

Argued for the appellant;—Where an Act of Parliament required a document to be subscribed or signed (and these were synonymous expressions), a facsimile impression of the writer's subscription or signature was not a sufficient compliance with the statute.¹ It had, it was true, been held in England that a stamp would suffice where a Registration Statute required the signature of a person,² but that decision necessarily followed from the analogies of English law, where a stamp was held a good signature within the Statute of Frauds and the Statute of Wills. The case had no application as regarded Scots Registration Statutes.

The respondent was not called upon.

LORD KINNEAR.—I do not think it is necessary to call for a reply. The Statute 19 and 20 Vict. c. 58, requires that a notice of objection shall be “signed” by the objector. There is no question in the case as to matters of fact. The objector did affix a signature to his note of objection in the manner stated in the case, and there is no dispute as to the genuineness of the signature or authenticity of the objection.

But then it is said that the signature was affixed in a certain manner which is not equivalent to subscription by the law of Scotland. He did not write his name in the ordinary manner, but “with a certain instrument called a stencil-pen he perforated the letters forming his signature upon a prepared waxed skin. He then placed the notice under the waxed skin, and passed an inked roller over the skin, and the ink from the roller passing through the perforations produced the signature.”

I take it to be clear that this signature would not be sufficient to satisfy the conditions of the statutes regulating the subscription and attestation of probative deeds; but I do not think that it is at all necessary, in order to satisfy the requirements of the statute which we are now construing, that an objection by one voter to the name of another should be subscribed in the sense of the statutes.

The word “signed” is not a technical word but a word of ordinary language. Subscription is a method of signing. It is not the only method. We are

* Sec. 4 of the said Act enacts that “every such notice of objection shall be signed by the person objecting.”

¹ Stirling Stuart v. Stirling Crawford's Trustees and Executrix, Feb. 6, 1885, 12 R. 610—per Lord President, pp. 617 and 625.

² Bennett v. Brumfitt, 1867, L. R., 3 C. P. 28.

therefore to consider whether the method of authentication described in the case can properly be called "signing." Now, upon that question, we have the advantage of a decision of the Court of Common Pleas, in the construction of a similar provision in the 6th of the Queen, chapter 18, which requires that a "notice of objection shall be signed by the objector." In *Bennett v. Brumfitt*, L. R., 3 C. P. 28, the Court held that this requirement was satisfied although the objector had not subscribed the notice but had affixed his name to it by means of a stamp on which was engraved a facsimile of his ordinary signature. I cannot suppose that when the Legislature has employed the same language in a Scots Act as in a previous English Act, it intended to prescribe one method of authentication in England and another in Scotland, and I should be very slow to differ from the learned Judges in England as to the meaning of an ordinary word in the English language.

I see no reason why the word "signed," in this statute we are considering, should be construed differently from the same word in England, and I am therefore of opinion that the mode of authentication described in the special case is a sufficient compliance with the statute.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT refused the appeal.

J. C. STRETTILL MILLER, W.S.—J. & F. ANDERSON, W.S.—Agents.

GEORGE METCALFE ROBERTSON AND OTHERS (Sir George Campbell's Trustees), Pursuers (Reclaimers).—*Dickson—Macfarlane*. No. 37.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY AND ANOTHER, Defenders (Respondents).—*Jameson—D. Dundas*.

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Property—Disposition—Road—Obligation on disponee to maintain road—Conversion of road into a city street.—By disposition, dated in 1875, of a piece of ground in the burgh of Maryhill, near Glasgow, A, the disposer, became bound to construct a road and footpath through other lands belonging to him as an access to the ground disposed, and B, the disponee, became bound to pay a certain proportion "of the expense of maintaining the said road." In 1891 the burgh of Maryhill was included in the extended boundaries of the city of Glasgow, and the Glasgow Master of Works called on A to repair the road by putting in new water-channels of square dressed whinstone four feet broad, and covering the road with hand-broken whinstone metal. A having called on B to pay his proportion of the expense of such repair, and B having repudiated liability, A brought an action against B for declarator that the defender was bound to pay a proportion of the expense of the operations required by the Master of Works. B pleaded that as these operations were not of the character contemplated by the disposition, he was not liable. A proof shewed that the operations required by the Master of Works would greatly exceed in cost what would be necessary to restore the road to its original condition. Held that the pursuer was not entitled to decree of declarator as concluded for.

By disposition, dated and recorded June 1875, the trustees of Sir George Campbell, of Succoth, Baronet, sold and disposed to John Ewing Walker, of Dalling Mhor, near Dunoon, and his heirs and assignees whomsoever, All and Whole part of the lands of Gilshochill and Lochburn, in Maryhill, near Glasgow, extending to about 67 acres, but that with and under the real burdens, conditions, and provisions thereafter written, and, *inter alia*, "(Fourth) our disponee and his foresaids shall have access to said lands by a road of 50 feet in width, running from the south-east corner of the Free Church Manse feu in Church Street, Mary-

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hill, through other lands belonging to us as trustees to the lands hereby disposed, as shewn in the said plan annexed hereto, and also by a footpath 10 feet in width, leading from Hill Street, Maryhill, to the lands hereby disposed, through the other lands belonging to us as trustees foresaid, which road and footpath are to be made by us at our own expense, and shall be immediately completed by us in so far as they are not already made: Declaring always that our said disponent and his foresaids shall have the fullest right of passage over said road and footpath now and in all time coming: (Fifth) Our said disponent shall be bound, as by acceptance hereof he hereby binds himself and them, to pay a proportion of the expense of maintaining said road of 50 feet and footpath, along with others using the same, in proportion to the extent of ground held by each party, until we, as trustees foresaid, or our foresaids, come to feu the ground on the sides of said road and footpath, or either of them, when this obligation shall cease, and we or our foresaids shall be bound to maintain said road and footpath in good order in all time thereafter: Declaring, however, that the said John Ewing Walker and his foresaids shall have right to open said road and footpath at any time for the purpose of forming and repairing drains and sewers, and laying and repairing gas and water pipes, our said disponents always being bound to restore said road and footpath."

A road about 840 feet in length, and consisting of a metalled surface, with a water-channel of rubble whinstone, was accordingly formed by the trustees.

At Whitsunday 1891 the municipal boundaries of Glasgow were extended so as to include the burgh of Maryhill, within which the road just mentioned lay.

On 3d December 1891 the Master of Works of Glasgow, acting under the Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), served a notice on Sir George Campbell's trustees, calling upon them to put the roadway into a state of repair, by putting in new water-channels of square dressed whinstone setts four feet broad, and covering the road with a good coating of hand-broken whinstone metal, the whole to be rolled until a uniform and smooth surface was obtained.

At the date of this notice part of the lands conveyed by the disposition of 1875 had come to be in possession of the Scottish Union and National Insurance Company, in virtue of a decree of mails and duties, dated 26th February 1887, and another part belonged to Robert Law, joiner, Kelvin Street, Glasgow, in virtue of a conveyance in his favour.

In July 1892, Sir George Campbell's trustees having called on the insurance company and on Law to pay the proportion effeiring to their lands respectively of the expense of repairing the road in terms of the notice, and the company and Law having denied liability, the trustees brought an action against them, concluding for declarator,—“(First) That the defenders are bound, each of them, to pay a proportion of the expense of repairing, in terms of the Glasgow Police Act, 1866, the private street known as Church Street, Maryhill, Glasgow, along with the pursuers and others using the same and similarly bound, the proportion being according to the extent of the ground held by each of the parties so bound.” Then followed a further declaratory conclusion apportioning the proportion of the expense alleged to fall to each of the defenders. There was no petitory conclusion.

The pursuers founded on the disposition of 1875 and on the notice of the Master of Works, and pleaded;—(1) The defenders being each of them subject to the real burden or real condition founded on as successors

of the original disponee in parts of the lands disposed are bound to contribute in terms of the first conclusion of the summons. No. 38.

The defenders averred;—"The road or street indicated in said notice is of a totally different character and description from the road contemplated by the disposition referred to"; and pleaded, *inter alia*;—(4) The operations directed by the Master of Works not being of the character nor within the description of those contemplated by the disposition, the defenders are not liable to contribute to the expense of the same. Nov. 28, 1893.
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The defenders also pleaded that the obligation to pay a proportion of the expense of repairing the road had not been validly constituted a real burden, and so was not effectual against them as singular successors; and the insurance company had a separate plea, that in any event they were not liable as being merely heritable creditors in possession under a decree of mails and duties. Neither of these pleas need be further noticed here, looking to the grounds of judgment on which the action was determined.

A proof was allowed. The evidence shewed that nothing had been done in the way of maintaining the road from the time of its formation until the present question arose; and that it had fallen into a state of some disrepair. The evidence as to the cost of restoring it to its original condition, as compared with the cost of executing the works required by the notice of the Master of Works, sufficiently appears from the opinion of the Lord Ordinary. The pursuers adduced evidence to the effect that water-channels of square dressed whinstone setts (which formed a large item in the requirements of the notice), had come to be the usual description of water-channels in roads like the present.

Under the Glasgow Police Acts, when the road was taken over by the town, it would thereafter be maintained out of the rates, the defenders being liable only in so far as they were bound to pay rates.

On 1st June 1893 the Lord Ordinary (Wellwood) pronounced this interlocutor:—"Sustains the fourth plea in law for the defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.*

* "OPINION.—It is admitted that the defenders are not primarily bound to obtemper the order of the Master of Works, as they are not proprietors of any land or heritage adjoining the part of Church Street in question, or having right of access by it in the sense of section 318 of the Glasgow Police Act of 1866. The parties bound to implement that order are the pursuers, and the present action is truly one of relief, or rather for declarator of right of relief, of part of the expense to be incurred in executing the works ordered. The summons does not contain any petitory conclusions. . . .

"The summons and condescendence are framed for the purpose of raising one question and one question only, viz., Whether the works ordered by the Master of Works are, as a whole, of such a character as to fall within the obligation contained in the fifth condition of the disposition in favour of Walker. The case is not framed for the purpose of raising the question whether the road was actually in disrepair, or what were the causes of and who were responsible for its being in that condition. The action proceeds on the assumption that the order of the Master of Works is conclusive upon that question. . . .

"The road was formed in 1874; but it was not until 1891 that the municipal boundaries of Glasgow were extended so as to include the burgh of Maryhill. I do not think it can be held that, when the disposition of 1875 was executed, any of the parties had in contemplation such an extension of the boundaries of Glasgow and the application to Maryhill of the provisions of the Glasgow Police Act.

"Now, a leading proposal which underlies the order of the Master of Works is not merely to put the road into the state of repair, according to the standard

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The pursuer reclaimed, and argued ;—The road, to the maintenance of which the defenders were here called on to contribute, was the road referred to in the disposition of 1875 ; there was no question as to alter-

on which it was formed, but to have it reconstructed, or at least materially improved, according to the standard and requirements in force in Glasgow, so as to admit of it being taken over and maintained as one of the streets of Glasgow, in all time coming, by the town.

“ The pursuers' argument is that the works ordered are merely repairs according to the enlightened views and requirements of the time, and that the original disponents must be held to have contemplated such a development. I cannot adopt this view ; and I think a conclusive test of its unsoundness is that, if the pursuers had done the same work at their own hand they could not have recovered the full proportions of the cost from the defenders. The road was originally constructed at a cost of £441. Of that sum, works costing £234 are still available, having been done once and for all. Thus only £207 is left to represent work which might be required for repair, or done over again. The cost of the repairs which the pursuers propose to make amounts to £400. I hold it proved that the road can be not merely repaired but made as good as new for £135. That includes a thorough remetalling, much more than would be necessary for ordinary maintenance from year to year ; and a few necessary repairs to the water-channel, the expense of the latter being not more than £13. On the other hand, the Master of Works has ordered new water-channels of square dressed whinstone setts, of 4 feet broad, which will cost £150 ; and the class of metalling ordered is of a much superior kind to that which was required for the road in its original state. I understand that the pursuers do not now claim from the defenders any part of the expense of the kerb ; but, deducting £91 on that head, there still remains a difference of £175 between the cost of works ordered and the outside cost of repairs which would make the road as good as new.

“ It seems to me that the works ordered by the Master of Works amount, if not to reconstruction, to such a renovation and improvement of the road as clearly to exceed maintenance in the sense of the disposition. This is not only proved by the defenders' witnesses, but admitted by the pursuers' witness, Alexander Fail, who constructed the road in 1874. He says in cross-examination,—‘ If the whole of the rubble stones were taken out of the water-channels, and they were replaced by square dressed stones, that would amount to a reconstruction of the water-channels, and not a repair. That would be much more costly than mere repair. I would describe it as an improvement of the water-channels. (Q.) And I suppose you would say the same thing with regard to the metalling with 2" instead of 2½" metal, blinding with ground whinstone or granite, and rolling with a steam roller ? (A.) Yes, that makes a more complete and rapid road.’

“ It might have been otherwise if the Master of Works had merely ordered ordinary repairs, such as the pursuers might have executed at their own hand, and charged the defenders with a proportion of the expense ; and if the repairs ordered had been the same in character, though slightly more expensive than the work originally done, the defenders might still have been bound to contribute. But here the character of the work ordered is materially different, as is well shewn by contrasting the cost of the new water-channels, £150, with the expense of repairing the old ones, £13. Whether the pursuers in another action may succeed in recovering any part of the expense, I do not think I am called upon to say, as the action is not raised to try that question, and no evidence has been led as to the causes of the disrepair, or as to the parties who were responsible for the openings in the road to which the disrepair seems to be confined or mainly due. The work now required is made compulsory by super-venient legislation, by which, in such cases, it has been repeatedly held that obligants in clauses of relief are not bound. As illustrations in point, I may refer to the cases of *Scott v. Edmond*, 12 D. 1077, and *Dunbar's Trustees*, 5 R. (H. of L.) 221.”

ing the situation or dimensions of that road. Now, nothing had been done during the eighteen years that had elapsed since the road was formed to keep it in a proper state of repair; and what the pursuers proposed to do was to put it into a state of thorough repair in accordance with the methods now considered right in the case of such roads. They did not propose to alter the character of the road, but merely to repair it, and the cost of doing so fairly fell under the obligation in the disposition of 1875, although it might be somewhat greater than was necessary barely to restore the road to its original state. The defenders were not asked to pay for something of which they did not reap the benefit, for not only had they contributed nothing towards the maintenance in the past, but they would for the future be released from the obligation to maintain under the disposition.

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Argued for the defenders;—Under the present summons the pursuers did not call on the defenders to contribute towards such sum as might be found to be necessary to repair the road as it was originally formed. What the pursuers asked for was that the road should be reformed according to the requirements of the Glasgow Master of Works. But the liability of the defenders depended on the obligation of 1875, which said nothing about the Glasgow Police Acts, and it could not well be assumed that in 1875 the parties had in view the possibility of Maryhill being annexed to Glasgow. In order to succeed therefore the pursuers must shew that the works which they proposed to execute were such as could have been charged *pro tanto* against the defenders, under the disposition of 1875, if the pursuers had executed the works of their own initiative. In this, on the evidence, they had failed.

At advising,—

LORD TRAYNER.—In 1875 the pursuers or their predecessors, the trustees of the late Sir George Campbell, granted a disposition of a piece of ground situated at or near Maryhill to Mr Walker, under which the disponee acquired right, not only to the ground disposed, but also to the use of a certain road and footpath (which had been made at the expense of the disponents) as an access to said ground. The disposition contained a provision to the effect that (for a certain time) the disponee and his assignees should be bound to pay to the disponents “a proportion of the expense of maintaining” the said road and footpath; and the present action is brought for the purpose of having it declared that the defenders are liable in respect of that obligation to make payment of a proportion of the expense attending the execution of works upon said road ordered by the municipal authorities of Glasgow. The defenders are (1) Mr Law, who is vested as proprietor in a part of the land so disposed under a singular title flowing from Mr Walker; and (2) the Scottish Union and National Insurance Company, who are in possession of part of said land as heritable creditors under a security title granted by Mr Walker.

It appears that in 1891 the municipal boundaries of Glasgow were extended so as to include the burgh of Maryhill, within which the said road and footpath are situated; and that in December of that year a notice was served on the pursuers by the Master of Works, acting under and in terms of the Glasgow Police Acts, calling upon them to execute certain works (described in cond. 6) on said road and footpath, which are rather of the character of reforming the road than merely maintaining it, and which would have the effect of greatly improving its condition. The pursuers are, undoubtedly, in the first place, the parties bound to obtemper the order or notice of the Master of Works, and so far as appears

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from anything that has been said, the only parties to whom the Master of Works could validly issue his order or notice. But admitting this, the pursuers maintain that under the provision I have referred to, contained in the original conveyance, the defenders, as assignees of Mr Walker, are liable in a proportion of the expense to be incurred in the execution of the works which the Master of Works has required to be executed. The defenders maintain that their obligation as Mr Walker's assignees does not cover or extend to the execution of such works as are now required to be performed, which are, they contend, neither of the character nor within the description of those contemplated by the disposition. The Lord Ordinary has sustained this defence, and in my opinion rightly sustained it. The only obligation on Mr Walker or his assignees was to pay a proportion of the expense of "maintaining" the road and footpath; and there does not appear to me to be any difficulty in ascertaining what that obligation means or imposes. The road, which was a country road at the date of the disposition, used as an access to the pursuers' feus, was to be maintained in its then character and state of efficiency. But what is now to be done, and for a proportion of the expense of which the defenders are sought to be made liable, is something of an entirely different description. The road is now to be covered with whinstone metal, with new water-channels of square dressed stone put down at the side of the footpath, which really is to make this road into a proper street within the city, and not in any sense to maintain it as a country road such as it was in 1875. That this is so is sufficiently evidenced by the pursuers' averment, which is, that "upon this being done the roadway will be taken over by the town, and thereafter upheld by it." The parties to the disposition of 1875 could not intend the obligation there expressed to cover such a radical change, because in 1875 it was not contemplated that a road in or near Maryhill would become a Glasgow street. Besides, the obligation in question is not to pay or relieve the pursuers from the payment of a burden laid upon them by statute, and arising under statute subsequent to the date of the obligation. On this ground I should have been disposed to have sustained the defenders' first plea in law, viz., that the action is irrelevant, for there is no averment by the pursuers that the defenders are liable to relieve them of an obligation imposed on them by statute such as is set forth in the conclusions of the summons. But it is sufficient to dispose of the case to sustain the defenders' fourth plea, as the Lord Ordinary has done, and I am of opinion that the Lord Ordinary's judgment should be affirmed. In disposing of the case on this ground it is unnecessary to notice the special defence urged by the Scottish Union and National Insurance Company, that as encumbrancers only, although in possession, they are not liable for the proprietor's obligations.

The LORD JUSTICE-CLERK.—That is the opinion of the Court.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

TAIT & CRICHTON, W.S.—COWAN & DALMAHOY, W.S.—Agents.

F. BROWNE & COMPANY AND OTHERS, Pursuers (Respondents).—*Burnet—MacWatt.* No. 39.

JAMES AINSLIE & COMPANY AND ANOTHER, Defenders (Reclaimers).—*W. Campbell—Aitken.*

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Sale—Subsale—Intimation—Arrestment—Mercantile Law Amendment Act, 1856 (19 and 20 Vict. cap. 60), sec. 3.—The Mercantile Law Amendment Act, 1856, sec. 3, enacts,—“Any seller of goods may attach the same while in his own hands or possession, by arrestment or pointing at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or pointing shall have the same operation and effect in a competition or otherwise as an arrestment or pointing by a third party.”

In January 1891 Ainslie & Company, of Leith, sold to Davis & Company, of London, twenty hogsheads of whisky, which were lying in Ainslie & Company's bonded warehouse at Leith, and gave Davis & Company a delivery-order for the whisky on Anderson, their warehouse-keeper, and Davis & Company sent this delivery-order to Anderson, intimating that they would grant delivery-orders on him for the whisky. Davis & Company paid the price of the whisky to Ainslie & Company.

About a fortnight afterwards Davis & Company sold the whisky to Thomas, and gave him delivery-orders on Anderson. Thomas took delivery of part of the whisky, and sold the remainder to Browne & Company.

In April 1892 Ainslie & Company arrested the whisky which had been sold to Browne & Company, but was still in Ainslie & Company's bonded warehouse, for a debt due to them by Davis & Company.

In an action by Browne & Company against Ainslie & Company for delivery of the whisky, Ainslie & Company pleaded that they were entitled to arrest in virtue of the Mercantile Law Amendment Act, 1856, sec. 3, the subsales not having been intimated to them within the meaning of the Act.

A proof shewed that the fact of the subsale by Davis & Company of the lot of whisky to one purchaser, who was not named, had been intimated in writing by Davis & Company to Ainslie & Company, and that delivery-orders for part of the whisky in favour of Thomas had been sent to Ainslie & Company prior to the date of the arrestments. It was held proved, further, that Ainslie & Company received verbal intimation from Davis & Company before the arrestment that Thomas was the subvendee. There was no written intimation to Ainslie & Company of the subsale by Thomas to Browne & Company, but it was held proved that Ainslie & Company knew of that subsale. Neither Thomas nor Browne & Company intimated, or authorised anyone to intimate, the subsales to Ainslie & Company.

Held that the arrestments were ineffectual in competition with Browne & Company, *per* Lord Justice-Clerk and Lord Trayner, on the ground that the Act did not require that the intimation of a subsale should be in writing, or that it should be given by, or with the authority of, the subvendee, or that the name of the subvendee should be intimated, and therefore that there had been due intimation to Ainslie & Company of the subsales to Thomas and Browne & Company; *per* Lord Young, on the ground that Davis & Company having sold the whisky to Thomas, it could not thereafter be attached by the diligence of any creditor of Davis & Company; *diss.* Lord Rutherford Clark, who held that the Act required intimation of the subsale to be given by, or with the authority of, the subvendee, and that no such intimation having been given to Ainslie & Company, the arrestments at their instance were effectual.

Sale—Subsale—Factors Act, 1889 (52 and 53 Vict. cap. 45), sec. 9—Factors (Scotland) Act, 1890 (53 and 54 Vict. cap. 40).—The Factors Act, 1889 (extended to Scotland by the Factors (Scotland) Act, 1890), sec. 9, enacts,—“Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him,

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of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Ainslie & Company sold certain casks of whisky in their bonded warehouse to Davis & Company, and gave them a delivery-order for the whisky on Anderson. Davis & Company sent the delivery-order to the warehouseman, informing him that they would issue their own delivery-orders on him for the whisky. In an action by Browne & Company, who were subvendees of the whisky, and held Davis & Company's delivery-order, against Ainslie & Company, who declined to give delivery in respect that prior to intimation to them of the subsale they had arrested the whisky in virtue of the 3d section of the Mercantile Law Amendment Act, 1856, *question* whether Davis & Company were "mercantile agents in possession" of a document of title in the sense of the 9th section of the Factors Act, 1889.

Opinion (per Lord Young and Lord Wellwood, Ordinary) that they were.

Opinion (per Lord Rutherford Clark) *contra*.

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 Ld. Wellwood.

IN November 1892 F. Browne & Company, licensed victuallers, sometime of the Griffin Tavern, Charing Cross, London, Henry James Towell, licensed victualler, of 3 Duke Street, Adelphi, a partner of that firm and as an individual, and Robert Lindsay, chartered accountant, London, trustee on the sequestrated estates of Frederick Browne, the only other partner of Browne & Company, brought an action against James Ainslie & Company, wine and spirit merchants, 201 Leith Walk, Leith, and also against John Anderson, warehouse-keeper, 23 Bond, Wet Docks, Leith, concluding for delivery of six hogsheads of Scotch whisky, of specified numbers, alleged to belong to the pursuers, and to be lying in 23 Bond under the charge of Anderson, the pursuers always paying duty and storage-dues before delivery, and failing delivery, for payment of £150, as the value of the whisky.

The pursuers stated that, in the beginning of 1891, Davis, Strange, & Barker, wine-merchants, then of 4 King William Street, Strand, London, bought a number of hogsheads of special Scotch whisky from the defenders Ainslie & Company, that this whisky was allowed to remain in Ainslie & Company's bonded warehouse, 23 Bond, Wet Docks, Leith, and was entered in the name of Davis, Strange, & Barker in the books of the warehouse owner, who thereafter held it for them; that in February 1891 Davis, Strange, & Barker sold to W. Freeman Thomas, then the proprietor of the Griffin Tavern, *inter alia*, eight hogsheads of this whisky, the price of which had been paid by Davis, Strange, & Barker to Ainslie & Company; that Thomas paid Davis, Strange, & Barker for the eight hogsheads, and received from them eight delivery-orders, addressed to John Anderson, warehouse-keeper, 23 Bond, Wet Docks, Leith; that "the defenders were well aware of the said subsale, and at the date of the said purchase due intimation was given to the defenders that the said whisky had been sold, and then belonged to Mr Thomas, and that delivery-orders therefor had been handed to him"; that in December 1891 Thomas sold the Griffin Tavern to the pursuers Browne & Company; that "they subsequently purchased from Mr Thomas and paid for the said eight hogsheads of whisky, and he at the same time indorsed and handed over to them the said eight delivery-orders. Intimation of the said sale was duly made to the custodiers of the whisky, who thereafter held for the before-mentioned pursuers." That in February 1892 Browne & Company presented to the defender Anderson two of the delivery-orders for two hogsheads, and obtained delivery of the whisky; but that

on 1st April 1892 the defenders declined, and still decline, to give delivery of the remaining six hogsheads. **No. 39.**

The defenders, in answer, admitted that Davis, Strange, & Barker had, in the beginning of 1891, bought twenty hogsheads of whisky from the defenders Ainslie & Company, and had paid the price to Ainslie & Company, and that the whisky, so far as undelivered, remained in Ainslie & Company's bonded warehouse, but they stated that there were no warehouse books kept in the warehouse in which any transfers could be made. The defenders further averred "that no intimation was given to the defenders that the whisky had been sold to Freeman Thomas, or that delivery-orders had been handed to him for the whisky in dispute. The pursuers are called on to produce a copy of the writing on which they rely as constituting an intimation of said sale to the pursuers, or otherwise to specify by whom and in what manner the alleged intimation was made"; and they also "specially denied that there was any intimation of a sale by Thomas to the pursuers of the eight hogsheads" until April 1892. "Previous to said intimation the defenders had arrested the said hogsheads in their own hands, in terms of the Mercantile Law Amendment (Scotland) Act, 1856,* on the dependence of an action at their instance against Davis, Strange, & Barker, for the sum of £806, 1s. 6d. due by them to the defenders. Said arrestment being prior to the intimation of the delivery-orders in question, the defenders are entitled to retain the said goods in satisfaction *pro tanto* of their claim against the said Davis, Strange, & Barker." With reference to the delivery of the two hogsheads in February 1892, the defenders denied that Browne & Company presented the delivery-orders for these hogsheads. "Explained that the delivery-orders for these two hogsheads were handed personally to Mr Ainslie, when in London in January 1892, by Davis, Strange, & Barker, who requested that these hogsheads should be forwarded to them duty paid, and this was accordingly done."

The pursuers pleaded;—(1) The pursuers Browne & Company having bought and paid for the said whisky, and having had the said delivery-orders indorsed to them, and having duly intimated the said sale prior to the date of the defenders' arrestments as condescended on, are entitled to decree in terms of one or other of the alternative conclusions of the summons. (2) The subsale of the goods in question to Mr Freeman Thomas having been duly intimated to the defenders prior to the date of their arrestments, the same are inept, and the pursuers are entitled to decree. (3) In any event, the defenders being well aware of the subsales condescended on, or one or other of them, were not entitled to arrest the goods

* The Mercantile Law Amendment Act, 1856 (19 and 20 Vict. cap. 60), sec. 2, enacts,—“Where a purchaser of goods, who has not obtained delivery thereof, shall after the passing of this Act sell the same, the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled in any question with a subsequent purchaser or others in his right to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser. . . .”

Section 3 enacts,—“Any seller of goods may attach the same while in his own hands or possession, by arrestment or pouding at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or pouding shall have the same operation and effect in a competition or otherwise as an arrestment or pouding by a third party.”

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No. 39. in their own hands. The pursuers also stated the following additional pleas;—(1) The goods in question having, as in a question between the pursuers as subpurchasers and the defenders, been delivered by the defenders to Davis, Strange, & Barker, the arrestment founded on by the defenders is inept. (2) In respect that the goods in question were all along, or at least from 22d January 1891, held by the defenders for and on behalf of Davis, Strange, & Barker, the latter were, in terms of the Act 52 and 53 Victoria, chapter 45,* in possession of the same, and the arrestment founded on is inept.

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The defenders pleaded, *inter alia*;—(1) The alleged subsale of the goods in question to Mr Freeman Thomas or to the pursuers not having been intimated to the defenders prior to the date of the arrestments of said goods in their hands, they are entitled to be assolizied, with expenses.

A proof was allowed. The evidence was to the following effect:—

In the end of 1890 Davis, Strange, & Barker, whose only place of business was in London, but who were desirous of appearing as Scotch dealers in whisky, entered into communications with Ainslie & Company for that purpose. As explained in the evidence of Mr Davis, of Davis, Strange, & Barker,—“We desired that our name and not his [Ainslie’s] should appear, so as to facilitate business. We wanted to pose as Scotch whisky merchants, having residence in Scotland.” Ainslie & Company

* The Factors Act, 1889 (52 and 53 Vict. cap. 45) (extended to Scotland by the Act 53 and 54 Vict. cap. 40), section 1, subsection 2, enacts,—“A person shall be deemed to be in possession of goods, or of the document of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.”

Section 1, subsection 4, enacts,—“The expression ‘document of title’ shall include any bill of lading, dock-warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.”

Section 2, subsection (1) enacts,—“Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.”

Section 9 enacts,—“Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.”

Section 10 enacts,—“Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor’s lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.”

agreed to this. On 17th December 1890 Mr Ainslie, the sole partner of the firm, wrote to Davis, Strange, & Barker,—“I shall only be too pleased to do your Scotch whisky business for you. . . . Casks can be marked with your firm's name and address, and bottlings with your label. My firm's name will not appear in any way.” In pursuance of this agreement Ainslie & Company arranged to supply Davis, Strange, & Barker with a special blend of whisky, to be termed “The Highland Dirk Blend” of Scotch whisky, and they also arranged for the printing of special labels, on which Davis, Strange, & Barker were described as the sole proprietors of “The Highland Dirk Blend.” Davis, Strange, & Barker further sent a large number of copies of a circular to Ainslie & Company, which were posted by Ainslie & Company in Leith.

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In January 1891 Davis, Strange, & Barker bought twenty hogsheads of Highland Dirk Whisky from Ainslie & Company. On 21st January they wrote to Ainslie & Company,—“We have been very successful to-day in opening one of the largest accounts in the whisky trade in London, with one of our richest publicans, the owner of several houses, who has hitherto never bought your whisky under any brand. We have sold him this lot of whisky . . . Can you send us separate warrants for each hhd., or have we to sign delivery-orders ourselves, and if we have to give them, on whom do we have to make them on? Of course such a man as this wants a tangible document.” It was not disputed that this letter referred to a sale by Davis, Strange, & Barker of the twenty hogsheads just mentioned to W. Freeman Thomas of the Griffin Tavern, Charing Cross, but Thomas' name was not mentioned in the letter.

Ainslie & Company replied on 22d January,—“We are in receipt of your favour of 21st inst., and are very pleased to see you have secured such a good order, and we must say it shews very good salesmanship on your part. We will mark off the 20 hhds. in our books in your name, and hold them to your order; and we will stamp the casks with your name, and you can issue a delivery-order to your customer, made out upon John Anderson, warehouse-keeper, No. 23 Bond, Wet Docks, Leith.” The casks were stamped accordingly.

Again on 27th January Ainslie & Company wrote to Davis, Strange, & Barker enclosing an invoice for the whisky, together with a delivery-order for the same,* and adding,—“If you desire separate warrants for each hhd., you can either issue them yourselves upon Mr Anderson, or we will send you them, just as you may wish.”

Davis, Strange, & Barker replied on 29th January,—“We will draw our own separate delivery-orders on Mr Anderson.”

On 9th February they again wrote,—“Have we to deposit your delivery-order for twenty hhds. on Mr Anderson, as we have issued twenty separate d/orders (form enclosed) for the twenty hhds.?”

* The delivery-order was in the following terms:—

“Delivery Order No. 1078.

“To Mr John Anderson, Warehouse-keeper,
No. 23 Customs Bond, Wet Docks, Leith.

“Leith, 27th January 1891.

“Please deliver in bond, to the order of Messrs Davis, Strange, & Barker, London, the undernoted (20) twenty hhds. Highland Dirk special Scotch whisky, Nos. 1/62 to 20/81, and oblige.

“JAMES AINSLIE & Co.”

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The form of the delivery-orders is given below,* and it appeared that twenty of these forms signed by Davis, Strange, & Barker were filled up in favour of "W. Freeman Thomas, Esq.," and dated 5th February 1891, each order being for the delivery of a hogshead of the whisky denoted by its number.

Ainslie & Company replied on the 10th,—“The d/order form, we think, is very nice indeed. You should lodge the d/o. which you have with the warehouse-keeper”; and again on 25th March they wrote,—“Regarding d/orders, it is unnecessary for us to issue same; all that is required is for you to issue your own d/orders made out upon our bonded warehouse-keeper, Mr J. Anderson.”

The Mr Anderson mentioned in these letters was the defender Anderson. It was not disputed that he was the servant of Ainslie & Company, at a weekly wage, and that they were lessees of the warehouse of which he had the charge; but there was a conflict of evidence as to whether these facts were known to Davis, Strange, & Barker at the time of these transactions. Ainslie deponed that he had verbally informed Strange as to Anderson's position in December 1890. Strange was not examined as a witness, and both Davis and Barker deponed that they understood that Anderson was a public warehouseman, and that the warehouse was a public warehouse. Anderson deponed,—“I keep no books in the stores except a small memorandum book for my own guidance. . . . I never effect any transfers of stock in my book; anything of that kind is done in the office.”

On 13th April Davis, Strange, & Barker sent the following letter to Anderson addressed to No. 23 Bond, Wet Dock, Leith,—“We beg to enclose you Messrs James Ainslie & Company's delivery-order on you for twenty hhds. Scotch whisky, \$1/62 to 20/81, 'Highland Dirk,' special. We have now issued our own delivery-orders on you for these and other whiskies bonded in your warehouse in our name by Messrs Ainslie & Company.” The delivery-order is that given above, p. 177.

The first delivery under this arrangement took place in September 1891, being effected as follows:—On 25th September Davis, Strange, & Barker wrote to Ainslie & Company enclosing two of the delivery-orders in favour of Freeman Thomas, and indorsed by him, and requesting Ainslie & Company to clear the whisky out of bond, and to forward it to themselves and not to Thomas, and this was done accordingly. Davis and Barker deponed that the reason why the delivery-orders were sent to Ainslie & Company and not to Anderson was that it had been arranged that Ainslie & Company should advance money necessary to clear the whisky out of bond.

Ainslie deponed that until the receipt of these delivery-orders he had had no information as to the name of any subvendee in connection with the twenty hogsheads. Both Barker and Davis deponed that at a meeting with the partners of their firm in London in February 1891 Ainslie was told that the whole twenty hogsheads had been sold to Freeman Thomas. Ainslie deponed that at this meeting Thomas' name was not mentioned.

* “No.

4 King William Street, Strand,
London, W.C.

“To Mr John Anderson, Warehouse-keeper,
No. 23 Bond, Wet Docks, Leith, N.B.

“Deliver to , or order,

“(Watermarked)—Delivery Order,

“DAVIS, STRANGE, & BARKER, Leith, N.B.”

In November 1891 two other hogsheads were delivered to Thomas through Ainslie & Company and Davis, Strange, & Barker, as on the former occasion. No. 89.

The four hogsheads thus delivered were the only hogsheads of the twenty received by Freeman Thomas. He had in July 1891 returned eight delivery-orders to Davis, Strange, & Barker, and the eight hogsheads corresponding to these orders were ultimately taken back by Ainslie & Company upon a single delivery-order in their favour granted by Davis, Strange, & Barker. Nov. 28, 1892.
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In December 1891 Thomas sold the Griffin Tavern and stock therein to Browne & Company, and some weeks afterwards indorsed and transferred to them the eight delivery-orders still in his hands.

In January 1892, at a meeting in London with the partners of Davis, Strange, & Barker, Ainslie declined to forward any further whisky until the amount of the balance against Davis, Strange, & Barker with him was reduced, but ultimately agreed to do so on condition that Davis, Strange, & Barker sent him their customer's cheque for the duty. Ainslie accordingly sent two delivery-orders indorsed by Freeman Thomas to his firm directing them (as requested by Davis, Strange, & Barker) to forward the whisky to Davis, Strange, & Barker, which was done. Davis and Barker deponed that at this meeting they informed Ainslie of the sale of the Griffin business to Browne & Company. Ainslie deponed that no such information was given to him, and that he only learned that Browne & Company were the purchasers of two of the hogsheads by seeing their name on the cheque which he received some days afterwards.

On 9th March 1892 Ainslie & Company arrested in their own hands the remaining six hogsheads.

On 1st April Browne & Company intimated to Anderson that they held delivery-orders for these hogsheads. Ainslie & Company in reply intimated that they claimed them in virtue of the arrestments.

Freeman Thomas was not examined as a witness, and there was no evidence that he had intimated or authorised anyone to intimate to Ainslie & Company that the whisky had been sold to him by Davis, Strange, & Barker. Mr Towell, a partner of Browne & Company, deponed that they first came to know that Davis, Strange, & Barker had anything to do with the whisky when they wanted to clear the two hogsheads in January 1892, and that they first heard of Ainslie & Company through Ainslie & Company intimating that they had arrested the whisky.

On 30th March 1893 the Lord Ordinary (Wellwood) pronounced this interlocutor:—"Repels the defences: Decerns and ordains the defenders to deliver up to the pursuers the six hogsheads special Scotch whisky, numbered 7/68, 8/69, 9/70, 10/71, 11/72, and 12/73, belonging to the pursuers, lying in No. 23 Bond Warehouse, Wet Docks, Leith, belonging to and occupied by the defenders James Ainslie & Company, and under charge of the defender John Anderson, the pursuers always before delivery paying the duty and storage-dues for the said whisky, and that within twenty-one days from the date hereof, reserving to the pursuers in the event of the defenders failing so to deliver the said six hogsheads to the pursuers, to move for decree in terms of the petitory conclusions of the summons. . . ."

* "OPINION.— . . . To judge from the correspondence, I should be inclined to say that the defenders represented Anderson to be an independent warehouseman. The only expression which militates against that view is that in one letter the word 'our,' an ambiguous expression, is used. But assuming

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The defenders reclaimed, and argued;—(1) If the defenders otherwise came within the Mercantile Law Amendment Act, it would take a strong

that Davis, Strange, & Barker knew that Anderson was the defenders' servant, the result of these proceedings was that the defenders, to oblige their customers, consented to efface or eliminate themselves, and to allow Davis, Strange, & Barker to pose as a Leith house, and as having both the property and possession of the whisky. The defenders thus enabled Davis, Strange, & Barker to represent themselves to customers as owners of the whisky. The result was, that any customers dealing with Davis, Strange, & Barker, and receiving delivery-orders on John Anderson in the terms which I have mentioned, were led to suppose, and were entitled to suppose, that Davis, Strange, & Barker had the full right of property in the whisky, and that John Anderson, named in the delivery-orders, simply held for them either as their servant or as an independent warehouseman. They had no reason to suppose that behind Davis, Strange, & Barker were the defenders, claiming the right as sellers, who had not delivered the whisky sold, to retain and arrest in their own hands for a general balance due by Davis, Strange, & Barker. I am therefore of opinion that on this ground alone the defenders are barred in a question with a purchaser from Davis, Strange, & Barker from founding on an arrestment used by them in their own hands. I do not mean to imply that the arrangement which they made with Davis, Strange, & Barker was fraudulent, although the defender Mr Ainslie admits that he never had to do with such a transaction before. But by allowing Davis, Strange, & Barker to hold themselves out as owners of the whisky, and as coming in place of the defenders themselves, the defenders are barred on equitable grounds, which are recognised both here and in England, from setting up any such right, the rule being that one who enables another to induce third parties to deal with him on the faith of false or erroneous representations as to his rights and position with regard to property or goods is held to the truth of such representations.

"The Scotch cases of *Pochin v. Robinson*, 7 Macph. 622, and *Vickers v. Hertz*, 9 Macph. (H. L.) 65, and L. R., 2 H. L. Cases, 115, may be referred to as shewing the tendency of Scotch law in such cases, and there are many English decisions illustrative of the doctrine of estoppel which proceed upon the same principle. The present seems to me to be a stronger case for the application of the principle than the case of *Vickers v. Hertz*, because while in the latter case Mr Vickers, by handing to his agents, Campbell Brothers, a delivery-order with his own name appearing on it as indorser, enabled them, contrary to his intention, to commit a fraud by indorsing the warrant to Hertz instead of selling on his (Vickers') account, the defenders here allowed, and indeed advised, Davis, Strange, & Barker to issue delivery-orders in their own name—the defenders' name not appearing on the documents at all, and Davis, Strange, & Barker being falsely described as merchants in Leith—for the very purpose of the latter holding themselves out as the real owners of the whisky, and securing purchasers on that footing.

"In this view of the case, it is perhaps not necessary for the pursuers to invoke the assistance of the Factors Act, 1889, 52 and 53 Vict. c. 45, which was extended to Scotland by an Act passed in 1890, being 53 and 54 Vict. c. 40. The material parts of the Act of 1889 are the following:—[His Lordship quoted the sections given *supra*, p. 176.]

"The application of those provisions to the present case is this,—The defenders gave Davis, Strange, and Barker possession of the documents of title to the whisky by sending them the delivery-warrant for twenty hogsheads, No. 44 of process, and allowing them to issue delivery-orders on Anderson in their own name. In terms of the Factors Act, the transfer of the documents of title by Davis, Strange, & Barker to Freeman Thomas had precisely the same effect as if Davis, Strange, & Barker were mercantile agents for the defenders, and in possession of the goods or documents of title with their consent.

"If these views are sound, it is not necessary to decide whether the subsale by Davis, Strange, & Barker to Freeman Thomas was intimated to the defen-

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case of personal bar to exclude them from the Act. Here, however, no case of personal bar had been either averred or established. The defenders had done nothing which they were not entitled to do. If the delivery-order had been on themselves there could have been no objection, and it made no difference that the order was on Anderson, their servant. The pursuers at least could take no advantage from the plea of personal bar. They knew nothing either of Davis, Strange, & Barker or of the defenders, when they bought from Thomas. (2) Was the subsale by Davis, Strange, & Barker to Thomas intimated to the defenders within the meaning of the Mercantile Law Amendment Act? It was not. The intimation required by the Act must be by or on behalf of the subpurchaser. The intimation must be such as would bar the original seller from delivering to the original purchaser, it must be such as would bar the creditors of the original buyer from doing diligence, and it must be such as would make the original seller hold for a particular subpurchaser, thereby preventing another subpurchaser from coming forward and demanding delivery of the subject. The subpurchaser, in short, must put himself into a contract relation with the original seller. A mere casual mention of a subsale by the subeller never could produce these results. Upon the proof, it was doubtful whether the defenders knew more than the fact of the subsale. The letter of 21st January did not mention Thomas's name, although no doubt they came to know that Thomas had an interest in the whisky. Assuming, however, that they knew of the subsale to Thomas, it was not suggested that there had been intimation by or with the authority of Thomas. The arrestments therefore were effectual under the Act, for there could be no doubt that the whisky remained in the hands of the defenders. (3) The Factors Act did not apply here. The principle of the Act was this. If a man, entrusted with goods or with a document of title, abused his trust, then it was the truster rather than an innocent third party who must bear any loss that occurred. But Davis, Strange, & Barker did not get possession of the whisky, nor did they transact with Thomas on the faith of any document of title granted by the defenders. Thomas knew nothing about the delivery-order granted by the defenders.

Argued for the pursuers;—(1) The Lord Ordinary had rightly held that the defenders were barred by their conduct from taking advantage of the Mercantile Law Amendment Act. The defenders led Thomas and also the pursuers to believe that Davis, Strange, & Barker alone sold the

ders so as to exclude their arrestment of the goods in their own hands. On the one hand there was no intimation of the subsale by the subpurchaser direct to Anderson or Ainslie & Company before the date of the arrestment. But, on the other hand, (1) the defenders, in January 1891, were informed that the twenty hogsheads had been sold by Davis, Strange, & Barker to one purchaser; (2) they subsequently learned that Freeman Thomas was the purchaser; and further (3), they received and acknowledged delivery-orders in his favour, and indorsed by him for part of his purchase; and (4) subsequently they were apprised of the sale by Thomas to Browne and Towell.

"It is an arguable question whether these facts may not be held as equi-pollents for regular intimation by the subpurchaser, keeping in view that the question arises, not between competing subpurchasers from Davis, Strange, & Barker, but between one subpurchaser and the defenders themselves. Here there was more than mere private knowledge of the subsale, as the defenders, by acting on the delivery-orders in favour of Thomas and Browne and Towell, in a way recognised the subsale.

"I do not, however, find it necessary to decide this point. I prefer to rest my judgment on the grounds formerly stated."

No. 39. whisky, therefore it was not open to the defenders to come forward and plead rights which they had intentionally concealed. At all events (2) the defenders had had intimation of the subsale to Thomas. The Act did not specify any particular form of intimation, nor did it require that the intimation should be by the subpurchaser, or that the name of the subpurchaser should be intimated, or that the intimation should be in writing. Here undoubtedly the defenders knew that there had been a subsale,—the letter of 21st January put that beyond question. Then the evidence was to the effect that they were told that Thomas was the subpurchaser. That being so, there had been intimation of the subsale in the sense of the Act. (3) The Factors Act applied. The pursuers admitted that they did not get a document of title granted by the defenders, but they got a document of title which had been granted “with consent of the seller.” That was enough under the Act.

At advising,—

LORD JUSTICE-CLERK.—The facts of this case are somewhat peculiar. Towards the end of 1890 a firm of the name of Davis, Strange, & Barker, who were then wine-merchants in London, purchased from the defenders Messrs James Ainslie & Company twenty hogsheads of whisky for the purpose of selling to customers in London if they could find such. With a view, presumably, to the better prospect of effecting sales they desired to pose as a Scotch firm carrying on business in Leith, and they accordingly entered into arrangements with the defenders, whereby the defenders agreed to mark the whisky casks with Davis, Strange, & Barker’s name and address, and to label any quantity bottled with the same name. They also received from that firm a quantity of their circulars to customers, and posted them for them in Leith, so as to keep up the fiction that they carried on business there. These circulars were posted on 19th January 1892, and on 21st January Davis, Strange, & Barker wrote to the defenders stating that they had sold to a customer “this lot of whisky.” To this the defenders replied by return, expressing satisfaction that Davis, Strange, & Barker had secured such a good order, and stating that they would mark off the twenty hogsheads in their books in Davis, Strange, & Barker’s name, and stamp them with their name, thus plainly intimating that the “lot of whisky” referred to in their correspondents’ letter consisted of the whole twenty hogsheads bought from them. The letter further stated, in answer to a query, that their correspondent could issue delivery-orders “to your customer” upon one John Anderson, warehouse-keeper in Leith. It was afterwards arranged that the defenders’ delivery-order in favour of Davis, Strange, & Barker should be lodged with Anderson, and that that firm should issue their own delivery-orders for the hogsheads as these might be required. These delivery-orders bore to be issued by Davis, Strange, & Barker as a Leith house, and were addressed to John Anderson, warehouse-keeper. Labels were also prepared and issued with the knowledge of the defenders, in which Davis, Strange, & Barker were entered as Leith merchants, and designated as “sole proprietors of the Highland Dirk blend whisky.”

Within a few days of these arrangements being completed, Mr Ainslie went to London and saw certain members of the firm of Davis, Strange, & Barker. As to what passed between them there is a sharp conflict of evidence. The witnesses for the pursuers depone that at their interviews Mr Ainslie was distinctly informed that Mr Freeman Thomas was the customer who had purchased the whisky, and Mr Ainslie was told who he was, and where he carried on business.

Mr Ainalie, on the other hand, denies altogether that anything of the kind took place. My view upon the proof is that the evidence for the pursuers must be accepted on this branch of the case.

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After this time and during 1891 several deliveries of the whisky took place, the whisky being given out by Anderson on delivery-orders issued by Davis, Strange, & Barker in favour of Freeman Thomas. In July 1891 eight hogsheads of the whisky were tendered back to the defenders by a delivery-order of Davis, Strange, & Barker on Anderson, Mr Freeman Thomas having not wished to carry out his purchase as regarded them, but no question turns upon these.

It is quite certain that the defenders knew long before the end of 1891 who the purchaser from Davis, Strange, & Barker was, for in September of that year he is spoken of by the defenders by name as being the purchaser.

In December 1891 Freeman Thomas sold six hogsheads still remaining in Anderson's store to Davis, Strange, & Barker's order to Browne & Company, now represented by the present pursuers, and the pursuers allege that Mr Ainalie was informed of this sale very shortly after it took place, but Mr Ainalie positively denies this. It may not be of consequence in the case which is right on this matter, but I am satisfied that he was told.

The financial position of Davis, Strange, & Barker having become very doubtful, the defenders arrested the six hogsheads as being in their own hands in security of a general balance due to them, and it is the validity of this arrestment which has to be decided in the present action.

The right of the defenders so to arrest arises under the provisions of the 3d section of the Mercantile Law Amendment Act of 1856, and turns upon the question whether the goods purchased from them being still in their "own hands or possession" at the time of arrestment, the exception to the right to arrest applies, viz., that "the sale of such goods to a subsequent purchaser shall have been intimated to such seller." The statute does not specify any way or form in which intimation must be made, nor does it state by whom intimation must be made to be effectual. It does not require it to be written or prescribe any particulars. "Intimated" is the only word used, and it depends on what may be included in that word whether the pursuers or defenders are to prevail. The pursuers maintain that it is proved that Davis, Strange, & Barker intimated the sale by them to Freeman Thomas, and that that intimation having been made before the date of the arrestment by the defenders, the right of the defenders to arrest under the statute thereby came to an end. The defenders maintain that as matter of fact there was no intimation, and that even if there were held to be an intimation, such intimation being only by Davis, Strange, & Barker, could not set up the exception contained in the statute, so as to render the arrestment at a subsequent date inoperative. I have already said that in point of fact I am satisfied intimation was given by Davis, Strange, & Barker, but the other question is one which I cannot help feeling to be of considerable nicety and difficulty. But giving it the best consideration I can, I have come to the conclusion that the intimation of the subsale by the original purchaser, to the defender, constitutes intimation under the statute. Given a *bona fide* subsale, on which the original seller would have been bound to give delivery on intimation if there had been no arrestment, I am unable to see ground for holding that such intimation cannot be given by the subvender, so as to fulfil the statutory requirement, by whom in the natural course of things

No. 39. the intimation would be made. In this case the original seller had the conditions of his contract fulfilled by payment of the price by the vendee, and that
Nov. 28, 1893. vendee, on his becoming subvender, intimated the subsale to the original
Browne & Co. vender. In doing so, I think that the statutory requirement was fulfilled so as
v. Ainalie & to exclude the original vender from using arrestment for a general balance
Co. against the vendee, and thus preventing the subvender from obtaining fulfilment of his contract.

This being a sufficient ground of judgment, I do not enter into a consideration of the clauses of the Factors Act referred to by the Lord Ordinary, the application of which to the facts of this case seems to me to be more than doubtful.

LORD YOUNG.—I agree with what your Lordship has said as to the facts of the case. The question is as to the validity of an arrestment by the defenders to the effect of depriving the pursuers of their right as purchasers of the goods which they undoubtedly bought and paid for. We have here three sales. Browne & Company, of the Griffin Tavern, the pursuers, bought from Thomas, who bought from Davis, Strange, & Barker, who bought from the defenders Ainalie & Company. I should state my view of the case more easily by taking only two of the sales, that is the sale by Ainalie to Davis, Strange, & Barker, and the sale by Davis, Strange, & Barker either to Thomas or to Browne & Company.

The whisky which Davis, Strange, & Barker bought from Ainalie & Company either was at the time of the purchase, or was in consequence of the purchase, deposited in a bonded warehouse. The casks containing it were stamped and branded with the name of Davis & Company. The bonded warehouse was kept by a man named Anderson, who was designed as the keeper of the warehouse. There is a question of fact which, in my view, is one of no importance, but there is evidence about it, as to whether Davis & Company was informed that Ainalie & Company, the defenders, were lessees of the bonded warehouse, and the employers of the keeper of the bonded warehouse. It would be a strange thing, in my opinion, and altogether inadmissible, for the right of a purchaser to depend in any way upon an inquiry as to who was the lessee of a building used and occupied as a bonded warehouse, but upon the evidence, if anyone should think it a question of material importance, I may say that I am of opinion that Davis & Company had no reason to know or suspect that Ainalie & Company were the lessees of the building so used and occupied. I believe Davis' testimony to the effect that he had no such knowledge or suspicion, but it is undoubtedly the fact—although in my judgment a totally immaterial fact—that Ainalie & Company were lessees of the building and employers of Anderson, the keeper of the bonded warehouse.

The spirits which were sold were deposited in that bonded warehouse in casks stamped with Davis & Company's name, addressed and set aside for them, and it was the intention of Ainalie & Company to put Davis & Company into the position of the owners of the whisky deposited in the bonded warehouse, and the possession which was given to them is what I think, at the common law, as well as under the Factors Act, may be called possession under a document of title. I look at the Act for the statement of what a document of title is under the Act, the main purpose of which was to protect purchasers against their rights as purchasers being disappointed by the interposition of other

parties. The definition of a document of title for the purposes of the Act is, No. 39.
 in my opinion, a good definition of such a title at the common law. I read it, Nov. 28, 1893.
 —“The expression ‘document of title’ shall include any bill of lading, dock-warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of *Browne & Co. v. Ainalie & Co.*
 goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise either by the indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.” In this particular case it was the contract between Davis & Company and Ainalie & Company that Davis & Company should be put in the position of owners of twenty hogsheads of whisky deposited in this bonded warehouse, and should be put in possession of such a document of title as is described in the clause of the statute I have read—should be put in possession of a document of title authorising by indorsement or delivery the transfer of the goods. It appears from the correspondence that it was a question with Davis originally whether they should have from Ainalie separate warrants for each of the twenty hogsheads—that is, a separate document of title for each, or a general order for delivery of the whole, which would enable them to issue their own documents of title to the purchaser of the hogsheads. They bring that under Ainalie & Company’s notice in a letter of 21st January 1891, in which they intimate that they have sold the whisky which they had bought from Ainalie & Company. In that letter Davis & Company say,—“Can you send us separate warrants for each hogshead, or have we to sign delivery-orders ourselves, and if we have to give them, on whom do we have to make them on? Of course such a man as this wants a tangible document.” The expression is significant, “a tangible document,” that is, just such a document as is described, and the effect of which is expressed in the clause of the statute which I have read. The answer is dated 22d January. In their letter Ainalie & Company say,—“We will mark off twenty hogsheads in our books in your name, and hold them to your order, and we will stamp the casks with your name, and you can issue delivery-orders to your customers.” That is the course which was followed out. Then in another letter from Ainalie & Company dated 27th January,—“We have now much pleasure in sending invoice for twenty hogsheads, and also warrant for same. . . . If you desire separate warrants for each hogshead, you can either issue them yourself upon Mr Anderson, or we will send you them just as you may wish.” Davis & Company preferred to send their own delivery-orders, which were prepared so as shew they were whisky-dealers in Leith although having a separate establishment in London.

Now, this delivery-order, which Davis & Company received from Ainalie & Company, and which they lodged with the warehouse-keeper, was addressed to “John Anderson, warehouse-keeper, No. 23 Customs Bond, Wet Docks, Leith,” and was in these terms,—“Please deliver in bond, to order of Messrs Davis, Strange, & Barker, London, twenty hogsheads,” and so on. I think that that may be taken as a form of order upon the warehouse-keeper by anyone, whether the lessee of the premises used and occupied as a warehouse or not, to deliver goods in their name, and I think it clear in point of law that such an order could not be cancelled or revoked or qualified without the consent or concurrence of the party who by contract had procured the order. But I refer to it in order to shew that the intention of Ainalie & Company was to do what they were quite entitled to do, namely, to

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put Davis & Company into the position of being owners of the whisky contained in the casks stored in their name in the bonded warehouse, and that the order was a document of title to enable them to transfer these goods to any person they pleased. It was intended that they should have something tangible as a document of title with the right of transfer to any purchaser from themselves, and if that was not the position which Davis & Company understood they occupied, their transactions with respect to this whisky would have been dishonest. But it was the position which they occupied, in my clear judgment, and was certainly the position which Ainslie & Company intended they should occupy. Suppose the other alternative had been adopted—that Davis & Company instead of issuing their own orders—that is to say, their own documents of title for each of the twenty hogsheads—had taken from Ainslie & Company separate orders for each of the casks, would that not have been the same thing as Ainslie & Company sending twenty different hogsheads to Davis & Company? I think it would, and in my opinion it makes no difference that Davis & Company issued the delivery-orders themselves in their own name, and in the very form which Ainslie & Company on its being sent to them approved of, instead of having a separate order for each cask from Ainslie & Company. The proposition then is that by arrestment under the Mercantile Law Amendment Act Ainslie & Company could defeat the effect of these delivery-orders which they themselves had granted or authorised to be granted. The pursuers purchased this whisky from Davis & Company, who certainly had Ainslie's authority to sell it, and who gave the pursuers documents of title in the shape of warrants for delivery. But the position of Ainslie & Company is this,—“Davis & Company, the sellers, are debtors of ours, and we will arrest goods which Davis & Company sold to you, as we intended they should, for a debt they owe to us.”

Now, under the common law, irrespective of the Mercantile Law Amendment Act altogether, I do not think that any creditor of Davis and Company could have arrested this whisky which had been sold to the present pursuers, who paid for it and received the documents of title. I say, that under the common law, irrespective of the Mercantile Law Amendment Act altogether, I am satisfied that if Davis & Company had become bankrupt this whisky would not have been passed to their trustee in bankruptcy, and I am satisfied that it was not open to the diligence of any of Davis & Company's creditors for the debt owing by them. Their connection with the whisky had ceased and determined, and in the very way that the sellers to them intended that it should, by their selling it to other purchasers, and giving them the documents of title. Davis & Company had no connection with the whisky after that, and how therefore could it be liable to the diligence of their creditors? That, I say, is at common law. But if there is anything clear at all in the Mercantile Law Amendment Act as to this matter it is that the right of a *bona fide* purchaser should not be defeated by any diligence of creditors of the seller. It is as a creditor of the seller to the present pursuers—that is, a creditor of Davis & Company—that Ainslie & Company say they have arrested these goods. But the goods are not Davis & Company's, and they are protected against any diligence at the instance of the creditor of the sellers by the very statute on which they found. Let me read the words—“From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent

for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same." If the arrestment by Ainslie & Company was good, then an arrestment by any other creditor of Davis & Company would have been good, or if Davis & Company had gone bankrupt, as they did, the receiver as they call him in England, or the trustee, as we should call him, would be entitled to attach these goods—they would indeed be attached by process of law. But that is a thing expressly excluded by the Act. The clause is not very happily expressed. The great evil, as it was found under the common law, was that if goods sold, although paid for, were allowed to remain in the custody or possession of the seller, they would pass to his trustee in bankruptcy, or might be attached by any of the creditors of the seller by separate diligence. If the goods were not in the possession of the seller they could not be attached even at common law, and at common law, if a bankrupt had sold goods which were deposited in a bonded warehouse, and had granted a delivery-order to the purchaser who had paid the price, they were not in the custody and possession of the bankrupt. The common law referred only to goods in the custody or possession of the seller. Now, the words in the statute, "in the custody or possession of the seller," are superfluous, and possibly a little misleading unless you attend to the whole object and intention of the provision. It could not mean that they shall be liable to be attached by the creditors of the seller if they are not in his custody or possession, but they shall not be liable to be so attached if they are in his custody or possession. That is simply nonsense. The true meaning is, that if they have not been delivered to the purchaser they shall not be attachable by creditors of the seller, although they might be in his custody or possession. It is a provision to protect a *bona fide* purchaser against the subject of the purchase being attached for the debt of the seller by reason of the goods remaining in his custody.

But then it is said the arrestment here was under clause 3 of the statute. That clause, I venture to say with great respect to any who may think otherwise, is not very felicitously expressed. The meaning of it is, however, I think not doubtful. It reads—"Any seller of goods may attach the same while in his own hands or possession by arrestment or poinding at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party." That is giving the seller a right to arrest when a third party has a right to arrest for a debt due by the same person. That is clearly the view of the Legislature, and the whole object and intention of the enactment. The Act says,—“You are the possessor of goods which a man who may be the debtor of yourself is entitled to demand delivery of. Your right of retention is abolished, but these goods may be attached in your hands by any third party who is a creditor of the buyer from you by arrestment or poinding, and it is very hard that on account of a technicality that a man cannot arrest goods in his own possession you should be placed at a disadvantage, and therefore we put you in the same position to protect yourselves as that occupied by any third party.” But I have pointed out that no creditor of Davis & Company could have attached these goods—no third party could have attached these goods by arrestment or poinding for a debt of Davis & Company to the pre-

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No. 39. judice of the purchaser from Davis & Company. That would have been a violation not only of the common law, but of the expressed provision of the statute. Therefore this arrestment is, in my opinion, altogether out of place. It might have been that there was no sale by Davis & Company. In that case the arrestment or pouding would have been as good by Ainalie & Company in their own hands as by any creditor of Davis & Company. But being sold by Davis & Company, as clearly and distinctly shewn by the document of title, the goods are not arrestable by any creditor of Davis & Company, and would not pass to any trustee of Davis & Company in bankruptcy. I think it is only carrying out the views and intentions of the parties, and the legal effect of what they did, to hold that these goods are the property of Browne & Company, and that they, and they alone, are the creditors for delivery, and that their creditors only can attach these goods. But then we have infelicity of expression here. The seller of goods may arrest the goods at any time prior to the date when the subsale shall have been intimated to him. Of course arrestment after a subsale has been intimated would be bad according to my view, because my view goes further. It is utterly bad, after a subsale has taken place, for the right of a buyer in a subsale to be affected by any debt of the seller to him, or by any creditor of the seller to him. It would be ridiculous to read the statute strictly and literally to mean that if the seller has got intimation of a sale by the buyer, he should not be in the same position as a third party to arrest or poud in his own hand, but if he had not got intimation, he should.

On these grounds, which are really independent of every question except the validity of the arrestment by Ainalie & Company or any other creditor of Davis & Company to disappoint the right of a purchaser from Davis & Company, I am of opinion that the judgment of the Lord Ordinary is right. I agree with your Lordship that not only was it Ainalie's intention that Davis & Company should be in a position to sell to third parties, to give them a document of title, and to give them control of the goods without being exposed to any risk of their attachment by a third party, but also that he certainly knew of the sale to Thomas. I agree that he was informed of the sale, and knew the name of the purchaser, and that, I think, was in law sufficient intimation of the subsale. I do not, however, care to put my judgment upon that; I rather prefer to put it upon the invalidity of any arrestment by a creditor of Davis & Company to the disappointment of a *bona fide* purchaser for value from Davis & Company.

LORD RUTHERFURD CLARK.—This action is directed against Ainalie & Company and John Anderson. But as Anderson is the servant of Ainalie & Company, I shall call Ainalie & Company the defenders.

The whisky to which it relates was sold by the defenders to Davis, Strange, & Barker. It was duly paid for. In February 1891 it was sold by Davis, Strange, & Barker to W. F. Thomas. In December of the same year Thomas sold eight casks to the pursuers, who now demand delivery of six. They have already obtained delivery of two.

The defenders were creditors of Davis, Strange, & Barker on another account. On 9th March 1892 they arrested the whisky in security of the debt due to them, as being "in their own hands or possession," in virtue of the power given to that effect in the Mercantile Law Amendment Act. The question is, whether this arrestment is effectual against the pursuers.

I am of opinion that the whisky remained in the possession of the defenders. **No. 39.**
 It was in their own private store, of which John Anderson is the storekeeper. **Nov. 28, 1893.**
 Anderson is the servant of the defenders, and is paid by a weekly wage. It is **Browne & Co.**
 true that a delivery-order was issued by the defenders against Anderson in favour **v. Ainalie & Co.**
 of Davis, Strange, & Barker, who, on 13th April 1891, forwarded it to Anderson.
 But as the store belonged to the defenders, and as Anderson was their servant,
 such an order was not equivalent to delivery. The goods still remained in the
 possession of the sellers. It is not even said that any transfer was made in the
 books of the store. In point of fact there was no transfer-book. Anderson
 merely kept a small memorandum-book for his own guidance. He says,—“ I
 never effect any transfers of stock in my book ; anything of that kind is always
 done in the office,”—that is to say, in the office of the defenders. It follows,
 I think, that the arrestment cannot be objected to on the ground that the goods
 were not in the hands or possession of the seller.

But no arrestment is legal unless it be used prior to the date “ when the
 sale of such goods to a subsequent purchaser shall have been intimated to such
 seller.” It is maintained by the pursuers that the sale to Thomas and to them-
 selves was intimated to the defenders before the arrestment was used. An im-
 portant question was raised on the meaning of the statute, and I think it right
 to determine it before I examine the facts on which the intimation is said to
 depend.

By the common law no one can arrest goods in his own hands. His only
 remedy is by retention. The Mercantile Law Amendment Act took from the
 seller the right to retain undelivered goods except for the price, but it gave him
 a right to arrest them. In other words, it permitted him to attach them for
 any debt due to him by the purchaser. The right to arrest necessarily presup-
 poses that the purchaser has right to the goods. Otherwise the arrestment
 would be ineffectual. But the purchaser is not the owner, inasmuch as there
 has been no delivery. The right which sustains the arrestment must consist in
 his title to obtain delivery, or, in other words, he must at the time when it is
 used be creditor in the contract of sale.

Accordingly the statute provides that the arrestment must be used prior to
 the intimation of a sub-sale,—that is to say, before a subpurchaser is made the
 creditor for delivery. This is effected by intimation, for by the second section it
 is provided that the seller on intimation of the sub-sale shall be bound to de-
 liver to the subpurchaser. So long as the original purchaser is creditor for
 delivery there seems to be no reason why the seller should not have the power
 to arrest. He is entitled to arrest in respect of the existence of that right, and
 in the absence of any declaration or indication to the contrary, I think that the
 right to arrest must remain so long as the right on which it is founded con-
 tinues to exist.

Accordingly, I read the words “ intimated ” and “ intimation ” as they occur
 in the statute in their ordinary legal sense as applied to moveable rights. Inti-
 mation is the process by which the right of the cedent is completed in the per-
 son of the assignee. A subvendee is the assignee of the original purchaser, and
 his right is completed by intimation to the seller. Until that be done there is
 no contract relation between him and the seller, and the latter is under no obli-
 gation to deliver to him. Indeed if he did he would be acting in breach of his
 contract with the original purchaser. I hold therefore that the arrestment was
 effectual unless it be shewn that before it was used there had been such intima-

No. 39. tion of the subsale as to constitute the pursuers creditors for the delivery of the goods.

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The question then comes to be, whether the subsale was so intimated as to make the subpurchaser the creditor under the contract of sale, or, in other words, so as to complete the assignation of that contract to the subpurchaser. I feel some difficulty in answering it from the great imperfection of the pursuers' record. They do not state the time or manner of intimation. They say nothing more than that "intimation of the said sale was duly made to the custodiers of the whisky, who thereafter held for the before-mentioned pursuers." This averment refers to the sale to the pursuers by Thomas. There is no averment that the sale to Thomas was intimated to the defenders unless it be meant that there is an implied intimation of that sale by the intimation of the sale by Thomas to the pursuers.

On turning to the evidence, I do not find that the pursuers rely on any written intimation of a definite date other than the letter of 1st April 1892, which was subsequent to the arrestment. They attempt to prove that the defenders were cognisant of the sale to Thomas and of the sale by Thomas to them. I do not doubt that the defenders knew that Davis, Strange, & Barker had sold the whisky. Mr Ainslie admits it, and I think it probable that they came to know that Thomas was the buyer. It is not said that anything was done by Thomas or by the pursuers to intimate the subsales. Indeed, it was only on the pursuers' demand to clear the first two hogsheads in January 1892 that they came to know that Davis, Strange, & Barker had anything to do with the whisky. "We did not then know"—so says Mr Towell—"that Ainslie & Company had possession of the whisky. I had never heard of Ainslie up to that time." The pursuers were referred to Davis, Strange, & Barker by Thomas. They applied to that firm, who directed the defenders to invoice and send the two casks to them. This was done, and the casks were delivered to the pursuers by Davis, Strange, & Barker.

In all this I can see nothing which amounts to intimation of the subsales. The evidence of the pursuers comes to no more than that the defenders knew that there had been a subsale. Knowledge is not the word of the statute, and I think it clear that the knowledge of the seller is not equivalent to intimation. The reason is, that as intimation is the act by which the subpurchaser becomes the creditor of the original seller the intimation must be his act. It denotes his acceptance of a position which is not created by the subpurchase, that he accepts the benefits as well as the liabilities of the original contract of sale. I do not mean to say that it must be in writing or be done by himself individually. But it must be done by himself or with his authority. Nothing less will signify that he has made a contract with the original seller. It is said that there could be no liability because the whisky was paid for. I do not think that this statement would be relevant even if it were true. But it is not true. For the creditors under the original contract were necessarily liable for the warehouse rents.

As I read the evidence neither Thomas nor the pursuers ever made any intimation to the defenders, either directly or indirectly. They never attempted to establish, and never did establish, any contract relation between themselves and the defenders. They simply did nothing. They were contented to remain creditors under the contract which they themselves had made.

I hold therefore that the arrestment of the defenders is good and effectual.

If I am right in the opinion I have expressed the defence is good in law, and must be sustained, unless the defenders are barred from pleading it. The Lord Ordinary has not decided whether the arrestment was effectual or not. But assuming it to be effectual, he is of opinion that the defenders cannot found on it. His view is that the defenders, at the desire of Davis, Strange, & Barker, so acted as to enable them to shew a clear title to the whisky as owners, and that customers by reason of their conduct were entitled to believe that Davis, Strange, & Barker had in truth such a title.

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The pursuers state no such case, and I do not think that I can refuse to sustain a legal defence in respect of an equity which is not stated on record. They allege no misconduct on the part of the defenders, nor any conspiracy or concert between them and Davis, Strange, & Barker. They ask judgment in respect of their own legal rights. They do not say that the defenders have been deprived of theirs. As the pleadings stand, I cannot affirm the judgment of the Lord Ordinary.

But if we are to consider a plea of this kind, in support of which no facts have been stated on record, I think that nothing has been proved by which the defenders are barred from founding on their legal rights. There is a great conflict of evidence, and it is not easy to decide where the truth lies. Mr Davis swears that he was never told that Anderson was the mere servant of the defenders. Mr Ainslie's evidence is to the contrary. But, after all, I see nothing more than that Mr Davis told Mr Ainslie that his firm was desirous of "posing as Leith merchants," and that at his request the defenders gave facilities to this end by agreeing that their name should not appear in the transactions with the customers of Davis, Strange, & Barker. If Mr Davis thought that Anderson was a public bonded warehouseman I cannot see what pertinence these statements have. They are more important when we see from the evidence of Mr Ainslie, that in the knowledge that Anderson was the servant of the defenders, Davis asked that delivery-orders should be issued in favour of his firm against Anderson, on whom Davis, Strange, & Barker might issue their own delivery-orders. But even in that case I can see no unfair dealing on the part of the defenders. They might have acted as they did on their own motive without sacrificing any of their legal rights. They were entitled to issue a delivery-order against the keeper of their own store. If they acted within their own powers, it seems to be immaterial that they followed a particular course at the request of Davis, Strange, & Barker.

But the matters with which I have been dealing are necessarily unimportant unless the pursuers were deceived. Mr Towell is the only witness who can speak to this fact. He does not say that the pursuers were deceived. He says no more than that they did not know that the defenders had possession of the whisky. The pursuers bought from Thomas in December 1891, and paid at the time. They did not even know of Davis, Strange, & Barker, until they desired to clear two hogsheads in January 1892. Consequently they completed their purchase without the knowledge of what had been done by the defenders and Davis, Strange, & Barker. In these circumstances I cannot see how the pursuers were misled or deceived, and if they were not, there is no foundation for the plea that the defenders are barred from founding on their legal rights.

The pursuers also founded on the 9th and 10th sections of the Factors Act of 1889. Here, again, their record is very imperfect. There is no attempt to explain the grounds on which they appeal to the Act. But it is obvious that

No. 39. they can take no benefit from it unless they shew that it deprived the defenders of their right to arrest.
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The ninth section deals with a person who has bought goods, and who has obtained with consent of the seller possession of the goods or documents of title, and it declares that the transference by such person of the goods or documents of title shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. We have to consider how that section can affect the defenders.

The goods here spoken of are the goods of the seller, and if the Act affects the defenders they must be taken to be the sellers. The enactment is that the buyer who has obtained possession of the goods shall be entitled to transfer them to the same effect as if he had been a mercantile agent in possession of the goods. The possession of the documents of title gives the same powers and rights as the possession of the goods, or, in other words, the possession of the documents of title is equivalent to the possession of the goods. But this is only possible if the documents of title are the documents under which the seller held the goods. For no transfer order granted by the seller can of itself divest him of the possession. The pursuers have no such documents of title, and the defenders remain in possession of the goods.

Again, the tenth section provides that when a document of title has been transferred to a buyer of the goods contained in the document of title, the transfer shall defeat the vendor's lien or right of stoppage *in transitu* in the same way as the transfer of a bill of lading defeats the stoppage *in transitu*. But we are not concerned with any such rights. The defenders are not claiming any lien, nor are they asserting any right to stop *in transitu*. They are claiming the benefit of an arrestment which they have a statutory right to use so long as the goods are in their own possession.

The Act in the ninth section deals merely with the right to transfer, and in the tenth with vendor's lien and stoppage *in transitu*. It does not alter the law relating to delivery. It leaves to the former law to determine whether the goods remain in the hands of the seller, or whether there has been a change of possession, and in my opinion it leaves unrepealed the statute which enables a seller to arrest the goods so long as they are in his possession.

LORD TRAYNER.—The facts of this case have been so fully stated in the opinion of the Lord Ordinary as to render any recapitulation of them unnecessary. The question of law to be determined is, whether the pursuers are entitled to delivery of the six hogsheads of whisky in question, or whether the defenders are entitled to retain them in respect of the arrestment they have used in their own hands.

The Lord Ordinary has held that the defenders in the circumstances he narrates are barred from pleading their arrestment in answer to the pursuers' demand. I offer no opinion upon this ground of judgment, as I am disposed to decide this case on a consideration of the effect of the 3d section of the Mercantile Law Amendment Act, 1856. That section provides,—“Any seller of goods may attach the same while in his own hands or possession, by arrestment or pouncing, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or pouncing shall have the same operation and effect in a competition or otherwise as an arrestment or pouncing by a third party.” There are here three

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conditions which must be fulfilled in order to make the arrestment effectual, viz. :—(1) The arrestment must be used by the original seller of the goods ; (2) the goods must be in his hands or possession ; and (3) the arrestment must be prior in date to an intimation made to the seller of the sale of the goods to a subsequent purchaser. The first of these conditions is admittedly fulfilled ; the defenders were the original sellers of the goods in question. The second condition is, in my opinion, also fulfilled. There may be room in this case for a question whether the goods sold by the defenders were or were not delivered to their buyers, Davis, Strange, & Barker, so as to pass the property in the goods to them. But such a question does not need to be determined. For the section of the statute does not limit the arrestment by the seller to goods in his "possession," which might be read as meaning in his possession as undivested proprietor, but on the contrary, by express words, provides that arrestment may be used of goods "in his own hands," which I read as meaning goods in the custody or keeping of the seller, no matter what the title may be to which the custody may be attributed, provided of course it be a lawful title. The words "in hands" and "possession" are in my opinion used in contrast and not as synonymous. Now here, whether the goods were or were not delivered in the technical sense to the original buyer, they were at the date of the arrestment in the store or warehouse of the defenders and under their control. In a word, they were in the custody—"in the hands"—of the seller. The only question then remaining is, whether the defenders used the arrestment upon which they found at a date prior to intimation of a subsequent sale. This is a question of fact, but before considering the fact or the proof offered in support of it, it is necessary to see what are the essentials of the intimation which, if made, excludes the seller's right to arrest ; what must be the form and character of the intimation, and by whom must it be made. On this subject I observe that the statute does not prescribe any form of intimation—it does not provide that it shall be in writing—there is no solemnity prescribed with regard to its form, contents, or mode of delivery. It provides merely that an intimation shall be given to the seller which conveys to him the knowledge that a subsale has taken place. Any intimation therefore, verbal or written, which possesses the seller with the knowledge of the fact of the subsequent sale appears to me to fulfil the requirement of the statute. It does not appear to me to be essential that the seller shall be informed who is the buyer under the subsequent sale. In that he has no interest. If the conditions of the original contract of sale have been fulfilled it is of no concern to him to whom the goods are ultimately delivered whether he be the first or the sixth subvendee, provided only that the person ultimately claiming the goods can shew such a title to them as warrants the original seller in giving delivery. If the conditions of the original contract have not been fulfilled the original seller can hold the goods against the world until such fulfilment is made. As the subsequent sale (if there is one) does not affect the rights of the original seller it is of no importance to him to know the name of the person to whom that subsequent sale has been made. Does it make any difference whether the intimation is made by the buyer under the original sale, and seller under the subsequent contract, or the subvendee ? I think not ; either may make it. If there is any difference I should prefer to hold that the intimation should be made by the original buyer and subvendor rather than the subvendee. The original seller knows nothing, or may know nothing, of the subvendee, with whom he stands in no contract relation, and he might very well answer

No. 39. any intimation from the subvendee by saying, "I will take no notice of your intimation or any claim under it until you produce your delivery-order or other notice from the man who bought from me, and to whom I am bound by contract to deliver the goods." But a notice from the original purchaser to the effect that he had sold the goods to another is a different matter, and a notice to which the original seller (saving his rights under the original contract) would be bound to give effect, and would be safe in giving effect.

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Now, then, how stand the facts as regards intimation of a subsale? The original sale of twenty hogsheads of whisky (of which the six now in question form a part) was made early in January 1891. On the 21st of that month Davis, Strange, & Barker wrote to the defenders that they had that day opened an account with one of the richest publicans in London, and added,—“We have sold him this lot of whisky,” and it is plain (I do not think it is disputed) that this letter refers to the twenty hogsheads bought from the defenders. Their reply, on the following day, clearly shews that the defenders so understood it. This intimation did not name the purchaser, but that, as I have said, was not in my opinion at all necessary. But the name of the purchaser was very soon supplied—for a delivery-order for a hogshead of this particular lot of whisky (identified by marks and numbers), dated 5th February 1891, in favour of W. Freeman Thomas, was forwarded to the defenders by Davis, Strange, & Barker. I think it does not appear on the proof on what date precisely this delivery-order reached the defenders, but there is no proof and no suggestion that it was not sent to and received by the defenders several months before the arrestments. The documentary evidence therefore comes to this—that written intimation was given to the defenders by their buyers of a subsale of the twenty hogsheads to one purchaser in January 1891, and that subsequently a delivery-order was presented for part of the whisky, which disclosed the purchaser to be a Mr Thomas. The parole evidence is to the same effect. Mr Davis and Mr Barker both depone to having informed Mr Ainslie, the defender, at an interview in London on 18th February 1891, that they had sold the twenty hogsheads to Mr Thomas, and “that the delivery-orders had been handed” to him. No doubt Mr Ainslie denies this. He does not deny knowledge of a subsale, but he says that at the interview with Davis and Barker he neither asked nor was told the name of the purchaser. But I prefer to believe that Mr Ainslie has forgotten what took place at that interview, rather than to believe that Davis and Barker are swearing to a statement which (if not true) they must have invented and knew to be false. I think, therefore, that the evidence in the case shews that prior to 18th February the defenders had written intimation of the subsale to Mr Thomas, and that on 18th February the intimation was verbally repeated.

The arrestment founded on by the defenders was used by them on 9th March 1892, a date somewhat carelessly omitted from the defenders' record, but which I find from the execution of arrestment produced. It follows that the defenders' arrestment is ineffectual in competition with the pursuers (who stand in the place and use the rights of Mr Thomas), not having been used prior to the date when the sale of the goods in question to a subsequent purchaser had been duly intimated. I am therefore of opinion that the result reached by the Lord Ordinary is right, and ought to be affirmed.

THE COURT adhered.

GORDON PETRIE & SHAND, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

ALLAN, BUCKLEY ALLAN, & MILNE, Pursuers (Appellants).—*M^cKechnie—W. Campbell.* No. 40.

JAMES Y. PATTISON, Defender (Respondent).—*Salvesen—W. Thomson.* Nov. 29, 1893.

Cautioner—Liberation of cautioner—Cautioner for composition liberated by creditors taking trust-deed without his consent—Consent not implied from silence v. Pattison.
 —*Personal objection.*—A debtor, who had granted a trust-deed for behoof of his creditors, entered into an arrangement with them for payment of a composition of 7s. 6d. per £1, and found caution for the payment of the last instalment, A being one of the cautioners. The debtor failed to pay the first instalment of the composition, and the creditors took from him a second trust-deed for their behoof. No intimation of this was sent to A, but a meeting of the creditors having been subsequently called by circular, one of the circulars was sent to A, who took no notice of it. The debtor's estate realised enough to pay about 2s. 6d. per £1. The cautioners having subsequently been called on to pay, A disputed liability, and an action was raised against him.

Held (dub. Lord Young) that by taking the second trust-deed the creditors had liberated the cautioners, and that A was not barred from pleading this by his silence after receiving the circular.

ON 12th February 1891 James Chalmers Mackay, printer, Nether-^{2d DIVISION.}
 kirkgate, Aberdeen, granted a trust-deed for behoof of his creditors. On
 23d February this trust-deed was superseded, and Mackay reinstated in
 his estates, under a composition arrangement by which the creditors
 agreed to accept a composition of 7s. 6d. in the £1, payable by instal-
 ments of 2s. 6d., 2s., and 3s. at four, eight, and twelve months respectively,
 Mackay finding caution for the last instalment, which amounted in all
 to about £250. Among the cautioners was James Y. Pattison, advertis-
 ing agent, Broad Street, Aberdeen, who became cautioner for that instal-
 ment to the extent of £100.

Mackay was unable to pay the first instalment of the composition, and on the 20th June 1891 a trust-deed was taken from him for behoof of his creditors, without any intimation to Pattison. Notice of this was at once sent to all the creditors, and a meeting called for the 24th June. A copy of this circular was sent to the cautioners, including Pattison, who took no notice of it. The creditors agreed to Mackay's estate being realised under this trust-deed. The estates having been realised, the dividend thereon was under 2s. 6d. per £1.

The cautioners having been called on to pay, and Pattison having declined to do so, Allan, Buckley Allan, & Milne, advocates in Aberdeen (in whose favour, as representing the creditors, the letters of guarantee had been granted), raised an action in the Sheriff Court at Aberdeen against Pattison, for payment of £100, the amount of his guarantee.

The pursuers pleaded;—(2) The defender having guaranteed payment of the said last instalment to the extent mentioned, he is bound, on the failure of the debtor to pay, to implement his guarantee. (3) The said James Chalmers Mackay having, on his failure to pay the first instalment of the composition, become insolvent, his creditors were entitled to take a trust-deed from him, and under it to realise the estate. (4) The creditors of the said James Chalmers Mackay not having by their actings or otherwise relieved the defender of his cautionary obligation, they are entitled to insist on implement thereof.

The defender pleaded;—(6) The said James Chalmers Mackay having failed to pay the first instalment of the alleged composition, and the pursuers, or those whom they represented, having in consequence thereof departed from the said composition arrangement, and entered upon the possession of the said estate under the trust-deed of 20th June 1891,

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and that without having consulted the defender, and the defender having thereby suffered prejudice, at least to the extent of the said alleged obligation, the pursuers, or those whom they represent, are barred from insisting in this action, and the defender is entitled to be assoilzied, with expenses. (7) The alleged guarantee sued on having been granted on the condition precedent that the first two instalments of the said composition should be paid, and the same having not been purified, and the composition arrangement having been abandoned and departed from, the defender is entitled to absolvitor, with expenses.

On 3d April 1893 the Sheriff-substitute (Brown) pronounced this interlocutor (after findings in fact):—"Finds in law . . . that the estate of the said James Chalmers Mackay having been realised with the knowledge of, and without objection on the part of the defender, he is now barred from objecting thereto or pleading it as a ground of release from his obligation: Therefore repels the defences, decerns against the defender as concluded for: Finds the pursuers entitled to expenses," &c.

On appeal, the Sheriff (Guthrie Smith), on 23d May, pronounced an interlocutor by which he affirmed the findings in fact in the Sheriff-substitute's interlocutor: "*Quoad ultra* recalls the same: Finds in law that the creditors by taking from the bankrupt the trust-deed of 20th June 1891, without the defender's consent, liberated him from his obligation: Therefore assoilzies the defender from the conclusions of the summons: Finds him entitled to expenses," &c.*

The pursuers appealed, and argued;—It was settled law that a cautioner was not liberated by reason of the debtor whom he had

* "NOTE.—This case seems to me to be governed by the case of *Scott v. Campbell*, 12 S. 447 . . . The offer of composition by the bankrupt, the interposition of the defender as one of the securities to a limited extent for payment of the last instalment, and the acceptance by the creditors of the composition so guaranteed, put an end to the prior trust-deed, and amounted to a contract between the cautioner and the creditors which could not be altered or varied without the cautioner's consent. This is the effect of the judgment in *Scott v. Campbell*. Nor is it relevant to inquire whether the new agreement with the bankrupt, by which he granted a second trust-deed, altered the cautioner's position for the worse, because when a man undertakes a cautionary obligation on a certain footing, it is for him to judge whether or not he will remain liable, notwithstanding the change; when, therefore, the bankrupt failed to pay any of the instalments of the composition which he had promised to pay, the creditors might have called on the cautioner to make good the deficiency to the extent of his obligation, and in that event he would have had recourse against the estate left in the hands of the bankrupt for his own indemnification, but they were clearly not entitled to deprive him of that remedy by taking from him the second trust-deed, without discharging the surety, unless he had expressly agreed to continue bound. It is this want of consent on the defender's part which seems to be fatal; and I cannot agree with the Sheriff-substitute, that standing by and doing nothing was as good as consent, and bars him from now urging the plea. This view of the Sheriff-substitute is opposed to the opinions expressed in *Polak v. Everett*, L. R., 1 Q. B. Div. 669, an English case no doubt, but there is really no difference on such a purely equitable question as this between the practice of the English and Scottish Courts. Wherever a man has knowledge of a transaction, and from the usage of trade or otherwise there is a duty to speak, he may be precluded by his silence from afterwards objecting. 'But to say' (says Lord Blackburn) 'that a person who, being a surety, becomes aware that the creditor is going to give time, or do something else which if done without his consent may discharge him, is bound to warn the creditor against it, is a thing for which no authority has been cited.' The defender therefore seems entitled to judgment."

guaranteed being sequestrated,¹ and the granting of the trust-deed of 20th June 1891 was equivalent to sequestration, in so far as this question was concerned. It was immaterial to the cautioner how his debtor had been divested of his property, whether by voluntary trust-deed, or by operation of sequestration. He therefore had suffered no prejudice. The case of *Scott v. Campbell*² was special.

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The argument for the defender sufficiently appears from the opinions of the Court.

At advising,—

LORD JUSTICE-CLERK.—In the beginning of 1891 the affairs of Mr Mackay became embarrassed, and on 12th February of the same year he granted a trust-deed to certain persons as trustees for behoof of his creditors. A composition arrangement was afterwards agreed to, and Mr Pattison, the defender, became security for payment to the extent of £100 of the last instalment of the composition arrangement. Mr Mackay failed to pay the first instalment of the composition, and thereafter he entered into a second trust-deed in June 1891. This trust-deed was granted without any communication to the defender, and a meeting of the creditors was held, when for the first time information of the trust-deed was sent to him.

The question in the case is, whether the second trust-deed, being entered into by Mackay and his creditors without the consent of the cautioner, has or has not the effect of relieving the cautioner from his obligation to pay the £100 for which he had become security.

Now, this second trust-deed was a voluntary arrangement made by the creditors of Mackay, and it is said by the defender that it has superseded the former arrangement and has freed him. The Sheriff-substitute found that the defender was liable; the Sheriff reversed that finding, and held that the taking of the trust-deed without the defender's consent liberated him from his obligations, and I have come to the conclusion that the Sheriff is right.

Had the intervention taken the form not of a voluntary trust-deed but that of proceedings in exercise of right by creditors, such as the diligence of sequestration, that would have made quite a different case. Sequestration would not free the cautioner from his obligation, because sequestration is a diligence according to law. But the position of this case is quite different. The defender undertook to become surety for this £100 upon certain conditions, and if these are not carried out, then he is not bound to submit to other conditions to which he was not a party.

It was said for the pursuers that the defender was barred from claiming to be relieved from the obligation because he did not object to the second trust-deed when it was entered into, but I do not see that a cautioner is bound in such circumstances to interfere. It is for the persons who are making the new arrangement to take care of themselves, but a cautioner cannot lose his right to relief in consequence of innovation because he did not inform the innovators that if they went on with their arrangement he would hold himself freed from his obligation.

¹ *Freeland v. Finlayson*, June 11, 1823, 2 S. 389; *Muir v. Scott*, Dec. 2, 1825, 4 S. 252; *Thomson v. Craig & Latta*, June 12, 1863, 1 Macph. 913, 35 Scot. Jur. 545.

² *Authorities.*—*Scott v. Campbell*, Feb. 14, 1834, 12 S. 447; *Forsyth v. Wishart*, Feb. 8, 1859, 21 D. 449, 31 Scot. Jur. 248; *Johnston v. Duthie*, March 15, 1892, 19 R. 624.

No. 40. LORD YOUNG.—I have not found this case free from difficulty, and the most I can say is, that I do not see sufficient grounds to interfere with the judgment of the Sheriff.

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LORD TRAYNER.—The material facts requiring attention in the decision of this case are not in dispute, and are to be found set forth in the joint minute of admissions lodged in process. Shortly stated, the facts are as follows :—In February 1891 James Chalmers Mackay, having become embarrassed, granted a trust-deed for behoof of his creditors, but after the granting of the trust-deed negotiations were set on foot for the purpose of carrying through a composition arrangement between Mackay and his creditors whereby the trust-deed would be superseded. That composition arrangement was effected, and under it Mackay offered and his creditors accepted a composition of 7s. 6d. per pound, payable by instalments at four, eight, and twelve months respectively from the month of February 1891. The defender guaranteed the due payment of the last instalment to a certain extent. The first instalment was due in the month of June, and was not paid by the debtor, and very shortly thereafter (in the same month) Mackay's creditors required him to grant, and he did grant, a trust-deed in their favour whereby he conveyed to trustees there named his whole estate for his creditors' behoof. Under that deed the insolvent's whole estate has been realised by the trustees. The question of law is, whether the actings of Mackay's creditors subsequent to the date of the guarantee have released the defender from his obligation. The Sheriff, differing from the Sheriff-substitute, has answered this question in the affirmative, and has assoilzied the defender. I am of opinion that the Sheriff is right, and for the reasons which he has stated, to which I have very little to add.

The condition of the agreement or contract under which the defender became cautioner was that the debtor was to remain vested with his whole estate with a liability to pay the instalments under the composition arrangement as they became due. That bargain was one which the debtor and his creditors were not entitled to depart from if the cautioner was to remain liable. But in four months after making that bargain the creditors and the debtor entered into a new contract, whereby the debtor was at once divested of his whole estate, and such a bargain did, or reasonably might, deprive the cautioner of a right of relief against the debtor's estate which he was entitled to rely upon having when he granted his cautionary obligation. The appellants argued that the taking of the trust-deed did the cautioner no prejudice which he would not have suffered if the creditors, instead of taking a trust-deed, had applied for sequestration of the debtor's estate after his failure to pay the first instalment, and that taking out sequestration would not have liberated the cautioner. The cases of *Freeland* (2 S. 389) and *Muir* (4 S. 452) were cited in support of this argument. The law laid down in these cases was not questioned, but I think these cases do not aid the pursuers' contention.

In the cases cited the rule laid down was that creditors who do diligence for recovery of a first instalment under a composition arrangement do not thereby liberate the cautioner for a second or third instalment. Sequestration is just a kind of diligence, and may be resorted to by a creditor like diligence of any other kind. It would be out of the question to say that creditors to whom a first instalment is due are not to be allowed to use the means which the law provides for recovery of what is due to them, except on condition of giving up a

cautionary obligation for something which is not yet due. Creditors may undoubtedly resort to such means without any such consequence following. But if creditors, instead of using such means, enter into a new bargain with the debtor, for obtaining, not money payment of the instalment due, but payment of their whole debt, so far as the debtor's whole estate when realised will yield payment, then they cannot hold a cautioner like the defender liable on his limited cautionary obligation—an obligation granted on a condition which left the debtor vested in his whole estate. In short, the creditors by voluntary arrangement with their debtor, having without the cautioner's consent essentially altered the conditions under which the cautioner alone consented to be bound, cannot enforce that cautioner's obligation. I think the case of *Scott* (12 S. 447), referred to by the Sheriff, is quite in point, and am of opinion that this appeal should be dismissed.

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LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-substitute of the county of Aberdeen, dated 3d April 1893: Find in law in terms of the findings in law in the interlocutor of the Sheriff of the county of Aberdeen dated 23d May 1893: Dismiss the appeal, and of new assoilzie the defender from the conclusions of the summons, and decern," &c.

DUNCAN SMITH & M'LAREN, S.S.C.—J. DOUGLAS GARDINER & MILL, S.S.C.—Agents.

WILLIAM SANDERSON SMART AND OTHERS (Wilkie's Trustees), First Parties.—*Strachan—Sandeman.*

GEORGE WILKIE AND OTHERS (Wight's Trustees), Second Parties.—*Strachan—Sandeman.*

MRS SUSAN WILKIE OR MACLEOD, Third Party.—*W. Thomson.*

No. 41.
Nov. 30, 1893.
Wilkie's Trustees
v. Wight's
Trustees.

Succession—Direction to trustees to retain—Repugnancy—Revocation—Vesting.—By trust-disposition and settlement a testator directed her trustees in the second place to give certain furniture and other effects to her two daughters; in the third place, to convey her heritable property to the daughters equally; and in the fourth place, *inter alia*, to pay one-third share of the residue of her estates to each of the daughters.

By a codicil the testator revoked the second and third purposes of the trust-disposition, and in place thereof directed her trustees to sell the whole of her furniture and effects mentioned in the second purpose, and also her heritable property mentioned in the third purpose, and to hold the proceeds thereof, and also the shares of the residue appointed to be paid to the daughters under the fourth purpose of the trust-disposition in their own hands, for the benefit and alimentary use of the daughters, equally between them share and share alike, and to pay, apply, and lay out the same for their behoof respectively, in such way and manner as the trustees might consider proper and expedient, and to pay the daughters the capital and interest, or only the interest, at such times and terms, and in such way and manner, and in such sums or proportions, as to the trustees should seem proper and expedient, as to all which she gave the trustees most ample powers and discretion, without control or interference on the part of the daughters or their husbands, or any party or parties acting for them or in their right, the said provisions being purely alimentary and not subject to the *jus mariti* or right of management or administration of their respective husbands, and she declared that it should not be in the power of the daughters or their husbands to sell, burden with debt, alienate or assign, the said provisions or any part thereof, either absolutely or in security, nor to

No. 41. anticipate the payment thereof, nor should the same be arrestable for, or affectable by, their debts or deeds of any description whatsoever, nor be subject to the legal diligence of their creditors, all such debts, deeds, and diligence being thereby expressly excluded and debarred; and in all other respects she confirmed her said trust-disposition and settlement.

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In a special case presented after the death of the testator, *held* (1) that as under the trust-disposition by itself the provisions to the daughters vested a *morte testatoris*, and as the fourth purpose was not revoked by the codicil, the codicil was not to be construed as altering the period of vesting either of the daughters' shares of residue or of the subjects mentioned in the second and third purposes of the settlement, but merely as making a money addition to the daughters' shares of residue, vesting a *morte testatoris*; and (2) (*dis. Lord Trayner*) that the daughters were entitled to immediate payment of their provisions, the directions to the trustees to retain, in the codicil, being void from repugnancy.

Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301, *followed*.

2D DIVISION.

MRS HENRIETTA CHRISTIE OR WILKIE, Rosslyn Crescent, Edinburgh, died on 26th September 1884, survived by three sons and by two daughters, Henrietta (Mrs Wight), and Susan (Mrs Macleod).

By her trust-disposition and settlement, dated 24th January 1883, Mrs Wilkie, in the second place, directed her trustees "immediately on my death, to give and deliver over to my two daughters, Mrs Henrietta Wilkie or Wight, and Mrs Susan Wilkie or Macleod, equally between them, share and share alike, my whole furniture, bed and table linen, china, books, pictures, silver-plate, and all other effects in my dwelling-house that shall belong to me at the time of my death." By the third purpose she directed her trustees "immediately after my death, to convey and make over to and in favour of my said two daughters, equally between them, share and share alike, and to the survivor of them, and the heirs and assignees whomsoever of such survivor, any dwelling-house or heritable property whatsoever which may belong to me at the time of my death, but exclusive of the *jus mariti* and right of management and administration, and every other legal right of their husbands respectively." In the fourth place, Mrs Wilkie directed her trustees "at the first term of Whitsunday or Martinmas six months after my death, and after the provisions in favour of my daughters as above written have been implemented, to divide the residue of my whole means, estate, and effects into three equal parts or shares, and to pay the same to and among my children as follows, *videlicet* :—One-third part or share thereof to each of my said daughters, and the remaining one-third part or share thereof to my sons . . . Declaring that if any of my said children above named shall die before the said period of payment, leaving lawful issue of their bodies, such issue shall, equally among them, be entitled to their deceased parent's share, and also declaring that the shares of any of my said children above named who may die before said period of payment without leaving lawful issue, shall go, accresce, and belong equally to the survivors of the said children above named, and the issue of such of them as may have predeceased *per stirpes* and not *per capita*."

Mrs Wilkie also left a codicil to her trust-disposition and settlement, dated 24th October 1883, in the following terms :—"I hereby revoke the second and third purposes of the said trust-disposition and settlement, and in place thereof I direct my trustees, immediately after my death, or as soon thereafter as they can conveniently do so, to sell the whole of my furniture and effects mentioned in the said second purpose, and also my heritable property mentioned in the said third purpose, and to hold the proceeds thereof, and also the shares of the residue appointed to be paid to my two daughters, Mrs Henrietta Wilkie or Wight and Mrs

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Susan Wilkie or Macleod, under the fourth purpose of the said trust-disposition and settlement in their own hands, for the benefit and alimentary use of my said two daughters, equally between them share and share alike, and shall pay, apply, or lay out the same for their behoof respectively in such way and manner as my trustees may consider proper and expedient, and to pay them the capital and interest, or only the interest, at such times or terms, and in such way and manner, and in such sums or proportions, and through such channels as to my trustees shall seem proper and expedient, as to all which I give them the most ample powers and discretion, without control or interference on the part of my said daughters or their husbands, or any party or parties acting for them or in their right, the said provisions being purely alimentary and not subject to the *jus mariti* or right of management or administration of their respective husbands; and I declare that it shall not be in the power of my daughters or their husbands to sell, burden with debt, alienate, or assign the said provisions or any part thereof, either absolutely or in security, nor to anticipate the payment thereof, nor shall the same be arrestable for or affectable by their debts or deeds of any description whatever, nor be subject to the legal diligence of their creditors, all such debts, deeds, and diligence being hereby expressly excluded and debarred, and in all other respects I confirm my said trust-disposition and settlement."

Mrs Wilkie's daughter Mrs Wight died on 13th August 1892. Prior to the death of Mrs Wight, Mrs Wilkie's trustees had paid the one-third of the residue left to the sons, and had realised the subjects mentioned in the second and third purposes of the trust-disposition, but had retained the proceeds, as well as the two remaining thirds of residue, in their own hands, paying the interest only to the daughters equally, with the exception of certain sums of capital, amounting in all to £600, which had been paid over to the daughters. At the date of Mrs Wight's death, the trustees had £1825 of capital in their hands.

On 24th May 1893, a special case was presented for the opinion and judgment of the Court as to the disposal of this £1825.

Mrs Wight's marriage-contract trustees—the second parties—claimed one-half, or £912, 10s. as having vested in her *a morte testatoris*, and consequently as carried by the conveyance in her marriage-contract.

The third party, Mrs Macleod, on the other hand maintained that on a sound construction of the settlement and codicil no right to this £912, 10s. had vested in Mrs Wight, as it had not been paid to her during her lifetime, and that, as the settlement contained no ulterior direction with regard to this sum, it passed into intestacy, *i.e.* fell to be divided among the testator's five children equally. Alternatively, Mrs Macleod maintained that if the daughters' shares vested *a morte testatoris*, she was entitled to immediate payment of £912, 10s. being her half of the £1825.

In opposition to Mrs Macleod's alternative contention, Mrs Wilkie's trustees, the first parties, maintained that, if the daughters' shares vested *a morte testatoris*, Mrs Macleod was not entitled to immediate payment of her share, they (the trustees) having an absolute discretion as to payment.

The questions of law were:—“(1) Did the said sum of £912, 10s. vest in Mrs Wight, and form part of the personal estate assigned by her to her trustees for the purposes mentioned in her antenuptial contract of marriage? or (2) Has the said sum fallen into intestacy as part of the estate of the late Mrs Wilkie, and are her next of kin entitled thereto in the foreshaid shares? (3) In the event of the first question being answered in the affirmative,—Is the third party entitled to immediate payment of the corresponding sum of £912, 10s. held for her behoof?”

Argued for the second parties;—The shares of both daughters vested

No. 41. *a morte testatoris*, or at all events, at the first term of Whitsunday or Martinmas six months after the death of the testator. That was plainly the rule upon a construction of the trust-disposition taken by itself, and the codicil did not alter the period of vesting of the residue, but merely gave the trustees power to retain the fee of the daughters' shares, in whole or in part, during their lifetime. The proceeds of the furniture, which was the subject of the second purpose of the settlement, and of the heritage, which was the subject of the third purpose, in effect became part of the daughters' shares of residue, and vested at the same time as the original shares.

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Argued for the first parties;—The directions to the trustees to retain the daughters' shares, in whole or in part, were not void from repugnancy. Such directions were not necessarily repugnant to an immediately vested interest. If it appeared plain that the testator intended to protect the beneficiary by interposing a trust, such a direction was effectual—at all events as in question with the legatee—notwithstanding¹ that the legatee took a vested interest *a morte*.

Argued for the third party;—(1) No right to the fee of her share had vested in Mrs Wight, since she had died without having received payment. Under the trust-disposition the vesting of the residue took place at the period of payment, which was at the first term happening six months after the death of the testator. Under the codicil, the period of payment of the daughters' shares was left absolutely to the discretion of the trustees; and consequently there was no vesting as regarded these shares except on actual payment.² (2) If however, the daughters' shares vested *a morte*, the third party was entitled to immediate payment of her share, the directions to retain in the codicil being, on that alternative, void from repugnancy.³

At advising,

LORD RUTHERFURD CLARK.—By the second purpose of her settlement the truster directed her trustees to give certain effects to her daughters Mrs Wight and Mrs Macleod, equally, and by the third, to convey to them certain heritable property in equal shares. By the fourth she directed them to pay to each daughter an equal third of the residue. There can be no doubt that under these clauses the daughters took a right of fee.

By her codicil she revoked the second and third purposes of the settlement, and directed the trustees to sell the subjects which were dealt with in these clauses, and “to hold the proceeds thereof, and also the shares of the residue appointed to be paid to my two daughters Mrs Henrietta Wilkie or Wight and Mrs Susan Wilkie or Macleod under the fourth purpose of the said trust-disposition and settlement in their own hands, for the benefit and alimentary use of my said two daughters, equally between them, share and share alike, and shall pay, apply, or lay out the same for their behoof respectively in such way and manner as my trustees may consider proper and expedient, and to pay them the capital and interest, or only the interest, at such times or terms, and in such way and manner, and in such sums or proportions, and through such channels as to

¹ Christie's Trustees v. Murray's Trustees, July 3, 1889, 16 R. 913; Campbell's Trustees v. Campbell, July 17, 1889, 16 R. 1007.

² Burnsides v. Smith, June 10, 1829, 7 S. 735; Weller v. Ker, March 2, 1866, 4 Macph. (H. L.) 8, 38 Scot. Jur. 256; Chambers' Trustees v. Smith, April 15, 1878, 5 R. (H. L.) 151.

³ Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301; Mackinnon's Trustees v. Official Receiver in Bankruptcy in England, July 19, 1892, 19 R. 1051.

my trustees shall seem proper and expedient." She further declared "that it shall not be in the power of my daughters or their husbands to sell, burden with debt, alienate, or assign the said provisions or any part thereof, either absolutely or in security, nor to anticipate the payment thereof, nor shall the same be arrestable for or affectable by their debts or deeds of any description whatever, nor be subject to the legal diligence of their creditors, all such debts, deeds, and diligence being hereby expressly excluded and debarred."

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It is to be observed that the truster does not revoke the fourth purpose, and I think that the effect of the revocation of the second and third purposes, taken in connection with the directions in the codicil, is merely to make a money addition to the interest which the daughters took under the residuary clause. For the money produced by the sale of the property, failing these clauses, is to be dealt with in the same way as the share of residue, and it is, in my opinion, impossible to make any distinction between the rights of the daughters in the residue and in this money.

As the fourth clause is not revoked, the right of fee given to the daughters remains. There is an attempt to limit the daughters in the use of it, but nothing more. There is neither a declaration that their right should be limited to a liferent, nor is there a destination to any other person. I am of opinion therefore that the share of Mrs Wight vested in her in fee, and passed to her marriage-contract trustees.

It is a more difficult question whether Mrs Macleod is entitled to immediate payment of her share. But I am of opinion that she is. I hold her to be a fiar, and I do not think that the rights of a fiar can be restricted by the limitations contained in this deed. These limitations do not reduce the right of the legatees to anything less than a fee. They are mere attempts to restrain the rights of the fiar in the use of her own property. It cannot, I think, be doubted that creditors would not be excluded, and though a liferent may be declared alimentary, such a declaration has no effect on a right of fee. Following the case of *Miller* (18 R. 301), I think that there is a repugnancy between these limitations and the right of fee, and that the rights of the fiar must prevail.

Mrs Macleod being fiar was, in my opinion, entitled to sell her interest under the settlement, and there could be no possible benefit in keeping up the trust against the buyer. It is, I think, a well-settled principle that the Court will allow a legatee to do directly what may be done indirectly.

LORD TRAYNER.—I have no difficulty in arriving at the conclusion that the shares of residue destined under the testamentary writing before us to Mrs Wight and Mrs Macleod vested in them *a morte testatoris*. But then the testatrix has directed her trustees to hold these shares of residue in their own hands "for the benefit and alimentary use" of the beneficiaries named, and to pay them the capital and interest, or only the interest, at such time and in such manner and proportion as to them (the trustees) shall seem proper and expedient. The testatrix has made her intention quite plain that the benefit conferred by her on Mrs Wight and Mrs Macleod should not be paid over to them, but should be so secured to them during their respective lives that no act or deed of theirs should deprive them of it. It may be that the testatrix has not effectually secured the shares of residue in question against the creditors of the beneficiaries, —a point on which I give no opinion,—but in judging of a claim made by a beneficiary under a testamentary writing, I am not disposed to dis sever the right

No. 41. itself from the condition annexed to the right by the giver of it; nor concede to the beneficiary something which the testator has in express terms forbidden or refused. It is maintained, on the authority of the case of *Miller's Trustees*, that the conditions referred to are ineffectual, and cannot be enforced. I am bound to follow the decision in that case if applicable, whatever my own opinion may be. But I think the present case falls within the exception to the rule given effect to in that case—an exception stated by the Lord President in these words,—"When there are trust purposes to be secured which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator." These words, in my opinion, express the law applicable here.

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Mrs Wight being dead, and the will of the testatrix having been fulfilled in regard to Mrs Wight's share, I think her representatives are now entitled to payment, and accordingly I would answer the first question in the affirmative. But I think Mrs Macleod is not entitled to claim payment of her share of the residue, and I would therefore answer the third question in the negative.

The LORD JUSTICE-CLERK concurred with Lord Rutherford Clark.

LORD YOUNG was absent.

THE COURT answered the first and third questions in the affirmative, and found it unnecessary to answer the second question.

MACK & GRANT, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

No. 42. THE TALISKER DISTILLERY, Pursuers (Respondents).—*Ure*—*M. Lennan*.
HAMLYN & COMPANY, Defenders (Reclaimers).—*Dickson*—*A. S. D. Thomson*.

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Talisker Distillery v. Hamlyn & Co.

Contract—Foreign—Locus solutionis—Arbitration—Reference to unnamed arbiters.—By contract, signed in London, H. & Company, an English firm, agreed to purchase from K. & Company, distillers in Skye, all grains made by them at a certain price, and to fit up a grain drying machine at the distillery. K. & Company agreed to keep the machine in good order, and to "bag up" their grains in H. & Company's sacks, and deliver them f.o.b. at a port in Skye. It was further agreed that "should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way."

Held (diss. Lord Kinnear) that the arbitration clause did not exclude action in the Scots Courts, the majority of the Court being of opinion (1) that the validity and effect of the contract fell to be determined by the law of Scotland as being the *lex loci solutionis*; (2) that the arbitration clause could not be regarded as a separate contract, the *locus solutionis* of which was in England; and (3) that the arbitration clause being a reference to unnamed arbiters, was by the law of Scotland inoperative.

1ST DIVISION.
Ld. Kyllachy.

BY memorandum of agreement, dated 27th January 1892, between Roderick Kemp & Company, of Talisker Distillery, Carbost, Skye (now represented by "The Talisker Distillery"), and Hamlyn & Company, merchants, London, Roderick Kemp & Company agreed to sell and Hamlyn & Company agreed to buy all grains made by Kemp & Company at a certain price, and further, to supply and erect at the distillery a patent grain drying machine, which Kemp & Company agreed to keep in proper working order, "supplying all steam and labour, &c. necessary for properly drying the grains for the said Hamlyn & Company, and will

bag up in the said Hamlyn & Company's sacks and deliver the grains f.o.b. Carboest, to their order." The contract was to be in force for ten years from the date of the erection of the machine.

The agreement contained the following clause,—“Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way.”

The memorandum of agreement was signed by the parties in London.

In March 1893, disputes having arisen between the parties, the Talisker Distillery raised an action against Hamlyn & Company concluding for declarator that the defenders were bound to purchase all grains made by the pursuers for ten years from 27th October 1892, and for payment of £3000 for breach of contract, in respect that the defenders had failed to provide a proper drying machine, and that they now sought to repudiate the agreement to purchase the grains made by the pursuers.

The defenders denied that they had failed to supply an efficient drying machine, and averred that they were anxious to carry out the agreement, but that the grains supplied were not properly dried and put into sacks for delivery.

The defenders averred;—“The said memorandum of agreement was drawn and executed by the parties thereto in England, and falls to be construed and governed by the law of England. Further, it was drawn and executed in contemplation of the English law, and the parties thereto intended that it should be construed and enforced according to the law of England, and that that law alone should govern its construction and effect. It is the law of England, and, in particular, it is prescribed by the Arbitration Act, 1889, that a clause of reference, expressed in the terms of the clause above quoted, is irrevocable and valid, and binding upon the parties, and must be given effect to by the Courts of law, and bars either party from raising, or at least insisting in, an action at law. The present action, and all others arising out of the said memorandum of agreement are, and by the parties thereto were intended to be, excluded by the said clause of reference. By letter, dated 21st December 1892, the defenders called upon the” pursuers “to appoint an arbitrator within seven days from that date, offering at the same time to nominate a second one, as provided by the said memorandum of agreement, for the settlement of the dispute which had arisen and is the cause of the present action. The pursuers refused to do so, but the defenders have always been, and still remain, ready and willing to have the dispute settled by arbitration, and to do all things necessary to the proper conduct of the arbitration.”

The pursuers admitted that they refused to appoint an arbiter, but explained “that the present dispute does not arise out of the contract, but is inherent to the contract itself.”

The defenders pleaded, *inter alia*;—(1) No jurisdiction. (2) The action is excluded by the clause of reference in the said memorandum of agreement.

On 6th July 1893 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—“Repels the first two pleas in law stated for the defenders: Before answer, allows parties a proof of their averments, and to the pursuers a conjunct probation.”*

* “OPINION.—(After dealing with the plea of no jurisdiction)—The defenders, however, plead further that the action is excluded by the clause of reference contained in the memorandum of agreement on which the action is laid; and it is undoubtedly provided by that agreement that ‘should any dispute arise out of this contract, the same to be settled by arbitration by two members of the

No. 42. The defenders reclaimed, but did not insist on the plea of no jurisdiction.

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Argued for the reclaimers;—The action was excluded by the clause of arbitration, the dispute being clearly within the terms of the reference. It was admitted that, if the question was to be decided by the law of Scotland, the clause was inoperative, the reference being to unnamed arbiters, but the arbitration clause was a separate contract, and fell to be interpreted by English law. The Lord Ordinary in his note gave undue weight to the *lex loci solutionis* in treating it as the leading consideration in determining which law was to govern. The contract was made in England, and it was evident from the reference being to "members of the London Corn Exchange in the usual way" that the intention of parties was that the clause of reference at least should be treated as an English contract.¹ The clause of reference was an independent contract to be performed in England, and therefore it fell to be governed by that law. It was always open to parties to make a stipulation that their contract should be construed according to the law of a foreign country, and they had done so here.² It was quite competent to have different laws applied to different parts of one contract.³

London Corn Exchange, or their umpire, in the usual way.' The defenders admit that this stipulation is inoperative by the law of Scotland, inasmuch as the arbiters are not named, but they aver that it is good and effectual by the law of England; and they contend that the contract is an English contract, and falls to be interpreted and receive effect according to English law.

"I am not prepared to adopt this view. The contract was no doubt executed in England, but it was an agreement to which one of the parties was a Scotch firm; and it had reference to the treatment and disposal of the 'grains' produced at the distillery of the Scotch firm in the Isle of Skye. It was therefore an agreement of which Scotland was the place of performance, and, that being so, the validity and effect of its stipulations must, in my opinion, be determined by the law of Scotland. Such is—I think it is now fixed—the general rule; and there seems nothing in the nature or terms of the agreement to displace that rule. It is true that if the *lex loci actus* were here applied, one of the clauses of the agreement, viz., the particular clause in question, would be operative, whereas, according to the *lex loci solutionis*, it is inoperative; but it is not, so far as I know, a proposition which can be supported, that the law to be invoked for ascertaining the rights of parties under a contract is necessarily or even generally the law which least interferes with the operativeness of its various stipulations.

"In this view it is not necessary to decide whether the law of Scotland is not here applicable on another ground, viz., that it is the *lex fori*. But it is at least a very arguable proposition that this clause of reference relates to a matter of procedure, and so belongs to the department of remedy. In that case it would appear to follow that the *lex fori* applied on the principle of the case of *Don v. Lippmann* (2 S. and M'L., 682). It is not, however, as I have said, necessary to consider that question at present. In any view, the law of Scotland is the law applicable; and, according to that law, the clause of reference is inoperative. I shall therefore repel the first two pleas stated for the defenders, and allow a proof before answer in the usual form."

¹ Corbett v. Waddell, Nov. 13, 1879, 7 R. 200; Chamberlain v. Napier, 1880, L. R., 15 Chan. Div. 614, V.-C. Hall, at p. 630; Cohen v. South-Eastern Railway Co., 1877, L. R., 2 Exch. Div. 253; Scottish Provident Institution v. Cohen & Co., Nov. 20, 1888, 16 R. 112; Nelson on Private International Law, 275; *In re Missouri Steamship Co.*, 1888, L. R., 42 Chan. Div. 321; Gillespie's Bar's International Law, 2d edn. p. 561.

² Jacobs v. Crédit Lyonnais, 1884, L. R., 12 Q. B. D. 589, see Bowen, L. J.

³ Alexander v. Badenach, Dec. 23, 1843, 6 D. 322; Duncan v. Campbell, 1842, 12 Simon, 616.

Argued for the pursuers;—The contract must be read as a whole. It had reference to sales of grains produced in Scotland and delivered there. Scotland was the *locus solutionis*, and the law of that *locus* should rule. The arbitration clause was not a separate contract, but was simply ancillary to the contract of sale. The question was ruled by the decision in *Valery v. Scott*,¹ which decided that the place of performance was the ruling consideration in determining questions of this kind. Further, they maintained that this was a question of remedy for breach of contract, and in that view also the law of Scotland, as *lex fori*, applied on the authority of *Don v. Lippmann*.²

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At advising,—

LORD ADAM.—This is an action of damages brought at the instance of the Talisker Distillery Company, as in right of the extinct firm of R. Kemp & Company, against Messrs Hamlyn & Company, in respect of an alleged breach of an agreement entered into between Kemp & Company and Hamlyn & Company.

By this agreement Hamlyn & Company agreed to purchase from Kemp & Company, at a fixed price, all grains made by them at their distillery. Hamlyn & Company, on the other hand, agreed to furnish a certain drying machine for the manufacture of the grains, which Kemp & Company agreed to work and keep in repair.

The alleged breach of agreement consists in this, that Hamlyn & Company failed to supply an efficient machine, so that the pursuers were unable to produce grains for sale, and suffered loss in consequence. The defence is that Hamlyn & Company duly supplied a proper drying machine in terms of the contract, but that Kemp & Company, or the pursuers, failed to work it properly or to keep it in repair, and that the deficiency, if any, in the production of grains has arisen from the pursuers' own fault.

The defenders plead, *inter alia*, that the action is excluded by a clause of reference in the agreement.

The clause of reference is in these terms,—“Should any dispute arise out of the contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way.”

The Lord Ordinary has repelled this plea, and the only question argued to us was whether his Lordship was right in so doing.

From what I have stated as to the nature of the dispute between the parties, it is clear that it falls within the terms of the clause of reference, and that indeed was not controverted, and the question therefore at issue between the parties is whether or not that clause is an operative clause.

If the law of Scotland is to rule the matter, it is admitted that the clause would be inoperative, in respect that it is a reference to persons as arbiters who are unnamed. It is averred by the defenders, and not disputed by the pursuers, that by the law of England the clause would be operative, and would exclude the present action.

The contract is between an English and a Scotch firm, and was executed in England. The fact that it was executed in England does not appear to me to be material in this question. It was probably a matter very much of conveni-

¹ *Valery v. Scott*, July 4, 1876, 3 R. 965; “*The Immanuel*” v. Denholm & Co., Dec. 7, 1887, 15 R. 152.

² *Don v. Lippmann*, May 26, 1837, 2 S. and M'L. 682.

No. 42. ence or of accident whether it was signed in England or in Scotland, or partly
 Nov. 30, 1898. in both countries.
 Talisker Dis- On the other hand, it is to be observed that the place of performance was in
 tillery v. Scotland. The grains were to be made at the pursuers' distillery at Carboist in
 Hamlyn & Co. Scotland, and were to be delivered to the defenders there, and the machine for
 producing the grains was to be erected and worked there. The agreement is
 silent as to the mode of payment, but, in the absence of stipulation, I should
 say that the pursuers were entitled to demand payment on and at the place of
 delivery, so that the place of payment was there also. So far as I see,
 nothing required to be done in England in implement of the contract.

That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *lex loci solutionis*,—that is, by the law of Scotland.

It was, however, maintained to us that, if it appeared to be the intention of the parties that the contract should be ruled by the law of England, it was the duty of the Court to give effect to that intention; that it must be presumed that the parties intended that all the stipulations of the contract should receive effect; that this would be so if the contract were ruled by the law of England, but would not be so if it were ruled by the law of Scotland, and therefore it was said that the parties must have intended that the contract should be treated as an English contract. But if, as I think, the law of the *locus solutionis* is the law which is applicable to, and which regulates the rights of parties under the contract, then I think with the Lord Ordinary that it is no reason for not applying that law, that the result may be that a particular stipulation in the contract may not receive effect.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN.—This is an action instituted in the Court of Session to compel performance of a contract entered into between a company of distillers in Scotland, pursuers, and Hamlyn & Company, merchants, London, defenders, whereby the pursuers agreed to sell and the defenders to purchase all "grains" made by the pursuers in their distillery, at a specified price per quarter. The defenders also agreed to supply and erect at the pursuers' distillery a certain drying machine, and the pursuers undertook to work and keep in repair this machine, and to pack and deliver the "grains" to Hamlyn & Company's order, the contract to be in force for ten years.

The contract contains a clause referring disputes which might arise out of the contract to two members of the London Corn Exchange or their umpire. This clause is inoperative by the law of Scotland because the arbiters are not named, and the parties are at issue on the question whether this rule of the law of Scotland takes effect upon the contract, in which case the action would be sent to trial in the exercise of the ordinary jurisdiction of the Court, or whether the parties are to be held to have contracted with reference to the law of England, which recognises agreements to refer disputes to the arbitration of persons unnamed, in which case the action would either be dismissed, or the proceedings stayed in order that a decree might eventually be pronounced giving effect to the decision of the arbiters.

According to the terms of the contract, Scotland must be taken to be the *locus solutionis*. The contract does not prescribe any particular mode of pay-

ment of the price of the grains which are to be supplied during its continuance, and I am not sure that the obligation of payment of the price has reference to any definite locality or system of local law. The price has to be remitted from England to Scotland, but by arrangement the price might be paid into a London bank, or settled in such way as the parties might find to be convenient. But certainly all the other stipulations of the contract of sale are to be performed in Scotland, including the manufacture of the grains, their shipment to any part of the world on the order of Hamlyn & Company, the erection of the drying machine, and the operation of drying preparatory to shipment. It does not appear to me that in the question of the locality of the contract any conclusive inferences can be drawn from the domicile of the parties. The sellers have a Scottish domicile, and the purchasers have an English domicile, and the circumstance that this mercantile contract was signed in London is probably the least important of the elements which enter into the determination of the question of the *locus* of the contract.

As regards the arbitration clause, I think that in fair construction the place of performance may be held to be in London, because the reference is to members of the London Corn Exchange.

The question, what system of law governs the construction and validity of the contract was argued as a question of private international law, and we were referred to the opinions of Story and Bar, and to decisions of the English and Scottish Courts. In considering such questions it may be kept in view, as was very forcibly stated by Lord Selborne in the great jurisdiction case of *Orr Ewing's Trustees*, July 24, 1885, 13 R. (H. L.) p. 1, that writers on international law have no legislative authority to impel their opinions on the Courts of any independent state, and that their *dicta* are only obligatory on Courts of justice in so far as they have been received into the system of jurisprudence which is administered by the Court whose jurisdiction is involved. Now, in this case, Scotland is at once the *forum* and the *locus solutionis*, and the question we have to consider is whether there is any principle of private international right, as understood and administered in Scotland, which displaces the ordinary rule according to which a contract expressed in ordinary language will be interpreted and applied by a Court of law according to its own conception of the terms of the contract, and with reference to any rules of law which it administers.

In the present case,—at least for the purposes of the present dispute,—no question of construction of the contract is raised. If there were such a question we should not, so far as I can see, find it necessary to resort to the law of England for assistance, because the contract is expressed in ordinary language, and it is the settled practice of the Scottish Courts, and I apprehend also of the English Courts, to construe ordinary mercantile contracts according to their own understanding of their meaning, and of course consistently with the decisions of the Courts of the United Kingdom.

But in this case the meaning of the clause of arbitration is perfectly clear, the question is as to the obligatory character of an agreement to refer disputes to two members of the London Corn Exchange, or their umpire. If the position of the parties had been reversed; if this had been a contract between an English company and a mercantile firm in Scotland to be executed in England, I should have held without hesitation that the obligation to refer disputes to arbiters unnamed was a valid obligation, because, whatever differences of opinion may exist amongst jurists, this Court has always acted on the principle

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No. 42. that the *lex loci solutionis* is the governing law in the construction of contracts, the law which determines the validity of their stipulations, and which in certain cases attributes to particular stipulations a special meaning depending on local custom or rules of construction pertaining to that system of law. On this point I refer to the opinion of the late Lord President in *Valery v. Scott*, 3 R. 965.

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As in the present case Scotland is the *locus solutionis*, we have no occasion to consider any system of law other than our own, so far as the contract of sale is concerned.

But it was maintained by the defenders (1) that the clause of arbitration ought to be treated as an independent contract to be performed in England; and (2) reference was made to the opinion of Lord Justice Bowen in the case of *Jacobs v. Crédit Lyonnais*, 12 Q. B. Div. 589, to the effect that it is open to the parties to a contract to make any such agreement as they please as to incorporating the provisions of a foreign system of law in the obligatory writing. I should distrust any opinion I might provisionally form on a question of this nature if I found it to be in conflict with that of Lord Bowen; but in this case the real question is as to the application of the principle, and it is to be observed that Lord Bowen, while stating the principle as a necessary step in the argument, declined to apply it to the case before him. Because in considering the question, whether the parties should be held to have contracted with reference to the law of France, he points out that, while the parties may be assumed to have incorporated with their contract so much of the law of the foreign country as was inseparable from the performance of the contract in Algeria, it would not follow that they had contracted with reference to a provision of the law of France, which released the parties from their obligations on the ground of the impossibility of performance in a certain state of facts.

Now, taking the defenders' arguments as I have stated them, my opinion on the first point is that the agreement to refer disputes to members of the London Corn Exchange is not an independent contract to be performed in England, and therefore to be governed by the law of England. I think it is a stipulation ancillary to the contract of sale. One test of independence is, whether the provision is capable of standing alone, or whether any effect could be attributed to it if the contract of sale to which it is annexed were displaced. But it is plain that the clause of arbitration would have no meaning if it were detached from the contract of sale, because it is a clause of reference of disputes arising out of that contract.

Thus, I come to the conclusion that the clause of reference is merely an incident in a contract of sale, the validity and interpretation of which as a whole is regulated by the law of Scotland.

On the second point, my opinion is also adverse to the argument of the defenders. I do not doubt that the parties to a contract may incorporate expressly or by implication such provisions of a foreign system of law as they might put into their contract by writing them out at length. But it does not follow that the parties to a contract can by agreement dispense with a rule of law which affects the validity of the stipulation. Supposing that the two parties to this agreement had been domiciled in Scotland, and that they had written down,—“Notwithstanding the rule of our law which disallows reference to arbiters unnamed, we agree to refer our disputes to two members of the Exchange to be mutually chosen, and elect to have our contract judged by the law of England,” everyone would admit that such an agreement would not

enable the Courts of Scotland to assist the party who might be desirous of enforcing the agreement. Now, in my view, the circumstance that one of the parties is domiciled in England, and that the arbitration is to be carried out in England, does not put the defender in any better position than he would occupy in the case supposed, unless I could regard the arbitration clause as an independent stipulation, which for the reasons stated is a view I am unable to accept. It follows, in my opinion, that the interlocutor of the Lord Ordinary is well founded, and that the reclaiming note ought to be refused.

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LORD KINNEAR.—I need hardly say that I have found this to be a question of difficulty since I have the misfortune to differ from your Lordships and the Lord Ordinary. I do not think, however, that there is any material difference of opinion as to the principles by which the question must be determined.

There is no absolute rule of the law of Scotland that a contract made in one country, to be performed in another, must be governed either by the law of the place of execution, or by the law of the place of performance. The Lord President observes in *Valery v. Scott* "that these are both circumstances to be taken into consideration as regards the nationality of a contract." But whether the greater weight is to be given to the one consideration or the other must depend, in each case, upon the construction of the contract itself, because the validity of either consideration depends upon the presumed or expressed intention of the parties to contract with reference to the law of a particular place. I agree that the place of performance has been considered in this Court to be of more importance than the place of contracting; and for reasons that are especially cogent, when one of the parties to the contract is domiciled in England and the other in Scotland. If such a contract is to be performed entirely in one part of the United Kingdom it may, in general, be of very little consequence that it has been made in the other. The place of contracting may depend on the merest accident; and it seems to me that the occasional presence of a Scotch manufacturer in London, or of an English merchant in Scotland affords very little ground indeed for the inference that either intends to subject himself to any other law but that of the country where he lives. And therefore, were it not for the arbitration clause, I should agree with the Lord Ordinary and with your Lordships that the contract in question is to be wholly performed in Scotland, and that its validity and effect must be determined by the law of Scotland. But it is not suggested that there is any difference between the law of England and the law of Scotland with reference to the construction or legal effect of the main provisions of the contract, or with reference to anything else than the clause by which disputes are referred to arbitration. The only question we have to consider therefore is whether the agreement to submit to arbitration is to be governed by the law of Scotland or of England. That appears to me to be a question of contract, and I think the rule for deciding it is that stated by Lord Justice Bowen in *Jacobs v. The Crédit Lyonnais*,—"The only certain guide is to be found in applying sound ideas of business convenience and sense to the language of the contract itself, with a view to discovering from it the true intention of parties."

Is it then the intention of the contract to incorporate the English law regulating arbitrations?

Now, this contract was made in London between merchants carrying on business in the city of London and distillers in Skye. The parties therefore are

No. 42. subject to different jurisdictions, and it is reasonable to presume that the possible consequences of this difference were in their view when they made their agreement as to the tribunal by which disputes, if they arose, were to be settled. The contract which they made in these circumstances is that disputes should "be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." Now, when a London merchant stipulates that disputes under his contract are to be referred to members of such a body as the London Corn Exchange,—that is, to merchants or brokers carrying on business in the city of London,—I think that that means that the tribunal is to be constituted and the arbitration conducted in London; and when it is farther stipulated that the arbitration is to be by two members of the Corn Exchange, "or their umpire, in the usual way," I think that that imports a reference to a known law and practice regulating the constitution and conduct of such arbitrations, and that can only be the law and practice of England. If that be so, London is the place of performance as well as the place of making the contract. No doubt the arbitrators might come to Scotland, if they thought it necessary or expedient to make inquiries in Skye. But it would be a question for their judgment whether it was expedient to do so or not, and whatever course they might think fit to take for the purpose of informing their minds, the main seat of the arbitration must still be England. The material considerations are that the tribunal must be constituted in London, and the powers of the arbitrators and their umpire must be determined and their proceedings must be regulated by the law under which they are living. We have constant experience of questions on which parties to an arbitration find it necessary to appeal to the Court; and I see no room for doubt that if both parties had been willing to carry out their agreement to submit, and questions of that kind had arisen, they must necessarily have been brought before the English Courts, and determined according to the law of England. We have no jurisdiction over the arbitrators, and we are not acquainted with the law and practice to which the contract refers by the use of the words "in the usual way." We do not know how the tribunal is constituted—whether the arbitrators appoint their umpire, or whether the umpire is named by the parties; on what conditions the functions of the arbitrators may be devolved upon the umpire; what are the specific powers of either in working out the arbitration; or what remedy the parties would have in case of misconduct. These would have been questions for the English Courts. I cannot conceive that the arbitrators themselves should have regard to any law but their own in the conduct of their own proceedings, even if it be assumed that they might be called upon to give effect to some foreign law in adjudicating between the parties. And if the constitution and procedure of the tribunal is to be regulated by the law of England, I think the intrinsic validity of the contract of submission must be determined by the law of England also.

—It is not immaterial to observe that our jurisdiction over the defenders depends on the mere accident that somebody in Scotland is in possession of certain sacks belonging to them, which are said to be of the value of £3, 6s. 8d., and which the pursuers have arrested. I do not suggest that the law we are to administer is dependent on the manner in which jurisdiction is founded. But it is a consideration that ought not to be overlooked in construing the contract, that but for the accident of the defenders possessing moveables of very trifling value which have been arrested in Scotland, the pursuer must have

gone to England to sue upon the contract. Can we hold that if he had appealed to the Court in England to enforce the contract of submission by the appointment of arbitrators or otherwise, the English Judges must have declined to adjudicate upon that question according to their own law, and have come to this Court for instruction as to the meaning or legal effect of the contract to submit? I cannot but think that they would have determined the validity of the contract, just as they would determine any question that might arise during the working out of the arbitration, according to the law which they themselves administer as the law of the place where the contract was made and where also it is to be performed.

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It is said that we must assume that an English Court would give effect to the law of Scotland, because this is to all intents and purposes a Scotch contract. But that is the question to be determined. The argument is that all the substantive obligations of the contract for the purchase, treatment, and delivery of the grains in question are to be performed in Scotland, and must be governed by the law of Scotland; and therefore that the ancillary obligation to refer disputes to arbitration must be governed by the same law, because two different systems of law cannot be applied to the same contract. That does not appear to me to be a very weighty consideration in the present case, because, as I have said, it is not alleged that there is any difference between the laws of England and Scotland, in so far as regards the main provisions of the contract. But if the obligations of a contract are separable, and one is to be performed in England and another in Scotland, I see no ground in principle for holding that the law of each country may not be incorporated in the contract for its own special purpose, and no farther. The more correct view seems to me to be that the agreement for arbitration is a distinct collateral agreement, and that the question we are to determine is whether it was the intention of the parties that that agreement should be carried into effect by an English or a Scotch arbitration. But if the contract is one and indivisible, I think it false reasoning to argue from the other stipulations taken separately and apart from the arbitration clause that the contract is entirely Scotch, and therefore to conclude that the arbitration clause must be governed by the law of Scotland. The arbitration clause may be of the greatest possible significance in determining the law with reference to which the parties intended to contract. If the contract were to be construed differently, according as it is held to be English or Scotch, then I think the stipulation for an English arbitration would be an argument,—I do not say a conclusive argument,—for preferring the English construction. For the ground on which so much importance has been attached to the place of performance appears to be that it is there that the parties must have anticipated that their mutual obligations would be discussed and enforced. But that ground is displaced if they have stipulated that their rights shall be determined by a tribunal of their own selection elsewhere than at the place of performance.

In the present case, however, we are not embarrassed by any conflict of laws, except with reference to the constitution of the tribunal to which the parties have agreed to refer their differences. If their agreement to that effect is to be governed by the law of Scotland it is ineffectual. I admit that they cannot alter the law by their agreement. But I think it was open to them to contract, first, that they should not have recourse to the ordinary Courts of either England or Scotland, but to a tribunal of their selection; and, secondly, that this private *forum* should be constituted and carry out its proceedings either in

No. 42. England or Scotland as they thought fit. They have, in my opinion, agreed that it shall be constituted in England; and I think it is for the law of England to determine whether that agreement can be carried into effect.

Nov. 30, 1893. *Talisker Distillery v. Hamlyn & Co.* The LORD PRESIDENT was absent during part of the hearing, and gave no opinion.

THE COURT adhered.

ALEXANDER MUSTARD, S.S.C.—FINLAY & WILSON, S.S.C.—Agents.

No. 43. REV. JAMES COULLIE AND OTHERS (Kirk-Session of the Parish of Pencaitland), First Parties.—*Sym.*

Dec. 7, 1893. *Kirk-Session of Pencaitland v. Inspector of Poor of Pencaitland.* ALEXANDER WOOD (Inspector of Poor of the Parish of Pencaitland), Second Party.—*Maconochie.*

Poor—Property held for behoof of the poor—Poor-Law Amendment Act, 1845 (8 and 9 Vict. cap. 83), sec. 52.—At various dates between 1729 and 1752 the kirk-session of a parish lent, upon personal bonds, sums amounting in all to £553, 6s. 8d., derived from church door collections and other usual sources of the revenue of a kirk-session, the granter of the bonds acknowledging receipt from the kirk treasurer, “on account of the poor of the said parish,” and taking himself and his heirs and successors bound to repay to the minister and kirk-session, and their successors in office “in name and for the use and behoof of the poor of said parish.” The interest of the bonds was applied by the kirk-session in the relief both of the legal poor and of the occasional poor, and was at times supplemented by assessment laid on the heritors by themselves.

The representatives of the granter of the bonds having in 1886 repaid the debt, *held*, in a special case between the kirk-session and the parochial board, that the 52d section of the Poor-Law Amendment Act, 1845, vested in the parochial board the right to receive and administer the sum repaid.

Inspector of Kinglassie v. Kirk-Session of Kinglassie, 5 Macph. 869, and *Flockhart v. Kirk-Session of Aberdour*, 8 Macph. 176, *followed*.

2D DIVISION. ON 4th November 1893 the kirk-session of the parish of Pencaitland, as first parties, and the inspector of poor of the parish, on behalf of the parochial board, as second party, presented a special case for determination of the question whether the contents of six personal bonds, granted on various dates between 1729 and 1752 by Alexander Hamilton of Pencaitland in favour of the kirk treasurer, and in some instances of the kirk-session, of the parish for behoof of the poor of parish, and amounting in all to £553, 6s. 8d. sterling, vested in the parochial board in virtue of the 52d section of the Poor-Law Amendment Act, 1845, or remained subject to the administration of the kirk-session.*

* The Poor-Law Amendment Act, 1845 (8 and 9 Vict. cap. 83), sec. 52, enacts,—“And be it enacted, that where any property whatsoever, whether heritable or moveable, or any revenues, shall at the time of the passing of this Act belong to or be vested in the heritors and kirk-session of any parish, or the magistrates, or magistrates and town-council of any burgh, or commissioners, trustees, or other persons on behalf of the said heritors and kirk-session, or magistrates, or magistrates and town-council, under any Act of Parliament, or under any law or usage, or in virtue of gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh, it shall, from and after a time to be fixed by the Board of Supervision, be lawful for the parochial board of each such parish, or of the combination in which such parish or burgh may be respectively, to receive and administer such property and revenues, and the right thereto shall be vested in such parochial board; and the said heritors and kirk-session, magistrates, town-council, commissioners, trustees, or other persons

The following is the substance of the facts set forth in the special No. 43.

Case:—

All the bonds were granted in practically similar terms, of which the first, dated 25th December 1729, is an example. By it the granter acknowledged to have "borrowed and received from Patrick Brown, tenant of Spilmerfoord, and present kirk treasurer of the parish of Pencaitland, on account of the poor of the said parish, All and Hail the sum of 4300 merks Scots money . . . which sum I bind and oblige me, my heirs, executors, and successors, thankfully to repay and again deliver to the present minister and kirk-session of the said parish, or their successors in office, in name and for the use and behoof of the poor of said parish."

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"The sum contained in the above-mentioned bond appears to have arisen from the consolidation of some moneys contained in prior bonds belonging to the kirk-session. . . . With regard to the sums contained in the remaining bonds, the minutes of the kirk-session shew that these were derived from accumulations of interest on investments in name of the kirk-session. The funds contained in all these bonds represent accumulations in the hands of the kirk-session derived from church-door collections, mortcloth money, ecclesiastical fines, and other moneys forming the usual sources of a kirk-session's revenue, including certainly one legacy, and possibly one or two more, left specially to them for the benefit of the poor, and accumulations of interest upon invested balances.

"The minute-books of the heritors do not go further back than the year 1774, and down to 1799 contain no reference to matters connected with the relief of the poor of the parish. The records of the kirk-session contain nothing to shew that prior to 1711 the heritors were consulted in regard to the funds which were applied for the benefit of the poor.

. . . . In that year . . . is found the first mention of joint action between the kirk-session and the heritors in maintenance of the poor." The case then set forth the following minute of meeting held on 22d October 1711, as engrossed in the minute-book of the kirk-session:—

"Sedt. of the heritors—the Laird of Pencaitland . . . the minister, and whole elders. The Act of the Justices of the Peace, of the 2d October 1711, ordaining each parish to maintain their own poor, and for discouraging of vagabonds and stranger beggars, was produced and read. In compliance therewith, there was produced a list of the poor who need maintenance within the parish of Pencaitland, which being considered by the heritors, minister, and elders, they modify the names underwritten to be paid to the said poor, ilk one of them for their own part, as is after divided, viz. :—[Here follows list of twelve poor people, total vote £163, 8s. Scots].

"And the meeting having considered how much of the said sum the poor-box of the said parish is able to afford yearly, it's unanimously agreed that when the Sacrament is given, the session, out of their collections, do pay £100 Scots, so that there remains to be paid by the parish £63, 8s., which sum, with the constable's and collector's fees, they are to set upon the heritors, conform to their valued rents in the parish, and it was remitted to the heritors to think upon fit persons to be constables."

"The session, are hereby authorised and required either to continue to hold all such property and revenues for the behoof of such parochial board, or to make, grant, subscribe, and deliver such dispositions, assignments, and conveyances of all such property and revenues as may be necessary to enable such parochial board to administer the same for behoof of the poor of such parish or combination."

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" This arrangement continued until 1714, when the kirk-session passed the following minute, of date November 15, viz. :—' . . . The session, taking under their consideration the state of the poor, and finding how difficult it was for them to get payment of that proportion of the ordinary maintenance of the poor which had been formerly agreed upon to be paid by the heritors and their various tenants, do resolve to stretch themselves as far as possible, and to assay the maintaining the most necessitous of the said poor for one year without troubling the said heritors and their tenants therewith, any further than what is advanced in the weekly collections.'

" The next reference to joint action of the heritors and kirk-session for maintenance of the poor is found in the records of the kirk-session under a minute of date July 28th 1728, which bears :—' This day was publicly intimate in this congregation an Act of the Justices of the Peace of the shire of Haddington for maintenance of the poor within the said shire, of date 2d July (1728), appointing the heritors, ministers, and elders of the respective parishes to meet and provide for the maintenance of their poor, and for repressing of vagrant beggars within their respective parishes, as the said Act more fully bears ; and the heritors and elders in this congregation being appointed to meet for this purpose on Monday, the 5th August next, the session at this meeting did advise upon what was fit for them to propose to the foresaid meeting ; and they, considering that this session had hitherto supplied their own poor out of the public collection at the church door and other funds under their own management, without desiring any particular stent to be laid upon the heritors and others concerned in the parish, they did agree to continue in the same practice for the ensuing year, with this provision, that the heritors and others concerned, according to the order of the foresaid Act of the Justices of the Peace, will provide a fund for maintaining a constable and for freeing the parish of vagabonds and stranger beggars.'

" Thereafter the minutes of the kirk-session down to the beginning of the present century shew that the kirk-session continued year by year to make up by themselves a list of the poor and to relieve them, as well as to give other poor persons not on the list occasional assistance in name of 'charity' from the income of the funds collected and administered by them, including the bonds above mentioned, leaving to the heritors the duty of providing and paying for the constable as above mentioned." From a table laid before the kirk-session on 4th April 1745 it appeared that for the seven years preceding the average annual disbursements on account of the listed poor had been £172, 0s. 6d. Scots, and on account of the incidental poor £213, 7s. 5d. Scots. " From this time until the end of the century the kirk-session continued to give relief to both classes, the listed poor receiving quarterly payments and the incidental relief being given from time to time. The total given incidentally usually exceeded by a considerable sum the total of the quarterly payments to the listed poor, some of whom are often found receiving incidental relief."

On 12th December 1799 the heritors and the kirk-session held a joint meeting on the subject, " and the minute of that day, which appears in the heritors' minute-book, and which is the first minute relating to the poor which is to be found in the heritors' records, bears,—' The heritors and kirk-session having met this day at noon, agreeably to a call from the precentor's desk on the 1st curt. . . . The meeting having taken into consideration the state of the poor at present on the parish roll for ten months from 4th November 1799 to 4th September 1800, finds that the sum of £74, 6s. (exclusive of the funds and collections) at least will

be found necessary for supporting them for these ten months at the present prices of meal, have resolved to take a bill of £71, 13s. 4d., granted by the late Mrs Hamilton to the session of Pencaitland, of date 13th November 1779, for that purpose.' The proceeds of that bill were accordingly carried into the kirk-session treasurer's account of 1799-1800, in addition to the interest on 'bonds belonging to the kirk-session,' and the expenditure of the whole upon the maintenance of the poor appears in the kirk-session treasurer's cash-account.

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"The income of the fund in question from the commencement of the present century down to the year 1845 was not specially devoted to one class of poor. The minutes and accounts of the kirk-session subsequent to 1799 do not distinguish between listed and incidental poor, and after 1820 there is no listed poor regularly given in the minutes of the kirk-session."

The following minute occurred in the heritors' minute-book of date 5th April 1803:—"Sederunt—George Bogue, Esq., of Woodhall, presses, . . . the Revd. Mr Pyper, minister, Mr Rate, elder, James Broomfield, session-clerk. Mr Pyper, in name of the kirk-session, laid before the meeting a state of the session funds and of the annual expenditure of money for the support of the poor of the parish. . . . The meeting, having considered the statement, find it necessary to provide for these articles of charge with all convenient speed; and to prepare their way to accomplish this end, they direct that the opinion of some person or persons learned in the law be obtained respecting the bonds due to the session, that it may be known to all concerned whether or not the amount of these bonds must be applied to the relief of the poor before an assessment can be legally laid on the parish for that purpose."

The opinion of Mr Matthew Ross, advocate, was obtained, and was "considered by the heritors and kirk-session at their next meeting, held on 12th April 1803, the minute of which runs as follows in the heritors' minute-book:— . . . 'In respect the opinion of Mr Ross is by no means clear and decisive upon the point in question, and as it appears a case directly similar is presently in dependence before the Court of Session, they resolve to await the decision of that case before adopting any final regulation. But as there is an urgent necessity for money to clear off what is actually due by the kirk-session, and to answer the demand that will be necessary for the current quarter and up to the 1st August next, the meeting resolve to make a legal assessment upon the parish to the amount of £60 sterling, to be apportioned and levied according to law, without prejudice; on the contrary, expressly reserving to the meeting, so soon as the point is legally determined and fixed, that in case it shall appear the heritors have a power to uplift and apply the principal sums due by bonds for the relief of the poor, then the heritors will be entitled to receive back the sums with interest paid by them respectively in consequence of the present assessment.

"Thereafter the meeting proceeded to take under consideration the persons presently upon the poor's-roll, with the allowances made to each, and having examined such of these persons themselves who were able to appear in person, and inquire into the circumstances of their respective cases, they continue the roll as it present stands. And the meeting consider themselves much obliged by the attention and trouble which the kirk-session have paid to the management of the poor, approve of their proceedings for the time past, and return their best thanks to them."

"Nothing further, however, appears to have been done after receiving counsel's opinion, and the heritors and kirk-session continued to act on

No. 43. the principle formerly adopted, of the kirk-session making annually a report of what was required beyond the ordinary funds arising from interest of bonded money, collections at the church doors, and mortcloth dues, and the heritors assessing themselves for the difference; and the kirk-session receiving this assessment through their clerk or treasurer; and the money so received from the heritors was disbursed by the kirk-session along with the interest on the said bonds (which bonds they treated as capital) and church-door collections, and other sources of annual income already referred to."

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In consequence of the Disruption of the Church of Scotland the heritors, at a meeting on 10th June 1843, appointed (as appeared from their minute) a committee of their own number "to co-operate" with an elder, who apparently did not secede, "in the management of the poor's funds till a regular session is in the parish."

"It is admitted by the first parties that their predecessors in office at the time of the passing of the Poor-Law Act of 1845 acted as if they were of opinion that the 52d section of that Act operated as a transfer of all funds held by the kirk-session for the behoof of the poor to the new parochial board." On 18th December 1847, the following minute of the parochial board occurred,—“The board having taken into consideration the 52d section of the Act 8 and 9 Vict. cap. 83, resolve in terms thereof, and in accordance with instructions from the Board of Supervision, that all the moneys belonging to the heritors and kirk-session of this parish be now transferred from them to the parochial board. . . .” No formal transfer of the bonds was made by the kirk-session in favour of the parochial board, but the latter got the custody of the bonds, drew the interest arising therefrom from the term of Martinmas 1845 to that term in 1884, and held the bonds from December 1847 up to the 7th of June 1886, when the bonds were discharged and the proceeds, with accrued interest from Martinmas 1884, was paid over to the kirk-session, the parochial board being of opinion (as appeared from the discharge which was granted both by the kirk-session and the parochial board) that the transfer to the board in 1847 was erroneous under the Act. The first parties, however, agreed that this discharge should not be pleaded as a bar to the right of the second party to receive and administer the fund if legally entitled to do so under the Act.

The interest on the bonds during the time that it was drawn by the parochial board was applied for the benefit of the statutory poor exclusively. The proceeds of the bonds, on being received by the kirk-session, were separately invested from the rest of the kirk funds. The amount so invested at the date of the case was £590.

The first parties maintained “that, as the funds in question were obtained by them from the sources mentioned in the foregoing statement of facts, are vested in the ‘minister and kirk-session,’ and were managed exclusively by them and employed for behoof of the occasional poor as well as the listed poor . . . they . . . were not affected in their right and duty as to the said fund by section 52 of the Poor-Law Act of 1845,” and they claimed “to be entitled to hold and administer the fund for the benefit of the poor—occasional or not—as they think best in the discharge of the functions of a kirk-session.”

The second party maintained “that the 52d section of the Poor-Law Act of 1845 operated as a transfer to the parochial board of said funds, and that said Act confers on the board the right to demand and receive payment thereof from the first parties, and to administer the capital or income for behoof of the poor having a statutory claim for relief.”

The question of law was,—“Did the 52d section of the Poor-Law Act

of 1845 vest in the parochial board a right to receive and administer the fund in question?" No. 43.

Argued for the first parties;—The bonds were taken in the name of the kirk-session alone, not in that of the heritors and the kirk-session. *Prima facie*, therefore, "the poor of the parish" did not mean the legal poor only, and the *onus* was on the second parties to prove that "poor" was used in its more restricted sense, so as to bring the fund within the 52d section of the Poor-Law Act, 1845.¹ This *onus* they had failed to discharge. The source of the funds was the ordinary revenue of a kirk-session; the persons who had received the benefit of the funds (down to the passing of the Poor-Law Act, 1845) were not the legal poor exclusively, but the poor generally; and the administration of the funds had down to 1845 been entirely in the hands of the kirk-session, the heritors, in last century at all events, taking little or nothing to do with the relief of the poor, and contributing little or nothing by way of assessment towards their support. In the administration of the fund the occasional poor had received more from it than the listed poor. The question in the case ought, therefore, to be answered in the negative.

Argued for the second party;—The case was ruled by the cases of *Kinglassie*² and *Aberdour*,³ particularly the latter. Every argument which had been advanced here for the first parties had been rejected by anticipation in the case of *Aberdour*, which settled that "poor of the parish" *prima facie* meant the legal poor exclusively, as in a question under the Act. The *onus*, therefore, was on the first parties. Then the source of the funds was the same there as here, as also was the title; there too, as here, the general poor, and not merely the legal poor, enjoyed the benefit, and the control of the heritors was rather by way of acquiescence in what the kirk-session did than by active administration, although here the case of the parochial board was stronger looking to the course of administration from the beginning of the present century. The question ought therefore to be answered in the affirmative.

LORD JUSTICE-CLERK.—The sums of money here in question came into the hands of the kirk-session of Pencaitland in name and for the use and behoof of the poor of the said parish, and in the cases which have been decided already under the 52d section of the Poor-Law Act, 1845, the Court have always considered the history of a fund so coming into the hands of a kirk-session for behoof of the poor of the parish in order to ascertain upon what footing the kirk-session hold the fund. In the cases of *Kinglassie*, 5 Macph. 869, and *Aberdour*, 8 Macph. 176, the Court, having considered the history of the fund, held that though standing in name of the kirk-session the fund truly belonged to the parochial board—the heritors and kirk-session—for behoof of the "legal poor," and therefore fell under the 52d section of the Poor-Law Act, 1845, and was transferred by that Act to the parochial board.

In this case it does appear that in early times, and for a considerable period,

¹ Liddle v. Kirk-Session of Bathgate, July 14, 1854, 16 D. 1075, 26 Scot. Jur. 484; Hardie v. Kirk-Session of Linlithgow, Nov. 15, 1855, 18 D. 37, 28 Scot. Jur. 6.

² Inspector of Kinglassie v. Kirk-Session of Kinglassie, June 14, 1867, 5 Macph. 869, 39 Scot. Jur. 484.

³ Flockhart v. Kirk-Session of Aberdour, Nov. 24, 1869, 8 Macph. 176, 42 Scot. Jur. 77.

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the kirk-session acted alone ; indeed, till the year 1711 the records of the kirk-session contain nothing that would indicate that the heritors took any part in the management of the money that was applied to the relief of the poor. In 1711, however, there is found evidence of joint action. The minute of 22d October 1711 bears,—“The Act of the Justices of Peace, of date the 2d of October 1711, ordaining each parish to maintain their own poor, and for discouraging of vagabonds and stranger beggars, was produced and read. In compliance therewith there was produced a list of the poor who need maintenance within the parish of Pencaitland, which being considered by the heritors, minister, and elders, they modify the soumes underwritten to be paid to the said poor, ilk one of them for their own part as is after divided,” and the minute further bears that a sum of £100 Scots was ordered to be paid by the kirk-session, the heritors on the other hand assessing themselves for £63 odds. Now, that plainly is a proceeding by which the heritors and kirk-session took action together for the relief of the legal poor. Then in 1728 we find from a minute of the kirk-session, under date July 28th, 1728, that in accordance with an Act of the Justices of the Peace of the shire of Haddington for maintenance of the poor within the said shire, of date 2d July 1728, appointing the heritors, ministers, and elders of the respective parishes to meet and provide for the maintenance of their poor, and for repressing of vagrant beggars within their respective parishes as the said Act more fully bears, the session did advise upon what was fit for them to propose at the meeting of the heritors, ministers, and elders which was appointed to be held, and accordingly what they advised was, that as the funds which they had charge of were sufficient to meet the management of the poor, there was no need to do anything more, provided the heritors would provide a constable to keep the parish free of “vagabonds and stranger beggars.”

Apparently for some considerable time after this the actual work was done by the kirk-session, and the funds being sufficient, there was no need for any special calling together of the heritors, and we find in a subsequent minute that the heritors expressed their thanks to the kirk-session for doing this work. But in 1799 there was a meeting at which several of the heritors were present, and others were represented by mandatories, and they took into consideration the state of the poor, and found “that the sum of £74, 6s. (exclusive of the funds and collections) at least will be found necessary for supporting them (the poor).” Accordingly they resolved to take a bill for that purpose. Now, that again was a joint action dealing with the funds which were in the hands of the kirk-session, and providing other funds to meet a deficiency.

In 1803 we find a meeting was held at which the heritors, ministers, and session-clerk were present, and it was there intimated that the income from the bonds would be insufficient to meet the charges for the relief of the poor for the year, and accordingly the meeting directed that the opinion of counsel should be taken upon the point whether or not the amount of the bonds should be applied to the relief of the poor before an assessment could be legally laid on the parish for that purpose. Accordingly a memorial was laid before counsel, and the question submitted to counsel was, whether or not the amount of the bonds must be applied to the relief of the poor before the heritors could lay on a legal assessment for the purpose? That question could only be asked on the footing that the sums in these bonds were for the relief of the poor for whom the kirk-session and heritors were liable, and the question asked was whether they

could assess the parish while they had this available sum? That seems to me a plain negation of the argument that at that time these sums were looked upon as being entirely subject to the will of the kirk-session. It is clear that at that time there was no dispute that these bonds were held for behoof of the poor of the parish generally. After that a report was made from time to time by the kirk-session as to the state of the funds, and the heritors assessed themselves from time to time for such sum as was necessary to make up the amount required. This is all in absolute consistency with the case of *Kinglassie*, which was considered by the whole Court, and decided unanimously. It has been suggested that there ought to be a certain apportionment of the fund here in question, seeing that part of it was formerly applied to the relief of the casually destitute, and that some provision ought to be made out of it for that class of persons. That idea received some countenance from the Lord President in the case of *Aberdour*, but it received no support from the rest of the Court, and I think it must now be held as settled that wherever we find that a fund has been applied by the heritors and kirk-session acting jointly, to the relief of the legal poor, that fund must now be handed over to the parochial board as representing the legal poor. I have, therefore, no doubt in this case, and following the decisions in the cases of *Kinglassie* and *Aberdour*, I think that we must answer this question in the affirmative.

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LORD YOUNG.—I am of opinion that the fund in question was at the passing of the Poor-Law Act, 1845, vested in the heritors and kirk-session of Pencaitland “for the use or benefit of the poor of the parish.” I do not think that it is at all material that one of the bonds stood in the name of the kirk-treasurer for the time being for the use and behoof of the poor of the parish, and that the others were in favour of the kirk-session for behoof of the poor of the parish, for I think that looking to the whole history of the fund which is given distinctly in the case before us, so far as it was vested in the kirk-treasurer or kirk-session, it was, to use the language of the statute, vested “in trustees or other parties on behalf of the heritors and kirk-session.” I think that the kirk-session held the funds on behalf of the heritors and kirk-session as the legal guardians of the poor, and the legal administrators of the funds for the use and benefit of the poor, and that if any question had arisen prior to 1845, it would have been decided that notwithstanding the terms of the investment these funds were held on behalf of the heritors and kirk-session as the legal guardians of the poor of the parish. If I am right in this there is an end of the case, because the statute says that where any property shall, at the time of the passing of the Act, belong to or be vested in the heritors and kirk-session of any parish for the use or benefit of the poor of such parish, it shall be lawful for the parochial board of each such parish to receive and administer such property. My opinion therefore is, without any doubt or difficulty, and irrespective of any decision in the matter, that the parochial board is entitled and bound to receive and administer these funds. I am also of opinion that the decisions are all to this effect, although there is language in the opinions of some of the Judges who decided these cases which I should not myself have used.

LORD RUTHERFURD CLARK.—I think I must follow the cases of *Kinglassie* and *Aberdour*, and following these cases, I must decide in favour of the parochial board.

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LORD TRAYNER.—Looking to the cases of *Kinglassie* and *Aberdour*, I think the question put to us should be answered in the affirmative.

THE COURT answered the question in the affirmative.

W. & J. COOK, W.S., Agents for both Parties.

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No. 44.

JOHN YOUNG, Pursuer (Respondent).—*Ure—M'Clure.*

THE TRUSTEE, ASSETS, AND INVESTMENT INSURANCE COMPANY, LIMITED,
Defenders (Reclaimers).—*Dickson—G. Grierson.*

Dec. 8, 1893.
Young v. Trustee,
Assets, and
Investment
Insurance Co.,
Limited.

Insurance—Insurance of deposit-receipt—Default by bank—Reconstruction of bank.—An insurance company guaranteed payment to a depositor of the deposit-receipt of a bank "after default" in payment by the bank. The bank stopped payment and failed to pay the deposit-receipt at due date. It was afterwards reconstructed. In an action against the insurance company at the instance of the depositor, *held* that the bank was in default, and that the pursuer was entitled to a decree for the amount of his deposit-receipt.

1ST DIVISION.
Ld. Wellwood.

ON 4th June 1890 John Young deposited £500 with Queensland National Bank, Limited, as a fixed deposit for three years, the due date being the 4th June 1893. On 6th June 1890 he effected an insurance of the deposit with the Trustee, Assets, and Investment Insurance Company, Limited, Glasgow, under which they guaranteed payment of the principal sum of £500, with the interest payable thereon, on the following among other conditions:—"After default has been made in payment by the bank pursuant to the notice to them recalling the money, and upon a transfer being made to the company of the deposit-note and the money due thereunder, so as to place the company in a position legally to sue for such money as creditors of the bank, the company will pay to the assured the principal money for the time being due under the deposit, with any interest then due thereon."

On 15th May 1893 the bank stopped payment, and Mr Young having failed on 4th June 1893 to obtain payment from it of the principal sum of £500 contained in his deposit-receipt, and £9, 11s. 1d., being the interest then payable thereon, claimed payment from the insurance company.

The company declined to pay, and Mr Young then raised an action against them concluding for payment of the two sums of £500 and £9, 11s. 1d.

The defenders in their answers set forth the condition above quoted, and averred "that the Queensland National Bank, Limited, after it stopped payment was reconstructed, and is at present carrying on business, and that default has not been made in payment by the bank in the sense of the first condition of the policy above set forth. . . . Further, the pursuer is not in a position to transfer to them the said deposit-receipt and the money due thereunder, so as to place them in a position legally to sue therefor as creditors of the Queensland National Bank, Limited, as it existed at the date of the said policy, and in terms of the said conditions therein."

The defenders pleaded;—2. The defenders are entitled to absolvitor, in respect (1) there has not been default in payment by the bank in the sense of the conditions in the said policy; (2) the conditions in the said policy, subject to the limitations of which the same was granted, have not been fulfilled; (3) the defenders are not due or resting owing the sums sued for.

On 8th November 1893 the Lord Ordinary (Wellwood) decerned in terms of the conclusions of the summons.* **No. 44.**

The defenders reclaimed, and argued;—There had been no default, for the bank was again carrying on business, and new documents of debt had been issued by it, which was equivalent to payment of the original deposit-receipts. Besides, the bank had been so reconstituted under the laws of Australia that no present action for recovery of sums due by it was competent. The pursuer therefore had failed to implement the conditions of the policy, for he was not able to put the defenders in the position of creditors legally entitled to sue the bank, at anyrate not to the same effect as at the date of the policy.

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The pursuer was not called upon.

LORD PRESIDENT.—The Lord Ordinary has informed us that no argument was forthcoming for the defenders. I must do Mr Grierson the justice to say that a slight advance has been made on that state of matters. He has said a good deal, but unfortunately the record says nothing, and contains no foundation for the argument which counsel has stated or suggested.

On the facts admitted it is quite clear that the bank has stopped payment, and is unable to meet the demands of its creditors, and, amongst others, the claim of this depositor, whose money was due on the 4th June 1893, and was not then paid. There can be no question then about default of payment. Accordingly I do not see how, *prima facie*, the defenders have any answer to this claim.

But then they maintain that the conditions of the policy have not been fulfilled. There is nothing on the record to support that argument. They have been offered all the rights that the depositor has, and they do not say what more they require. They darkly hint that some reconstruction of the bank may give them trouble in working out their remedies against the defaulting debtor, but nothing tangible is either averred or pleaded in this regard which forms an answer to the pursuer's claim.

LORD ADAM.—I am also for adhering.

LORD KINNEAR.—I also agree. I think the defence is irrelevant. It is stated by counsel that there has been a change in the constitution of the bank in Australia which, by the laws of Australia, so alters the position of the creditors as to make it impossible for them now to pursue their claims to the same

* "OPINION.—No maintainable defence to the pursuer's claim is stated on record, and I am not surprised that no argument was forthcoming for the defenders. I shall therefore content myself with saying that, in my opinion, the pursuer having offered to assign to the defenders all his rights against the Queensland National Bank, and tendered them his deposit-receipt indorsed, is entitled, under his policy, to payment of the sum sued for.

"The sum deposited with the Queensland National Bank was repayable on 4th June 1893, and the bank was and is admittedly in default. The pursuer is therefore entitled to call on the defenders to implement their guarantee unconditionally. He has no concern with the steps that have been taken to reconstruct the bank. If they are successful so much the better for the defenders, who will stand in the pursuer's shoes, as it was intended by the conditions of the policy they should do in the event which has happened. But no reason has been suggested why the present condition of the bank should affect the pursuer's claim against the defenders, and I can see none."

No. 44. effect as at the date of the policy. How that may be, I do not know. There is no averment on record which would lend support to that argument. All that the defenders say is that they believe "that the pursuer is not in a position to transfer to them the deposit-receipt and the money thereunder so as to place them in a position legally to sue therefor." The pursuer, however, was quite ready to transfer the receipt, and that in my opinion satisfied his obligation.

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LORD M'LAREN was absent.

THE COURT adhered.

J. W. & J. MACKENZIE, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 45. THOMAS BARR, Pursuer (Respondent).—*Dickson—Younger.*
JAMES F. WALDIE, Defender (Appellant).—*Salvesen—A. S. D. Thomson.*
Dec. 8, 1893.
Barr v.
Waldie.

Sale—Contract—Construction—"Equal monthly quantities of 300 tons maximum."—On 5th March 1891 Waldie, a coalmaster, by sale-note contracted with Barr to sell 2500 tons of coal "in equal monthly quantities in lots of 300 tons maximum." A letter accompanying the sale-note stated "that if necessary you"—Barr—"are to extend the period of delivery somewhat."

Barr neither asked for nor obtained delivery of any coal in March or in April. In May he asked for and got 24 tons, in June he asked for and got 4 tons, and during the succeeding months down to January 1892 he asked for and got deliveries of coal monthly, but of very varying quantities, the total amount delivered being 1071, leaving 1428 undelivered.

On 12th May 1891 Waldie wrote,—"If you cannot take up the coal now due for delivery under contract, I cannot bind myself to give it later on," and at various times afterwards he remonstrated with Barr for not taking delivery in terms of the contract. In February 1892 Waldie refused to make any further delivery under the contract, alleging that it was at an end.

Barr then raised an action against Waldie for damages for breach of contract.

Held that the contract imported that the deliveries of coal were to be in monthly quantities as nearly as might be of 300 tons each, but never more; that the pursuer therefore was himself in breach of contract in February 1892 when the defender refused to make any further delivery, and consequently that the defender fell to be assoldized.

2D DIVISION.
Sheriff of
Lanarkshire.

ON 5th March 1891 James Waldie, coalmaster, Glasgow, sold to Thomas Barr, coalmaster there, 2500 tons Skaterigg coal, conform to the following sale-note:—"I confirm sale to you of 2500 tons of Skaterigg cannel coal for shipment in equal monthly quantities to Brussels in lots of 300 tons maximum. Any detentions in transit, labour disputes, stoppages, or partial working of pits, accidents, or unforeseen delays excepted, and I guarantee nothing as to quality beyond the description herein specified—at 27s. 6d. stg. per ton, colliery weight—delivery being at pit. Payable net cash thirty days after despatch from pits."

In a letter accompanying this sale-note Waldie wrote,—"Referring to your Mr Urquhart's call yesterday evening, I enclose sale-note for the cannel then arranged for, and confirm further arrangements that, if necessary, you are to extend the period of delivery somewhat."

Barr did not ask for or receive any deliveries under the contract in the months of March and April 1891. In May he got 24 tons 19 cwt., in June 4 tons 17 cwt., in July 95 tons 6 cwt., in August none, in September 5 tons 11 cwt., in October 688 tons 13 cwt., in November 38 tons 4 cwt., in December 227 tons 7 cwt., in January 1892 6 tons 3 cwt.

In all 1071 tons 2 cwt. were delivered down to January 1892, leaving 1428 tons 18 cwt. then undelivered. **No. 45.**

Waldie having declined to make any further deliveries under the contract, Barr brought an action against him in the Sheriff Court at Glasgow for payment of £250 as damages. Dec. 8, 1893.
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The pursuer averred,—“After the sale was made, parties by arrangement or agreement, or by acquiescence, so dealt with the question of delivery that the coal was not sent to Brussels, the quantities were never equal, and in some months there were practically no deliveries.”

The pursuer pleaded;—(1) The defender having illegally and unwarrantably cancelled said contract when the quantity of coal consigned on was undelivered, and the market value of the coal undelivered at the date of cancelling being at least equal to that stated, decree ought to be granted as craved, with costs.

The defender denied the alleged agreement or acquiescence, and pleaded;—(2) The period of the contract having expired at the end of November 1891, and the pursuer having failed, in breach of the contract, to take delivery of the coal tendered to him during that period, or a reasonable time after the expiry thereof, he is not entitled to delivery now from defender, or to damages.

A proof was allowed. There was no evidence that the defender ever refused to give delivery of coal to the pursuer until February 1892, when the defender intimated that the contract was at end. The defender sent the letters quoted below to the pursuer.*

On 25th July 1892 the Sheriff-substitute (Guthrie) pronounced this interlocutor:—“Finds that the defender on 5th February wrongfully refused to implement the contract he had made with the pursuer to sell him 2500 tons of cannel coal as libelled, whereby the pursuer has sustained loss and damage: Finds that the damages are correctly stated in the condescendence; therefore decerns as craved.”

On appeal, the Sheriff (Berry) adhered.

The defender reclaimed. The arguments sufficiently appear from the opinions of the Court.¹

At advising,—

LORD YOUNG.—This is an action of damages for breach of contract, the pursuer averring that he purchased 2500 tons of Skaterigg cannel coal from the defender, and that he has received only 1071 tons, leaving 1429 tons undeli-

* 12th May 1891,—“Referring to my recent calls and conversation with your Messrs Urquhart and Clarkson, I confirm what I then stated, viz., that if you cannot take up the cannel now due for delivery under contract, I cannot bind myself to give it later on.”

17th June 1891,—“I am still waiting your orders for Skaterigg cannel, delivery of which is now overdue under contract.”

27th June 1891,—“Please note I am still without a reply to mine of 17th, and have again to ask you to see that orders are sent at once for the Skaterigg cannel, delivery of which is now much overdue, under contract.”

25th December 1891,—“As to your contract, the period expired on 5th inst., and any arrears are through you not taking it up in about equal monthly quantities, as per my letter to you of 17th and 22d June last, and repeated verbal communications during its currency.”

5th February 1892,—“Yours of yesterday received, and as stated by me in the conversation you refer to, your last contract with me for Skaterigg cannel has expired. If you wish further supplies of the cannel, I should be glad to quote.”

¹ *Pursuer's Authority.*—Tyers v. Rosedale and Ferryhill Iron Co., 1875, L. R., 10 Ex. 195.

No. 45. vered, which he says he is entitled to have, but which the defender refuses to deliver.

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The contract alleged to be broken is in writing, and is in these terms,—“I confirm sale to you of 2500 tons of Skaterigg cannel coal, for shipment in equal monthly quantities to Brussels, in lots of 300 tons maximum,” and so on.

It is not according to the fact, as I understand, and indeed it is not alleged, that the defender ever refused to deliver 2500 tons of coal in equal monthly quantities of 300 tons maximum. It appears, on the other hand, from the evidence that it suited the purpose and business of the pursuer to take delivery of no coal at all in the first month of the contract, the month of March, and also in the month of April. In the month of May he asked for and got delivery of 24 tons, in June he asked for and got delivery of 4 tons, and between June 1891 and January 1892 he asked for and got delivery of about 1000 tons altogether. In all from the date of the contract, 5th March 1891, down to January following, when the supply ceased, he asked and got delivery of 1071 tons, and that leaves a balance of 1429 tons, which he says the defender has refused to deliver, and it is this refusal which is the breach of contract alleged. The defender repeatedly remonstrated with the pursuer for the slowness and irregularity with which he took delivery of the coal, and at last the defender declined to go on any further. At the end of January 1892, by which date, according to the defender's view, the whole coal ought to have been delivered, and less than half had actually been delivered, the pursuer desired him to deliver the balance, but the defender refused to do so, and the question is whether that refusal constituted a breach of contract or not?

Now, the first question which naturally occurs here, and which we put repeatedly to the pursuer's counsel in the course of the argument, is, what is the meaning of the contract under which the defender undertook to deliver 2500 tons of coal in equal monthly quantities of 300 tons maximum? We pressed it upon the pursuer's counsel to put any interpretation on the contract consistent with the pursuer's conduct, against which the defender, as I have said, repeatedly remonstrated. What construction is consistent with no delivery in March, no delivery in April, 24 tons only in May, 4 tons in June, and about 1000 tons between June and January? No answer was given to that question, and I think that the contract is incapable of any construction which would shew that the pursuer's conduct was in accordance with his rights under the contract. But assuming, contrary to my own opinion, that the pursuer was not himself in breach of contract when in February he made his demand that the defender should deliver the balance of the coal, it would be impossible to sustain his claim for damages unless he could shew in what quantities and at what times the defender was bound to deliver the coal which had not been delivered by January. We put it to the pursuer's counsel within what time and in what quantities was the defender bound, according to his construction of the contract, to deliver the balance of the coal? Was it to be delivered all at once, or in equal quantities, and if in equal quantities, in what equal quantities, and if not in equal quantities, in what quantities? We could get no answer to these questions either, and therefore, even if the pursuer were otherwise right, I think it would be impossible to sustain his claim to damages for breach of contract, since he has failed to specify within what time and in what quantities the defender was bound under the contract to deliver the balance of the coal.

On the whole matter, and without going into details, my opinion is, that when the pursuer made his demand in February that the defender should continue the delivery of the coal, the pursuer was himself in breach of the contract. I concur in the interpretation put on the contract by the defender. I think that its legal meaning and effect is that deliveries are to take place in equal monthly quantities of about 300 tons each. The deliveries are never to exceed 300 tons, but they may be a little less. Any other construction would leave it in the buyer's option to fix the equal monthly quantity at what amount he pleased—it might be 10 tons or even 1 ton. But I think that the rational meaning of the contract is that the buyer is to take and the seller is to deliver about 300 tons a-month until the whole 2500 is made up. Now it is not the fact,—it is not even alleged,—that the defender ever refused to give delivery on that footing; the pursuer, on the other hand, never acted on that construction of the contract. I therefore think that when the pursuer made his demand in February he was himself in breach of contract, and consequently I am of opinion that we ought to recall the judgment of the Sheriff, and, after findings in fact in accordance with the views which I have expressed, assolvie the defender.

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LORD RUTHERFURD CLARK.—The contract on which this action is laid is dated in March 1891, and is thus expressed,—“I confirm sale to you of 2500 tons of Skaterigg cannel coal for shipment in equal monthly quantities to Brussels, in lots of 300 tons maximum.” The deliveries under it were very irregular. The pursuer ordered no coal and took delivery of no coal in the first two months. He ordered and received 24 tons in May and 4 in June. At the end of January 1892 he had ordered and received 1071 tons. The defender refused to make any further delivery. Hence the pursuer has brought this action of damages.

The pursuer maintained that he was entitled to require the defender to deliver in the first month such reasonable quantity of coal as he might prescribe not exceeding 300 tons, and that that quantity became the amount deliverable during each succeeding month until the contract was completed. Subject to such restraint as is involved in the word reasonable, he claims the right of fixing the duration of the contract, as its duration would necessarily depend on the amount required in the first month of its existence. But from his difficulty in defining, and in indicating the means of defining, a reasonable quantity, he did not confine himself to this view. His ultimate position was that he was entitled to order for the first month any quantity he chose, and that that quantity became the amount deliverable in the succeeding months.

The defender, on the other hand, contended that the only fair construction of the contract is, that deliveries were to be made of about 300 tons in each month.

The case of the pursuer depends on the fact that a maximum is fixed. It is said that by fixing a maximum without defining the amount of the monthly deliveries, the contract necessarily gave to the buyer the power of ordering for the first month any amount within the maximum. I am unable to hold that he had any such power. A mercantile document like that which is before us must be construed reasonably, and I could not imagine a more unreasonable construction than to hold that a power was given to the buyer by which he might indefinitely prolong the execution of the contract and reduce it to an absurdity. If we are to judge of the meaning of the parties by their actions, it

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is very plain that it never occurred to either to give to the contract any such interpretation. The pursuer did not imagine that he was limited by the amount of his first order. He acted under the very opposite belief.

Nor can I see how this construction would avail the pursuer. He ordered no coal during either of the first two months. On his theory the contract would be brought to an end; for he could not demand in any month more than he ordered in the first. His first order in the third month was for 24 tons. If the deliveries were to be regulated by this amount it is very unlikely that he could take benefit under such a contract.

But if we cannot hold that the buyer has the power of determining the amount of the monthly deliveries, we must find from the contract what these deliveries are to be. If we cannot, the contract is incapable of execution, and therefore incapable of sustaining any claim for damages, for we would be unable to declare what are the obligations or rights of the parties. Any such result must, if possible, be avoided, and I think that if it were necessary we would be justified in doing some violence to the language of the contract in order to avoid it.

The words are, "in equal monthly quantities in lots of 300 tons maximum." The word "maximum" expresses a stipulation in favour of the seller, so as to limit his obligation to deliver. It is against the buyer in so far as it deprives him of the right to require the delivery of larger quantities. It suggests that the buyer has the power to take delivery in smaller lots. But there is nothing more than a suggestion unless we can find from the contract itself what these smaller lots may be. I cannot do so when I have rejected the construction that the deliveries can be fixed at the pleasure of the buyer. If, then, the contract is to have any force I am driven to the conclusion that its true meaning is that deliveries were to be made and taken in equal monthly quantities as nearly as might be of 300 tons, but never to exceed that amount.

Nor in my opinion is there anything unreasonable in such a construction. When a buyer enters into a contract in which the seller stipulates for a maximum, we may without any unfairness infer that he is desirous of getting in every month as large a delivery as he can, and that the amount which is called a maximum is inserted as an approximate statement of the monthly deliveries—approximate because there cannot be exact equality. It is a construction which can harm neither party, and which, so far as I can see, furnishes the only rule for the execution of the contract.

The pursuer suggested another method of fixing the deliveries. Giving up the absolute power for which he contended, he said that he was bound to take a reasonable quantity per month, or, in other words, to fix a reasonable quantity for the first delivery. He did not claim to be the judge of what was reasonable; but he could not say how the quantity was to be determined. The obligations of parties to a contract cannot be settled by the judgment of others except in the sense of interpretation. The contract does not furnish the means of determining a reasonable amount, and if a Court or jury attempted to do so, they would, in my opinion, be stepping out of their province. For the application of a rule which is not furnished by the contract is necessarily an addition to the contract.

Again, the pursuer contended that he had a right to the delivery of 300 tons per month. I agree that he had a right to the delivery of that amount for each successive month after the date of the contract until the quantity was exhausted.

The deliveries were to be made monthly, and in equal quantities. If he did not choose to take delivery within these months, he had no further right. For the contract necessarily expired with the time required for the delivery of the total amount.

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If I am right, there is an end of the pursuer's case in so far as it is laid on the contract alone. I think that he was in flagrant breach of it, and that he did not and would not take delivery at the time at which alone he was entitled to demand it. Even if the views which he has put forward with respect to the construction of the contract were sound, he did not act in conformity with them. He is in breach of the contract on his own construction of it. For he did not take equal monthly deliveries or make any provision under which the deliveries should be equal. On the contrary, he refused to take any quantity except that which suited him for the time, and he has so acted that if I were to hold that the contract was still in force, I do not see how I could determine the obligations of the seller under it. If I were to hold that the seller was bound to deliver the balance in equal monthly quantities, I think that I would be making an entirely new contract.

When we heard the case, the pursuer claimed damages under the contract alone. But as I read the record, his claim is founded more on a new agreement to be discovered from the course of dealing, and I think that it was on this view that his case was presented in the Sheriff Court. I can find no such agreement. The pursuer was in evident breach of the contract very soon after it was made. The defender complained of the breach, and desired orders for equal monthly quantities. On 12th May 1891 he wrote,—“If you cannot take up the cannel now due for delivery under contract I cannot bind myself to give it later on.” Nothing could be more distinct. While the pursuer was in breach of the contract the defender adhered to it, and he never altered his position. He gave great accommodation to the pursuer, but he made no new contract. I must say that I have no sympathy with the pursuer. He has, I think, been very generously dealt with, and I am surprised that he should have brought such an action as the present.

The LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

THE COURT pronounced the following interlocutor:—“Sustain the appeal: Find that by sale-note, dated 5th March 1891, the defender sold to the pursuer 2500 tons of Skaterigg cannel coal for shipment in equal monthly quantities to Brussels, in lots of 300 tons maximum: Find that under said contract 1071 tons of said coals were delivered by the defender to the pursuer as follows, viz.:—In April no delivery, in May 24 tons 19 cwt.,” &c.: “Find that the defender was ready and willing to deliver coals to the pursuer under said contract in equal monthly quantities of 300 tons maximum in each of the months following the date of the contract: Find that the pursuer, in breach of said contract, wrongfully failed to take delivery thereof: Therefore recall the interlocutors appealed against: Assolzie the defender from the conclusions of the action: Find the defender entitled to expenses.”

A. C. D. VERT, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 46. GUY MAXWELL HERON, Pursuer (Reclaimers).—*Johnston—C. J. Guthrie—F. T. Cooper.*

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GEORGE DUNLOP, Defender (Respondent).—*Sol.-Gen. Asher—Murray—Blackburn.*

Entail—Disentail—Consent of next heir—Security—Curator ad litem—Personal liability—Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), sec. 12.—The Entail (Scotland) Act, 1882, sec. 12, enacts that “no curator ad litem who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment, or inadequacy of consideration, or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter.”

In a petition for disentail a curator ad litem for the next heir, in an agreement with the petitioner, consented to a disentail “on the terms hereinafter set forth,”—(1) It is hereby agreed “that the value in money of the expectancy or interest in the entailed estate of” the next heir is £16,000, for which the petitioner agrees to grant a bond and disposition in security; (2) in exchange for the said bond and disposition in security, the curator ad litem hereby agrees to deliver “a deed of consent to the disentail”; (3) and (4) by these articles it was agreed that the estate should be preferably burdened to the extent of £48,000, and that children’s provisions to the amount of £6000 should also be ranked preferably to the £16,000 bond.

The security having proved insufficient to cover the £16,000 bond, except to a very small extent, the next heir on reaching majority raised an action for payment of £16,000 against his curator in respect of his breach of duty in failing to take adequate security for the £16,000; (1) in allowing the bond to be postponed to the burdens mentioned in the agreement; and (2) in consenting to the disentail without seeing that the estate was cleared of certain other burdens not specified in the agreement.

The defender pleaded that the action was irrelevant, in respect that he was protected by section 12 of the Entail Act, 1882, there being no averment that he had acted corruptly.

Held that as no corruption was averred the action was irrelevant (*diss.* Lord Rutherford Clark with respect to the averment that the defender had failed to discover the existence of certain prior burdens not mentioned in the agreement).

2d DIVISION.
Lord Kin-
cairney.

ON 16th February 1893 Guy Maxwell Heron, eldest son of Captain John Maxwell Heron, brought an action against George Dunlop, Writer to the Signet, concluding for payment of £16,000, with interest from 30th October 1883, on the ground that the defender was liable in the sum concluded for on account of a breach of duty as curator ad litem to the pursuer, under a petition by Captain Maxwell Heron for disentail of the estates of Heron and Kirrourtree.

The pursuer averred;—Captain Maxwell Heron, proprietor of the entailed estates of Heron and Kirrourtree, on 6th March 1883 presented a petition for the disentail of these lands. The pursuer was at that time a minor, having been born on 8th June 1871, and the defender was, on 25th April 1883, appointed his curator ad litem.* Authority to

* By sec. 12 of the Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), it is enacted,—“In any application under the Entail Acts, to which the consent of any person is required, where such person is disabled under the provisions of the Entail Acts or otherwise from consenting by reason of being under age or subject to other legal incapacity, the Court shall appoint his tutor, curator, or other administrator, or one of his tutors, curators, or administrators, or another person, to be curator ad litem to the person under disability, and such curator ad litem may consent on his behalf, and no curator ad litem who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment or in-

record the instrument of disentail was pronounced on 18th February 1884. (Cond. 4) "The pursuer's father, Captain Heron, was born prior to 2d June 1851, and therefore it was necessary that the value of the pursuer's consent to the disentail should be ascertained. Both Captain Heron and the defender obtained valuations of the entailed lands for the purpose of ascertaining the value of the consent. The valuation of the lands obtained by Captain Heron was £93,000. That obtained by the defender was £91,000. By minute of agreement between Captain Heron and the defender, dated 1st November 1883,* the larger valuation was taken by the defender as the basis for computing the value of the pursuer's interest, and that interest was accordingly fixed at £16,000, and a

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adequacy of consideration, or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter."

* The minute of agreement was in these terms :—"Whereas the said John Maxwell Heron, on or about the 6th day of March 1883, presented a petition to the Lords of Council and Session for authority to record an instrument of disentail of the said lands and estates, upon which petition the usual procedure followed ; and, *inter alia*, the said George Dunlop was appointed curator ad litem to the said Guy Maxwell Heron : And whereas the said George Dunlop, as curator ad litem foresaid, has agreed to consent to the said disentail on the terms hereinafter set forth : Therefore the parties have agreed, and do hereby agree, as follows, *videlicet* :—

"First, It is hereby agreed between the parties that the value in money of the expectancy or interest in the said entailed estate of the said Guy Maxwell Heron is £16,000, for which sum the said John Maxwell Heron hereby agrees and binds and obliges himself to grant to the said Guy Maxwell Heron a bond and disposition in security, in ordinary form and containing all usual and necessary clauses.

"Second, In exchange for the said bond and disposition in security, the said George Dunlop, as curator ad litem, hereby agrees to execute and deliver to the said John Maxwell Heron a deed of consent to the disentail of the said estate.

"Third, The said George Dunlop, as curator ad litem foresaid, further agrees to the said John Maxwell Heron borrowing a sum not exceeding £10,500 upon the security of the said lands, to rank preferably thereon to the said sum of £16,000, the said sum of £10,500 to be applied as follows, *videlicet* :—(First) £3000 to be applied in the redemption of one-half of the annuity of £700 presently payable out of the said lands and estate to Mrs Charlotte Burgoyne Maxwell Heron, mother of the said John Maxwell Heron ; (second) £2500 to be applied in repayment to the petitioner of sums expended by him on permanent improvements on the said estate, or to be hereafter so expended ; (third) in payment of any sums presently borrowed by the said John Maxwell Heron on the security of his life interest on the said estate and policies on his life, and the expenses hereinafter mentioned ; (fourth) the balance to be paid to the said John Maxwell Heron at such times and in such amounts as shall be fixed by James Howden and James Alexander Molleson, both chartered accountants, Edinburgh, and by the said George Dunlop, or by a majority of them in the event of their differing in opinion.

"Fourth, The parties hereto agree that the said sum of £10,500, to be borrowed as aforesaid, and the sum of £6000, being the provision to younger children contained in the first party's antenuptial contract of marriage, shall rank on the said estate preferably to the foresaid sum of £16,000 ; and that the whole other existing debt amounts to the sum of £37,500, as will be shewn by searches to be exhibited by the said first party to the said second party.

"Fifth, The whole expenses of the said application to the Court, the bond in favour of the said Guy Maxwell Heron, and of these presents, and incident thereon in any manner of way, shall be paid by the said John Maxwell Heron."

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deed of consent to the disentail was lodged in the process by the defender." (Cond. 5) "It was the duty of the defender as curator ad litem, if he consented to take security over the lands before they were dis-entailed, instead of insisting on consignation of the value of the pursuer's consent, to see that the security was proper and adequate. The defender agreed, by the said minute of agreement of 1st November 1883, to accept security over the said lands instead of consignation; but he, in breach of his duty, failed to see that the security he obtained was proper and adequate. . . ."

The pursuer then averred;—(Cond. 6) "By the 4th clause of said minute of agreement, Captain Heron undertook to shew to the defender that the debts on the lands at that time amounted to £37,500. The defender took no steps to satisfy himself of the accuracy of Captain Heron's statement. On the contrary, he, in breach of his duty to the pursuer, failed to make any adequate inquiry as to the burdens on the lands, and their sufficiency to afford a security for the value of the pursuer's interest. If the defender had made adequate inquiry he would have found that besides the said sum of £37,500 the lands were burdened with— . . . (2) An annuity to Miss Heron of £150 per annum. This annuity became payable on the death of her mother, and its capitalised value then was £2700." (Cond. 7) "Not only did the defender not inquire as to the real amount of the burdens on the lands, but, by the minute of agreement he, while accepting a bond and disposition in security over the lands in return for the consent of the pursuer, agreed that Captain Heron should burden the lands by bonds taking priority to that in favour of the pursuer to the extent of £16,500," besides £2180 being the value of insurance premiums secured on the estate. . . . (Cond. 10) "Further, the defender, in breach of his duty foresaid, failed to make adequate inquiry as to the amount of the rent-roll of the said estates. For the year 1882,—being that immediately preceding the year in which the disentail petition was granted,—the rents amounted to £3215, 13s. 8d. From that sum there fell to be deducted payments of interest on prior burdens and expenses necessarily incurred over the estates, and there was consequently left only £479, 7s. 4d. to pay the interest (£800) on the bond which the defender had accepted for the payment of the pursuer's interest in the said lands."

The pursuer further averred;—(Cond. 11) "On 11th July 1887 Captain Heron was sequestrated, and Mr J. A. Robertson, C.A., was appointed his trustee. The interest on the bond to the insurance company fell into arrear, and the premiums on the policies of assurance which the said company held were not paid. In these circumstances the said company forced the trustee to sell the lands, which he did by public roup at the price of £60,000. After paying prior burdens on the lands, only £488, 11s. 6d., subject to deduction of expenses, was left to meet the pursuer's bond for £16,000. . . ." (Cond. 12) "The pursuer has thus lost the whole of the sum payable to him for his consent to the said disentail. The defender is liable for said loss in respect that he failed to have the value of the pursuer's consent paid or properly secured, having accepted as a security for payment of the said sum of £16,000 what was manifestly an inadequate security. The defender failed to take care that the value of the pursuer's consent was properly secured on the estates. He could have insisted on consignation of the £16,000 instead of taking security for it. He allowed other bonds to be granted over the said estates in preference to the pursuer's bond. He failed to ascertain the amount of the burdens on the said estates, and he took as security on behalf of the pursuer a bond over the said estates which were already burdened to

such an extent as to render these a totally inadequate security for payment of the pursuer's debt. In the circumstances condescended on said failure amounts to *culpa lata*."

The pursuer pleaded;—(1) The defender having, in breach of his duty as curator and guardian of the pursuer during minority, failed to obtain proper security for the said sum of £16,000, and the pursuer having in consequence lost the same, decree should be granted in terms of the conclusions of the summons.

The defender pleaded;—(1) The action is irrelevant and incompetent. (2) The action is barred by the Entail Acts, and, in particular, by sec. 31 of the Entail Amendment Act, 1848, and sec. 12 of the Entail (Scotland) Act, 1882. (3) The defender as curator ad litem in the petition for disentail was entitled to give his consent for such consideration as he thought proper; and the consideration in respect of which the consent was given having been fixed *in bona fide* by the defender as fair and reasonable under the whole circumstances, and having been duly obtained, the defender ought to be assoilzied.

On 20th July 1893, the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that the averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons: Therefore assoilzies the defender from the said conclusions, and decerns." *

* "OPINION.— . . . The argument was confined to the effect and application of the 12th section of the statute pleaded by the defender. The pursuer maintained that it did not apply. He maintained that the consideration for the consent of the curator ad litem was £16,000. He did not dispute that his interest was fairly estimated at that sum, and that it was, if paid, an adequate consideration for the consent. His objection therefore, he maintained, was not to the inadequacy of the consideration, but to the inadequacy of the security for it; and he maintained that in complaining of the inadequacy of the security he was not charging the defender with mere error in judgment, but with such carelessness and fault as had in various cases been held sufficient to subject in liability trustees who had invested trust funds on security which was manifestly insufficient.

"It was maintained for the defender that he was not in the position of a trustee who had invested trust funds; because, in the first place, the statute had conferred on him a much wider immunity than the law had accorded to trustees; and, in the second place, because he had never been in possession of any funds for investment; that the agreement must be read as a whole; and that, on a sound construction of it, it appeared that the consideration for the curator's consent was not the payment of £16,000 but the bond granted in terms of the agreement.

"On this argument my opinion is in favour of the defender.

"The main question is, what was the consideration obtained by the curator ad litem in respect of which he gave his consent. In considering that question it is important and instructive to distinguish between the duties imposed by the 13th section of the statute on the Court, in a case where consent is refused, and the provisions of the 12th section, which apply when consent is given. In the former case the Court is required to ascertain 'the value in money' of the interest of the heir, and to direct that the sum ascertained shall be paid into bank in name of the heir, 'or that proper security therefor shall be given over the estates.' The case of *Farquharson*, 14 R. 231, quoted by the pursuer, was a case where consent had been refused.

"But there are no such provisions in the 12th section relating to cases of consent. The curator ad litem is not required to ascertain the value in money of his ward's interest, or to see that the sum ascertained is consigned or invested. In such a case, as pointed out by the counsel for the defender, it may happen that no money consideration is involved, as in the case—not at all unusual—where the object of a disentail is a resettlement of the estates; and other less

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The pursuer reclaimed, and argued ;—The Lord Ordinary had assumed that the defender had given his consent as curator ad litem after due consideration of the whole circumstances ; that could not be taken for granted without further inquiry. On the contrary, the defender failed in duty by overlooking the existence of burdens on the estate not disclosed by Captain Heron. The defender committed a further breach of duty by allowing certain sums to be secured on the estate prior to the bond for the value of the next heir's consent, after he had agreed to take a bond as the consideration for that consent. The agreement of 30th October and 1st November 1883 must be read as in reality two agreements. The first, consisting of articles 1 and 2, after fixing the value of

usual cases may be supposed where the consideration for a disentail might be something different from a payment of money,—for example, an annuity, or a disposition of a portion of the entailed estates ; or, again, there might be reasons which might legitimately induce a curator ad litem to be moderate in his claims, as if (as is suggested in the present case) there was reason to doubt whether the entail was good against creditors. For such reasons a curator ad litem has a very wide discretion in regard to the grounds on which he shall consent to the disentail on behalf of his ward ; and the Court is not concerned with these reasons, except with the view of ascertaining whether the transaction has been honest and incorrupt.

“I am of opinion that on a sound construction of the agreement the consideration for the consent was not payment of £16,000, but a bond for that sum. That is expressed unequivocally in the second head of the agreement. Captain Maxwell Heron did not come under an obligation by the agreement to pay the £16,000 in money, and never did so, except indeed by the bond itself. It may be that the curator ad litem ought not to have accepted Captain Heron's bond, and ought to have refused his consent if he could not get the money, and so have thrown on the Court the duty and responsibility of ascertaining the sum and approving the security. But it is quite certain that he did not do so. He accepted a bond ; and if it be said that that bond has proved an adequate security, what is that but saying that the consideration was inadequate ?

“At first sight there is some difficulty in seeing how a security over an estate can be an inadequate security for a partial interest in it, and the 13th section of the statute seems to contemplate that the estate would be adequate security. But in this case the curator consented to new burdens being imposed on the estates ; and it may be doubtful whether it was advisable to do that. Still, I think it clear that the bond for which the curator stipulated was not a bond over the estate as it then stood, but a bond subject to the burdens mentioned in heads three and four of the agreement. But that, again, resolves into a question of the inadequacy of the consideration ; and from any liability on that score the curator ad litem is protected by the statute.

“I am of opinion, therefore, that the ground of liability here is really inadequacy of consideration, and that that ground of liability is excluded by the statute.

“It may be noticed that here the father, who granted the bond, was his son's administrator-at-law ; and it rather appears to me that if he had paid £16,000 to the curator ad litem, he could have demanded it back as his son's administrator-at-law, or could have uplifted it from the bank in that character if it had been consigned in bank. It is true that in that case he would have held the money in a fiduciary character, and it might, if capable of identification, be safe from his creditors ; and it was perhaps a different thing to lend him the money on his bond, but the consideration suggests how limited the duty of a curator ad litem in such cases really is.

“I decide this case on the footing that the whole question relates to the liability incurred by the defender in accepting the bond and disposition in security under the conditions specified in the agreement as a consideration for his consent to the disentail.”

the consent at £16,000, embodied the consent to the disentail on the consideration of a bond for £16,000 on the estates of Captain Heron as previously diminished by existing burdens. That bond must be a bond over the estate which was being disentailed, not a bond over that estate as subsequently reduced by further burdens. Then followed in the concluding articles a separate agreement under which the curator ad litem consented to the bond in favour of the heir being postponed to new burdens to be imposed on the estate. The new burdens, together with those disclosed by Captain Heron, and those not disclosed by him nor discovered by the defender, amounted in all to about £59,000, or more than two-thirds of the estimated value of the estate. No prudent man of business would have accepted as a security a bond over an estate already burdened beyond two-thirds of its value. In fixing the value of the heir's interest the curator might be protected by the 12th section of the Entail Act, 1882, but it was no part of his functions as curator to accept security for his ward's money, still less to consent that that security should, for the convenience of the disentailer, be postponed to new borrowings on the estate. In doing so, he was acting ultroneously, and had no protection from the statute. If the disentailer insisted upon giving a bond, and postponing that bond to new borrowings, it was the duty of the curator to refuse his consent and leave the Court to order the value of the reclaimer's consent to be ascertained and paid into bank.¹ The respondent farther failed in his duty to make adequate inquiry as to the rent-roll of the said estates, which shewed a free rental of only £479, 7s. 4d. to pay the interest (£800) on the bond which he had accepted for his ward.

Argued for the respondent;—The Entail (Scotland) Act, 1882, section 12, gave no warrant for the view that the curator's duty ended with fixing the money value of his ward's consent. He was charged with the interest of the ward, and entitled to act and give his consent to the disentail, with powers as full as the ward, if capable, would have had. In practice the consideration was more often not a money payment, but resettlement of the estates, or a bond and disposition in security. The curator had absolute discretion in fixing the consideration, and so long as he did not act corruptly was protected by the statute from all responsibility. Here the curator might have taken what was not a first-class security, but that only meant that his consent was given for an inadequate consideration. It was necessary to fix the value of the heir's consent in money, but the consideration for which the consent was given was not money, but a bond. The agreement of 30th October and 1st November 1883 could not be taken in separate parts without doing violence to its terms, for the whole was connected together by the words in the narrative clause, "consent to the said disentail on the terms hereinafter set forth." The latter clauses of the agreement might have reduced the value of the security, but it was no relevant ground of action that the bond had on that account turned out bad. All that could be alleged was that the consideration for consent was inadequate, and the respondent was also protected by the wider clause in the statute giving immunity for errors of judgment. The 12th section of the 1882 Act, read along with the 31st section of the Rutherford Act,² left to the curator the option of giving his consent with or without consideration, and there was no mention of a money payment or of proper security being insisted upon, until the 13th section of the 1882 Act, which provided for the case in which the

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¹ Farquharson v. Blair, Dec. 15, 1886, 14 R. 231.

² Entail Amendment (Scotland) Act, 1848 (11 and 12 Vict. cap. 36).

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curator had refused his consent, and had left the matter with the Court. *Farquharson v. Blair* did not apply here. In that case the security being unsatisfactory, the curator had refused his consent, and the duty then devolved upon the Court to order the value in money of the heir's interest to be paid into bank.¹ Having agreed to take a bond, it would have been impossible for the curator to resile and get decree for a money payment instead of the bond. The only operative clause was the second. The reclaimer could not therefore assume that he had £16,000, and meet the respondent on the question of investment. Had the respondent received the money and subsequently invested it, he would have exceeded his duties as curator, and might have been liable as *negotiorum gestor*. In this case he never received the money, but gave his consent on the consideration of receiving the bond.

At advising,—

LORD JUSTICE-CLERK.—The pursuer is the son of Captain Maxwell Heron, who was in 1883 heir of entail in possession of certain lands in the Stewartry of Kirkcudbright. The pursuer was at that time in minority, and under a petition for disentail presented by his father the defender, Mr Dunlop, was appointed to be his curator ad litem.

The particulars in regard to the position of the estate and the defender's actings at the time when he gave his consent to the disentail for his ward are, according to the pursuer's statement,—

1. That the estate was then valued as for a sale at £93,000. 2. That the debt then secured on the estate was £37,500. 3. That in addition to this sum there was further debt put upon the estate, which the pursuer puts at £18,680, and that there were certain other prior burdens which were said not to have been disclosed, the whole debt coming in round figures to £59,000, leaving a margin of £34,000. 4. That the value of the pursuer's interest, which was to be the price of consent to disentail, was £16,000. 5. That the defender agreed to accept a bond over the estate to be disentailed for the £16,000, postponed to the bonds above referred to, in exchange for his consent to the disentail. 6. That the disentail was accordingly carried through. 7. That in 1887 Captain Maxwell's Heron's estate having become insolvent, the trustee appointed upon his estate was under the necessity of selling it. 8. That it realised only £60,000, which price practically left no balance to pay the pursuer's £16,000.

In these circumstances the pursuer sues the defender for payment to him of £16,000 in respect, as stated in his first plea in law, that the defender has, in breach of his duty as curator and guardian of the pursuer during minority, failed to obtain proper security for the £16,000 fixed as the pursuer's interest, and that the pursuer has in consequence lost the amount. This plea is somewhat ambiguous, as the expression "curator and guardian" is used, but it is plain that if the defender is to be made liable, it must be in consequence of his actings as curator ad litem, appointed by the Court under the disentail proceedings. It is on his actings as curator ad litem that the pursuer must succeed if he is to obtain decree.

The defender maintains that he is not liable, he having been appointed as an officer of Court under the Entail Acts, and he maintains that he is protected

¹ Entail Amendment (Scotland) Act, 1875 (38 and 39 Vict. cap. 61), sec. 5, subsec. 2; and Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), sec. 13.

from a claim stated on such grounds as are founded on by the pursuer by sec. 12 of the Entail Act of 1882, by which it is enacted,—“That no curator ad litem who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment or inadequacy of consideration, or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter.” It is not alleged by the pursuer that there was any corrupt action, and therefore there can be no case for the pursuer unless he has a legal plea against the defender which cannot be met by any one of the three exemptions stated in the clause, viz., “error of judgment, inadequacy of consideration, or want of consideration.”

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The pursuer maintains that the defender agreed with the heir of entail in possession that £16,000 was to be paid for his interest, and that the defender in accepting the bond on the estate—which he did accept—for the amount was guilty of such carelessness and fault as would make a trustee liable for loss of property in his hands which he had invested without proper care. He further maintains that the defender failed to ascertain some of the burdens on the estate, which he might have ascertained if he had made more close inquiry than he did, and which made the investment worse by about £2000 than he knew it to be when he accepted it.

The defender maintains that the agreement must be read as a whole, his consent to the disentail being exchanged for the agreement, and that thus he was not at any time in the position of investing £16,000. He had to consider whether he would accept a bond for £16,000 as the consideration for his consent, and had no bargain with the heir of entail by which he became a holder of a sum of money for investment.

The curator ad litem in such a case as this is called upon to exercise his discretion, and to refuse his consent or give it on such terms as in his judgment in the circumstances it would be wise for the ward to consent to if he were major. Such exercise of discretion may depend upon a consideration of a great many complex circumstances. No rule is or can be laid down as to the extent to which investigation is to be made, or at what point a line is to be drawn as to adequacy of consideration. The curator is appointed as being a suitable person fully and fairly to consider the interests involved, and all the surrounding circumstances, making such investigation as he considers to be necessary. His action may prove afterwards to have been unfortunate from depreciation of property or some similar cause, but no rules are laid down for his guidance in judging of such matters. And it is certain that in some cases it might be in the interest of the negotiating heir to accept a less high class of security for his compensation for consent than would in the ordinary case be likely to be accepted.

In this case undoubtedly the security which the defender took was not what is called, in parlance applicable to heritable bonds, a first-class security. The margin left over upon the valuation was not very great. But the question whether a security is to be accepted or not, having regard to the calculated or estimated margin, is essentially one of circumstances, and although in a case of this kind it might be said after the event, when it is proverbially easy to be wise, that there was an inadequacy or even a want of consideration for the consent, the clause of the Act precludes inquiry on such points unless a relevant averment be made of corrupt action on the part of the curator.

Taking the case upon the footing that the curator accepted a security of which it must be said now that in prudence it ought not to have been accepted,

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it must, I think, also be taken on the footing that the defender conscientiously believed that he had made such inquiry as it was his duty to make, and conscientiously arrived at the conclusion at which he did arrive, and acted upon it. If he erred in either of these branches of his duty, it appears to me that his error is described in the language of the statute by the words "error of judgment." It was his duty to exercise his judgment as to what inquiries he should make, and to exercise his judgment upon the information obtained as their result. It is not said that he corruptly failed to do either. But if he did not corruptly fail, then, if he did what he ought not to have done, he did so through error of judgment. But it is just from liability in respect of such error of judgment that the 12th clause of the Act protects him.

I am of opinion that the pursuer's averments do not state against the defender any acts by which the pursuer may have suffered loss which are not fairly covered by the words of the statute, which exempt him from liability for alleged error of judgment, and that, on these grounds, the interlocutor of the Lord Ordinary is right, and ought to be adhered to.

LORD YOUNG.—I am of the same opinion, and generally on the same grounds. I agree with the Lord Ordinary. I think that this is a case to which the provision of the statute applies, and that the defender, who acted as an officer of this Court, is not liable, unless it is established to the satisfaction of the Court—what is not even alleged here—that he acted corruptly. I think that there may have been an error of judgment—probably there was—in the defender taking the security which he did over the estate, even assuming that the estate was of the value which it was said to be at the time, and that a prudent, cautious, judicious man-of-business would probably have required better security to be given. But I think that that was merely an error of judgment, if it was an error at all, and that the provision of the statute applies to such an error. All one's inclination is to protect an officer of Court who honestly tries to do his duty, and it was in pursuance of such an inclination that the provision of the statute was enacted, that a curator ad litem should not be liable unless it is proved that he acted corruptly. I must add that I am not strongly favourable to the pursuer of an action such as this. It is really a question between father and son. The pursuer says that when his father became bankrupt, and the estate was sold at something like £30,000 under the value at which it was estimated, the result was that he has lost the whole of the sum paid to him for giving his consent to the disentail, and therefore that that sum is now payable to him by the defender as having been his curator ad litem. That is really the nature of the action—to make Mr Dunlop pay a debt due to the pursuer by the pursuer's father. I am, I repeat, not favourable to such an action, and on the whole matter I agree with the Lord Ordinary that the defence must prevail.

LORD RUTHERFURD CLARK.—The case of the defender is that under the agreement of October 1883 the consideration for the pursuer's consent to the disentail was the bond and disposition mentioned in that deed. There is great force in that view, for there is no evidence of any other arrangement, and the deed expressly states that the defender, as curator for the pursuer, has agreed to "consent to the said disentail on the terms hereinafter set forth." It is true that it is stated in the first clause that the parties had agreed that the value of the pursuer's expectancy was £16,000. But I find it difficult to separate this clause from the rest of the deed, or to hold that this sum was fixed without

reference to the manner in which it was to be satisfied. We must read the clause as a whole, and I agree with the Lord Ordinary in thinking that the just construction of it is that the bond therein mentioned was the consideration for the consent of the heir. On this footing, and apart from a question to which I shall hereafter advert, the defender is protected by the statute. He incurs no liability for inadequacy of consideration when, as here, there is no corruption alleged.

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But I do not see that any other result can be reached if we assume that the value of the expectancy was fixed at £16,000, and that the bond was taken as a sufficient security for that sum. The curator's duty is not limited to fixing the value of the expectancy. He is entitled to give his consent to the disentail, and therefore it is part of his duty to see that the price of the consent is paid or properly secured. For he cannot give his consent till that be done. If, then, the defender fixed the value of the expectancy at £16,000, and thereafter agreed to take the bond above mentioned as a sufficient security, he was in my opinion acting within his province. He gave his consent because he believed the security to be sufficient. Nothing more is or can be alleged against him than an error of judgment. By force of the statute he incurs no responsibility on that ground.

But in my opinion the defender was bound to use due diligence to see that he got the security for which he stipulated, or, in other words, that the security was not postponed to any debts other than those mentioned in the agreement. I do not think that the statute in this respect gives him any protection from negligence. I cannot hold it to be an error of judgment if he gave his consent without getting the consideration for which he bargained. It is simply a failure in duty. Nor does the case fall within the other category mentioned in the statute, by which a curator incurs no responsibility on account of his consent in respect of any inadequacy of consideration or want of consideration. These words, in my opinion, refer to the consideration which is fixed for the consent. They do not protect the curator if he fails by negligence to obtain that consideration.

As I understood at the debate, the only charge not mentioned in the agreement which took precedence of the bond in question was an annuity in favour of Miss Heron for £150. In my opinion there should be inquiry into this matter.

LORD TRAYNER.—I concur in the result at which the majority of your Lordships have arrived.

THE COURT adhered.

J. K. & W. P. LINDSAY, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

CHRISTOPHER FURNESS & COMPANY, Petitioners.—*Lorimer—Dickson.*

LIQUIDATORS OF "CYNTHIANA" STEAMSHIP COMPANY, LIMITED,

Respondents.—*C. J. Guthrie—Younger.*

CHRISTOPHER FURNESS & COMPANY, Petitioners.—*Lorimer—Dickson.*

LIQUIDATORS OF "FELICIANA" STEAMSHIP COMPANY, Respondents.—

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Company—Shares—Fully paid up—Payment in cash—Companies Act, 1867 (30 and 31 Vict. c. 131), sec. 25.—The Companies Act, 1867, section 25, provides that every share in any company shall be deemed to have been issued and to be held subject to the payment of the whole amount in cash, "unless

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the same shall have been otherwise determined" by a contract filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

F. & Co. agreed to lend £1000 to the C. Company, Limited, and in security the company agreed to deposit with the lenders "scrip" of the company for £1000, and to give an assignment of freight and a mortgage over a ship belonging to the company. The agreement was not registered under section 25 of the Companies Act, 1867. Twenty £50 shares of the company were subsequently allotted to F. & Co., and the company sent to them certificates for twenty shares, "fully paid up," along with a receipt bearing,—"Received from F. & Co. £1000, being four calls of £12, 10s. for 20 shares."

In the voluntary liquidation of the C. company, *held* that as no agreement had been registered under section 25, and as the company had received no payment in cash on account of the shares, and as F. & Co. were aware of that fact, they fell to be regarded as allottees of unpaid-up shares.

Transfer of shares to an insolvent person.—The articles of association of a limited company provided that the company might decline, in respect of any shares not fully paid up, to register any transfer made to a bankrupt. *Held* that the company was not entitled to refuse to register a transfer made to a person who was insolvent but not bankrupt, although the transfer was made for the purpose of freeing the transferor from liability.

1st DIVISION.

ON 26th January 1893 Christopher Furness & Company presented a petition in which they prayed the Court to order their names to be removed from the A list of contributories of the "Cynthiana" Steamship Company, Limited, in respect of twenty shares of the company. The liquidators of the company lodged answers.

On the same day Messrs Furness & Company presented a petition for an order to have their names removed from the A list of contributories of the "Felician" Steamship Company, in respect of 120 shares of the company. The liquidators, who were also the liquidators of the "Cynthiana" Company, lodged answers in this petition also.

The two companies, which were under the same management, had gone into voluntary liquidation on 23d June 1892, and the liquidators had made up the A list of contributories on which the name of Messrs Furness & Company appeared, on 10th June 1893.

The circumstances of the petitioners' connection with the shares of the two companies, as appeared from a proof which was led before Lord Kinnear, were as follows:—

The two companies in question were registered and incorporated under the Companies Acts, 1862-1890, in November 1892. The shares were of the value of £50 each.

By article 55 of the companies' articles of association, Messrs M'Lean & Sutherland, Glasgow, were appointed managers, with the powers of directors,* there being no regular directors of the companies. By agree-

* Article 55 provided,—"So long as the said managers hold office they shall possess the whole powers and rights conferred by these articles or by law on directors."

Article 12 provided,—"The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof."

Article 14 provided,—"The company may decline, in respect of all shares not fully paid up, to register any transfer of shares made by a member who is indebted to them or made to a minor, lunatic, married woman, or bankrupt, and every transferor who is aware or suspects that his transferee is a minor, lunatic, married woman, or bankrupt, shall be bound to intimate his knowledge or suspicion to the directors. No member shall cease to be such until a transfer or other legal title to his shares in favour of some other person has been registered."

ment dated 13th April 1891, Messrs Christopher Furness & Company, No. 47. London, who acted for the Maritime Mortgage Trust, Limited, agreed to lend to the "Cynthiana" Company £1000, and "as security" against the loan the company agreed to deposit with the Trust Company "scrip of their company" to the extent of £1000, and to give an assignment to freight and a second mortgage over the "Cynthiana" steamship.

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On 6th May 1891 Messrs M'Lean & Sutherland sent by letter to the Mortgage Company this receipt:—

"Form of Receipt Account of Call.

"Glasgow, 71 Queen Street,
6th May 1891.

"No. 74.

"Received of Messrs Christopher Furness & Coy. the sum of One thousand Pounds — Shillings, being four Calls of Twelve Pounds Ten Shillings Sterling, for Twenty shares of the 'Cynthiana' Steamship Company, Limited."

And the following certificate bearing the same date:—

"Shares fully paid up.

"This is to certify that Messrs Christopher Furness & Company, 5 and 6 Billiter Avenue, London, E.C., is registered proprietor of twenty shares of fifty pounds each, fully paid up, numbered from 193 to 212 inclusive, in The 'Cynthiana' Steamship Company, Limited, subject to the Memorandum and Articles of Association of the Company."

Messrs Furness & Company had previously lent on behalf of the Trust Company £6000 to the "Feliciana" Company, of which company Messrs M'Lean & Sutherland were also managers. In the agreement relative to that loan the deposit of "scrip" of the company was not mentioned, otherwise the terms of the loan were similar to those in the "Cynthiana" agreement. On 13th March 1891 a receipt for calls and a certificate of 120 shares in the "Feliciana" Company in similar terms to those granted in the "Cynthiana" Company were granted to Furness & Company.

In October 1891 Messrs Furness & Company, who had by that time got mortgages over the vessels, began to doubt whether some liability might not attach to their holding the shares in the two companies. They accordingly in that month transferred the shares in both companies to Mr Sutherland, of Messrs M'Lean & Sutherland, who was then insolvent but not bankrupt. In each case the consideration stated in the transfer was a payment of five shillings.

On 8th November 1891 the companies granted certificates in favour of Mr Sutherland as registered proprietor of both sets of shares. In these certificates the shares were certified as being fully paid up.

Owing to an omission on the part of the companies' officials the transfers of the shares were not entered in the annual return of transfers made to the registrar. The secretary of the Trust Company having noticed the omission, and leave having been obtained from the Registrar of Joint Stock Companies, the return was corrected on 18th March 1892. In the return as amended the numbers of the shares transferred from Furness & Company to Sutherland were not identical with the numbers of the shares allotted to Furness & Company and transferred to Sutherland, though Sutherland admittedly had acquired no other shares of the companies, and the name of Messrs Furness & Company was not struck off the register, though a pencil note that their shares had been transferred was put opposite their name on the register. Messrs Furness & Company then wrote requesting that their names should be struck out of the registers, but that was not done before the companies went into liquidation in June 1892.

The grounds on which the petitioners maintained that their names

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should be removed from the list of contributories of both companies were thus stated in the petitions:—“(1) The petitioners stipulated for fully paid-up shares, and the company represented and certified that the shares taken by them were fully paid up, and the liquidators are now barred from maintaining the contrary. (2) The shares are fully paid in cash. (3) In no case do the petitioners fall to be placed on the A list, as present members, having transferred their shares about eight months before the winding up began.”

The respondents opposed the petition on the following grounds:—“(1) The petitioners are registered owners of the said shares, upon which nothing has been paid. There was no contract in terms of section 25 of the Companies Act, 1867, that the shares were not to be held subject to the payment of the whole amount thereof in cash.* (2) The transfer alleged is a collusive transfer for the purpose of avoiding liability. (3) Under the articles of association the company were entitled to decline, in respect of all shares not fully paid, to register a transfer until the whole calls due thereon were paid, and in the present case the petitioners were and are not entitled to have the said transfer registered. (4) The transfer is not duly stamped. (5) In any case, the petitioners fall to be placed upon the B list, as having held the shares in question up to 15th March 1892, and there being debts due to creditors prior to that date to an amount greatly exceeding the total calls payable upon the said shares, which the total calls payable by the contributories in the A list are unable to meet.

Argued for the petitioners in both cases;—(1) The transaction between them and the company was of such a nature that it amounted to a payment in cash for the shares. They would not have been liable for calls if such had been made before they got rid of their shares.¹ (2) They had contracted to take only fully paid-up shares, and they were entitled to rely on the statement of the company on the certificates that the shares were “fully paid up.” Holding such certificates, they could not be placed on the list of contributories.² The *onus* of shewing that the petitioners knew that the shares were not, in point of fact, “fully paid up,” lay on the respondents, who had certified that they were, and they had not discharged it.³ (3) The petitioners had transferred their shares before the liquidation, and their names ought at once to have been taken off the register. Though that had not been done, they were entitled to demand that it should be done now, as there had been undue delay by the directors in doing it at first.⁴

Argued for the respondents;—(1) The petitioners were not entitled to have their names removed from the list of contributories. The only money which had passed in any way connected with the shares was the loans by the Mortgage Company, and the petitioners had always acted as

* Section 25 of the Companies Act, 1867, provides that “every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.”

¹ *Spargo's case*, 1873, L. R., 8 Chan. 407.

² *Burkinshaw v. Nicolls*, 1878, L. R., 3 App. Cas. 1004; *Arnot's case*, 1887, L. R., 36 Chanc. Div. 702; *In re Macdonald*, 1893, 9 Times Reports, 643.

³ *In re Hall*, 1887, L. R., 37 Chanc. Div. 712.

⁴ *Nation's case*, 1866, L. R., 3 Eq. 77; *Stenhouse v. City of Glasgow Bank*, Oct. 31, 1879, 7 R. 102; *Buckley*, pp. 130 and 131, and cases there cited.

creditors for those loans. Such a transaction did not amount to a payment in cash for the shares. The requirements of section 25 of the Companies Act, 1867, had not been complied with, there being admittedly here no written contract as to the holding of the shares.¹ (2) The case was not within the rule of *Burkinshaw*.² The petitioners were not in the position of a purchaser of shares in the open market, who could not know whether the shares he bought were in point of fact fully paid up. That was the position of the purchaser in *Burkinshaw's* case. Here the receipt granted to petitioners shewed that the full price had not been paid for the shares, and in point of fact they had known that all along. Further, the petitioners were not transferees of these shares, but allottees.³ (3) The transfer to Sutherland was not *bona fide*. At its date the petitioners were indebted to the company for unpaid calls, and the transferee Sutherland was insolvent. In those circumstances, the directors ought at once under article 14 of the articles of association to have refused to register the transfer. That being so, and as the petitioners' names were actually on the register, the Court ought not to help them to escape liability.⁴

At advising,—

LORD PRESIDENT.—This case presents an appearance of some complexity, and the full debate which we heard involved it in many conflicting and alternative legal views. When regard is had to the salient and clearly established facts, the difficulty largely disappears.

In the first place, the petitioners were allottees of the shares now in question,—that is to say, they received them on their first issue direct from the companies. *Prima facie* therefore they are not in the position of third parties who acquire shares by transference from the original allottee.

Upon what contracts then did they acquire the shares? Now, upon this and upon all branches of the case some apparent confusion is created by the interposition of Messrs M'Lean & Sutherland. The position of these gentlemen, however, is easily fixed. They were, under the articles of association, managers of the two companies—there were no directors, and these managers had all the powers of directors. This is made perfectly clear by article 55 of the articles of association of either company. In the matters in question, then, these gentlemen were the executive of the companies, and their acts were the acts of the companies. Acting then in this character, Messrs M'Lean & Sutherland negotiated loans from the Mortgage Company, of which the petitioners were the managers. The securities on which those advances were made were mortgages over the steamers, policies of insurance, assignment of freights, and certain amounts of what is described in the documents constituting the agreement as "scrip" of the company.

The whole case of the petitioners is that it was represented to them that the shares thus stipulated as security were fully paid up, and that, they having

¹ Ooregum Gold Mining Co. of India, L. R. [1892], A. C. 125; Johannesburg Hotel Co., L. R. [1891], 1 Ch. 119; Eddystone Marine Insurance Co., L. R. [1893], 3 Ch. 9.

² *Supra*, note 2, p. 242.

³ London Celluloid Co., 1888, L. R., 39 Chanc. Div. 190.

⁴ Addison's case, 1870, L. R., 5 Chanc. App. 294; Shipman's case, 1868, L. R., 5 Eq. 219; Anderson's case, 1869, L. R., 8 Eq. 509; Addlestone Linoleum Co., 1887, L. R., 37 Chanc. Div. 191.

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advanced their money on this representation, the shares must be held to be fully paid up, the companies and the liquidators being barred from denying it.

There is a conflict of evidence as to whether in conversation between M'Lean & Sutherland on the one hand and Mr Stoker (who represented the petitioners) on the other, it was made matter of stipulation that the shares to be given as security should be "fully paid-up shares." In the correspondence, the neutral term "scrip" is employed. The fact that at an earlier stage of the ships' history the former managers of the Mortgage Company expressly stipulated for fully paid-up shares is not decisive, as this was at a time when the ships not being built, no mortgage could be granted. When the shares were delivered, however, they were accompanied by certificates that they were fully paid-up shares, and these certificates are the representation on which the petitioners substantially rely.

Now, I take it to be perfectly clear that the companies received no consideration whatever for the issue of these shares, except the loans from the petitioners, for which they were delivered as security. Further, it has not been suggested that the petitioners were told that any other consideration had been granted to the companies by anybody else. It seems to me therefore that when the petitioners had these shares allotted to them, the only representation made to them consisted in the shares being called fully paid-up shares,—their history being perfectly well known to all concerned.

The sense in which this name was given to those shares was brought home to the petitioners, had that been necessary, a month after their issue, when they got a receipt for the calls on the shares of one of the steamers, by which the £1000 advanced for that vessel was said to have been received from the petitioners "being four calls of £12, 10s. for twenty shares of the 'Cynthiana' Steamship Company, Limited." In the case of the "Feliciana" a similar receipt was asked for and obtained some time afterwards, avowedly for the purpose of supporting the assertion of the certificate that the shares were fully paid up.

All this while, and down to the present time, the petitioners have adhered to the position of creditors for the moneys advanced, have drawn interest on their loans, and, in the case of one of the two vessels, have sold her under their mortgage.

It appears to me therefore that these shares, when issued, were not *de facto* fully paid up in cash, that this was known to the petitioners, and that the agreement upon which they were issued was one which, if legal at all, required to be registered under section 25 of the Act of 1867. No such agreement has been registered. Now, in those circumstances the petitioners went upon the registers of the companies. They do not say that this was done without their knowledge, or that it was not according to the contract with the companies that they should become members, and they acted as members, when, subsequently, they executed transfers of the shares.

Upon this state of the facts the petitioners seem to me to have no case in law apart from the transfers to which I am presently to refer. The central facts are that, on their own shewing, they directly contract with the companies for the issue of those shares as "fully paid up," they well knowing that cash had not been paid, and that they accept the position of members of the company. It is surely in vain for them to appeal to such cases as *Burkinshaw*, in which third parties acquiring shares in ordinary course have been held entitled to found on the representations of the company.

The petitioners, however, have an alternative contention that they have transferred their shares to Mr Sutherland, and that the registers ought to be rectified so as to give effect to those transfers. The facts relating to this branch of the case are the same in the case of the "Feliciana" as in that of the "Cynthiana." That such transfers were executed there is no doubt. It is also proved that in March 1892 the petitioners applied to have the registers altered accordingly. This request was not refused, but, on the other hand, the registers were not effectively altered, the thing apparently having been blundered. Mr Sutherland was put on the register as holder of different sets of shares from those which were the subjects of the transfers, although he had acquired none others, while the petitioners' names were not struck off the registers, but in each case a pencil note was put opposite their names to the effect that their shares were transferred. At present I think it clear that in law the petitioners are still on the register, especially having regard to sec. 25 of the Companies Act, 1862, and sec. 12 of the articles of association of these companies. The question remains, whether the petitioners are not entitled now to have the registers rectified. Although the petitions relate to the lists of contributories, it seems competent incidentally to rectify the registers, and the respondents did not take any technical objection to our considering the question as if we had before us petitions to rectify the registers. After full consideration, I have come to the conclusion that the petitioners are entitled to have their names removed from the registers.

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I do not think that the 14th article of association applies to this case, so as to confer on the managers any right to refuse to register these transfers. The transferors were not indebted to the company, nor was the transferee bankrupt. That he was insolvent I think is now established, but I do not consider that he was bankrupt in the sense of the article. Well, then, if the constitution of these particular companies did not give to the managers a special right to refuse to register these transfers, are they open to challenge on the general law of companies? It is plain, and indeed admitted, that the reason why the petitioners transferred the shares was that, doubt having been thrown on their position as holders of paid-up shares, they wanted to be free of liability. I think it is pretty clear, on the other hand, that Mr Sutherland became transferee partly because he was insolvent. But, on the authorities, neither of these facts, nor the two combined, seem to render the transfer illegal. Nor was the position of the company such as to make it the duty of its executive to refuse to alter the register. The company had not resolved to stop or to go into liquidation; in fact it seems to have been, as it always had been, in low water, but not more. Accordingly, I think that in March 1892, when they asked it, the petitioners were entitled to have the transfers registered and their names taken off the register. As this has not been done, through no fault of theirs, I think they are now entitled to have it done.

If this should be the view of your Lordships the prayer of each petition will be granted, and we may also order the registers to be rectified. It was admitted that, in this event, the petitioners' names must be put on the B list of contributories, should such a list be required.

LORD ADAM, LORD M'LAREN, and LORD KINNAR concurred.

THE COURT pronounced the following interlocutor:—"Ordain the register of the 'Cynthiana' Steamship Company, Limited, to be

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rectified, by deleting therefrom the name of the petitioners Christopher Furness & Company as holders of twenty shares in said steamship company, numbered 193 to 212 inclusive; also ordain the name of the petitioners, the said Christopher Furness & Company, to be removed from the A list of contributories of said steamship company, in respect of said twenty shares numbered 193 to 212 inclusive, and decern: Find the petitioners liable to the respondents in expenses, modified to one half of the taxed amount thereof, and remit," &c.

A similar interlocutor was pronounced in the other petition.

JOHN C. BRODIE & SONS, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 48. JENNY ALLAN DONALD AND OTHERS, Pursuers (Respondents).—*Dickson—Constable.*

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MATTHEW HODGART AND OTHERS (Hodgart's Trustees), Defenders (Reclaimers).—*Jameson—Burnet.*

Trust—Trustees—Liability of trustees—Goodwill of business carried on by truster.—An engineer who had been many years in India, on his return to this country, continued to supply native and other traders in India with cotton presses, which he bought from makers in this country. At the time of his death his average income from this source was about £300 per annum.

In an action of accounting brought some years after his death by the beneficiaries under his settlement against his trustees, the pursuers contended that the trustees were bound to account for the value of the goodwill of the testator's business which they had not sold. The trustees pleaded that as the deceased's transactions were conducted by him personally without business premises or clerks, there was no business to which a goodwill could attach.

After a proof, *held (aff. judgment of Lord Kyllachy)* that the goodwill was an asset of the deceased's estate which should have been sold by the trustees, and that they fell to be debited with £300 as the value thereof.

1ST DIVISION.
Ld. Kyllachy.

JOHN HODGART, who had been an engineer in India, returned to this country in 1868, and died on 11th February 1879, leaving a trust-disposition and settlement, by which he conveyed his whole estate to Matthew Hodgart, his brother, Charles Jones, his son-in-law, and others, as trustees, for the purpose, *inter alia*, of payment of the liferent to his widow, and after her death, of one-fourth of the fee to the children of his deceased daughter Mrs James Donald.

The liferentrix died in April 1889. In 1891 Mrs Donald's children, along with their father, raised an action of accounting against the trustees, in which they, *inter alia*, concluded for declarator that they were entitled to credit for their share of the goodwill, books, and plant of the business carried on by their grandfather, the truster, with the legal interest thereof from the date of his death.

They stated that the trustees had in November 1890 produced an account of their intromissions. (Cond. 6) "The said account contains no entry whatever in respect of the plant or the goodwill of the business carried on by him. The pursuers believe and aver that a valuable asset of the estate has thus been omitted. The truster, upon retiring in 1868 from active service as an engineer in India, carried on a large business through engineers at Paisley and elsewhere in connection with cotton presses and other machinery, several valuable improvements in which he had patented. He had an extensive business connection in India, and received from his correspondents there orders for all classes and kinds of machinery, which

he placed chiefly with the firm of Fullerton, Hodgart, & Barclay, engineers, Paisley. Altogether the business of the deceased was worth not less than £500 or £600 a-year. There was also, as the pursuers believe and aver, in the deceased's premises at the time of his death a considerable quantity of plant, consisting of models, drawings, patterns, &c., used in connection with his inventions and improvements, and also business books and stock in trade not accounted for in the statement given up by the trustees." No. 48.
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The defenders answered,—“The only business carried on by the deceased was a commission-agency for the sale of cotton presses in India, where the deceased had a number of business acquaintances from whom he procured orders. The commission he obtained on sales varied from 5 to 10 per cent, and in some years he realised as little as £20 per annum from this business. What business he had depended entirely on his personal influence and exertions, and there was thus no goodwill which admitted of being sold. The only patent taken out in the deceased's name had expired before his death.”

The pursuers further averred that it was the duty of the trustees to have sold the business as a going concern, that, instead of doing so, they allowed the business to be acquired partly by the firm of Fullerton, Hodgart, & Barclay, and partly by the defender Charles Jones, and that the firm in question had taken over most of the plant and goodwill.

These averments were denied by the defenders.

The pursuers pleaded;—(3) The defenders, having failed to realise certain assets of the trust-estate as condescended on, are bound to account therefor, or for the profits therefrom, to the pursuers.

After accounts had been lodged by the trustees, objections were stated thereto by the pursuers, who, *inter alia*, repeated the averments above mentioned.

On 15th January 1892 the Lord Ordinary (Kyllachy) allowed a proof before answer of these averments.

It appeared from the evidence that the truster had been in India for many years prior to 1868. He had held official positions first in the dockyard and afterwards in the mint at Bombay, but had been allowed to conduct private business on his own account as well. He was well known in India as a skilful engineer, and in particular had acquired a reputation in connection with machinery for pressing cotton into bales. In 1863 he took out a patent for an improved cotton press, for which he obtained many orders, both while he remained in India and after he returned to this country. Even after the expiry of the patent (about 1876) he continued to do a considerable business. He at no time manufactured the presses himself, his practice being to place the orders which he received with manufacturing engineers at home, and then to sell the finished presses at a profit. He had no business premises or plant, and employed no clerks or workmen. He kept business-books, including letter-books, and made drawings and plans of machines, some of which he preserved. Down to 1871 he employed the firm of Craig & Fullerton to make the presses for him, and after that date Fullerton, Hodgart, & Barclay, of which firm three of the trustees were partners. The patent presses were marked “Hodgart's Patent,” and were also stamped with the name “Craig, Fullerton, & Company,” or “Fullerton, Hodgart, & Barclay,” as makers. The average annual profits made by the truster were variously estimated at from £400 to £800 down to about three years from his death, the annual average during the latter period being about £300. It appeared that when Indian customers were once well served by a trader

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they seldom went past him * when they had other orders to give, and that this added greatly to the value of the connection formed by Mr Hodgart with native merchants.

After Mr Hodgart's death the question was not considered by his trustees whether there was a realisable goodwill. One of their number, however, Mr Jones, had assumed the title of "successor to Mr John Hodgart" on his business paper, and although he deponed that he had received no orders from Mr Hodgart's old customers he admitted that he had so described himself in the hope that he would receive such orders.

The pursuers' father, Mr James Donald, deponed that he would give £100 for the books and drawings left by Mr John Hodgart.

On 11th June 1892 the Lord Ordinary (Kyllachy) before further answer appointed the trustees "forthwith to expose to public sale the goodwill of the business carried on by the truster, along with the whole business-books of the deceased, including letter-books and the whole plans or drawings belonging to him." †

* Mr John Turnbull, an engineer in Glasgow, of thirty years' experience, deponed,—“It is well known that dealing with natives of India is different from dealing with any other class of merchants in the world ; if a native buys a machine and it turns out bad, he will never more, no matter what improvements are made on the machine, deal with that person ; but if it turns out good he will never go to any other person. That is an almost universal custom.”

Mr David Gray deponed,—“An Indian connection is very valuable, because it is difficult for any person to supplant you, if the machine you supply is a good one, and has been once adopted. When you get a name for a certain class of machinery in India the name carries with it a very large connection—a valuable connection. I am acquainted so far with the nature of the business carried on by the late Mr John Hodgart. I consider a business of that description has a goodwill, because of the tendency of people in India to stick to a particular machine and a particular connection.”

† “OPINION.—This is an action of accounting brought against the trustees of the late Mr John Hodgart by certain beneficiaries under the trust, and the main question involved is whether the trustees are bound to account for a certain alleged asset of the estate, viz, the goodwill of a certain business carried on by the deceased up to the time of his death. The pursuers say that this goodwill of the business, if put up to sale along with the books of the deceased and some plans and drawings which he left, would have realised a considerable sum ; and they complain that, in place of doing so, the trustees—who were for the most part relatives of the deceased, and had had business relations with him—appropriated, or in effect appropriated, the goodwill to themselves.

“The case has this peculiarity, that the deceased died so far back as 1879, and that the division of the estate has been postponed until now, by reason of the survival of his widow, who had a liferent of his estate. This makes it impossible to test by a sale as at the present time the value, if any, of the alleged goodwill as existing at the time of the death. I have been obliged to allow a proof, and that proof has, I think, sufficiently disclosed the nature of the truster's business, and the manner in which the trustees dealt with such goodwill as attached to it.

“I think the result of the proof is shortly this. The truster, who had long held an official position in Bombay, had obtained a name in connection with certain machinery for pressing cotton into bales. In point of fact, he was the inventor of an improved form of cotton press, and he held a patent for the invention ; and both before and after his return from India, which took place, I think, in 1868, he kept the supply of the patented machinery in his own hands ; that is to say, he got the presses manufactured in this country, chiefly, if not altogether, by the firm of which three of his trustees were partners, and he sold the presses so manufactured to firms in India at a large profit. After the patent expired he continued this line of business, selling, however, latterly more of an

The defenders reclaimed, but on 4th November 1892 the First Division adhered. No. 48.

On 30th November 1892 the goodwill, books, plans, and drawings were thereafter exposed for sale by public roup, no upset price being named. The pursuers' father, Mr James Donald, offered £100, and Dec. 8, 1893. Donald v. Hodgart's Trustees.

On 4th February 1893 the Lord Ordinary (Kyllachy) found, *inter alia*, "(1) That the defenders are bound, in accounting with the pursuers, to debit themselves with the sum of £300 as the value of the goodwill of the truster's business," and on 17th March 1893 he decreed against them for the balance of the trust-estate in their hands.*

unpatented press, called a finishing press, which seems to have been used in connection with the patent press. He had no place of business, and no plant or stock in trade, but he kept business-books, including letter-books. He appears to have for a number of years before his death made a profit which on an average amounted, according to one estimate, to between £700 and £800, and according to another to between £400 and £500 per annum.

"After his death, the business, or such of it as remained, was carried on for a time by one of the trustees—his son-in-law, Mr Jones—who had lived in family with him, and continued to live with his widow after his death. Mr Jones, I have no doubt in good faith, assumed the title of Mr Hodgart's successor, and so designed himself on his letter-paper. After a year or two he discontinued the business, but the firm of which the other trustees were partners, and which firm had all along manufactured the Hodgart presses, continued, and I think still continue, to supply those presses to the Indian market, the presses being still described as 'Hodgart's patent, manufactured by Fullerton, Hodgart, & Barclay.'

"These are, I think, the facts, and I think support the conclusion maintained by the witnesses for the pursuers, that Mr Hodgart's business as at the time of his death had attached to it a certain element of goodwill, and that that goodwill had a certain marketable value, greater or less. In other words, I think the proof must be held to establish that if the goodwill had been sold at the time of the truster's death, a price, greater or smaller, would probably have been obtained for the privilege of carrying on the deceased's business under his name, or as his successor; and for the benefit arising from the possession of his books, and consequent right of access to his customers. Moreover, if I am to accept the evidence of Mr Donald, the pursuers' father, he is prepared, even at this moment, to give not less than £100 for such goodwill as still survives, and more particularly for the business books and business documents of the deceased, which he says he can turn to valuable account in connection with his own business as an engineer.

"Now that being so, the question comes to be, am I to decide, on such materials as the proof affords, what is the sum for which the trustees are to account as the assumed value of the goodwill which they failed to realise? or, am I in the first place to direct that the goodwill, so far as it still subsists, shall, along with the books and documents of the deceased, be *ante omnia* sold? I have come to the conclusion—especially in view of Mr Donald's evidence, which I must assume to have been given in good faith, that the latter course is the course which I ought to follow. There is here, what I hold upon the proof to be, an asset of the estate which is admittedly unrealised. The trustees' first duty is to realise the assets, and they will not do so until this goodwill, including the books and papers of the deceased, have been duly sold. It will then be for consideration what additional sum, if any, is to be charged against the trustees in respect of the delay which they have allowed to take place in the realisation of this asset. I reserve that question for after consideration, and in the meantime I say nothing about expenses, and if desired I shall give leave to reclaim."

* "OPINION.—In this case I have already decided, or at least expressed the

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The defenders reclaimed, and argued;—The trustees, who were the best judges, at the date of Mr Hodgart's death, had in perfect good faith formed and acted on the opinion that there was no realisable goodwill, and it was only ten years afterwards that their view was challenged. The action was tantamount to an action for damages, and before the trustees could be found liable there should be the clearest evidence of neglect of duty. There was no such evidence. The fact that the pursuers' father had offered £100 for the goodwill was no real test of value in the circumstances, and it was to be noted that there was no competition at the sale. *Quoad ultra* the pursuers' evidence was wholly speculative. The business itself was entirely personal to Mr Hodgart. He had no business premises or plant, he employed no workmen or clerks, and accordingly when he died there was nothing in existence to which goodwill could attach.¹ It was a commission business dependent entirely on the truster's personal skill.² His intimate personal relation to Indian customers was not transmissible, and could not therefore be included *in bonis defuncti*.³ In no

opinion, that Mr Hodgart's business had, at the time of his death, a certain goodwill, and that that goodwill had a certain tangible value, greater or less. It now appears from the report of the sale, which I lately ordered, that such part of the goodwill as still survives has fetched at a public sale the sum of £100. That sum accordingly falls to be now put to the trustees' debit. The question which I have still to decide is what further sum, if any, falls to be similarly debited so as to satisfy the pursuers' demand for an account of the value of the goodwill as it stood at the truster's death.

"I have come to the conclusion—taking Mr Donald's purchase at the recent sale simply as an element in the proof, and making due allowance for the perhaps somewhat special circumstance which attended that purchase—that I shall do justice between the parties by fixing the value of the goodwill as existing at the date of the truster's death at the sum of £300. That is to say, the beneficiaries under the trust must have credit for £200 in addition to the £100 paid by Mr Donald, and that with interest at four per cent from the life-renter's death.

"I do not propose to go into the details of the proof. The view which I take is, after all, only a jury view, and it is this: I think it is pretty clear that during the three years before the truster's death—that is to say, after the expiry of his patents—his business to some extent fell off. The state No. 54 of process appears to make that clear, and that being so, I do not think that I shall go far wrong if I hold that the profits during those last three years were somewhere about £300 per annum. I shall, at all events, take them at £300, and I think I deal leniently with the trustees in holding that if the goodwill had been duly exposed to sale, either to public sale or to a sale as amongst the persons interested in the business, it would have fetched at least one year's profits. The pursuers' witnesses say, of course, that it would have fetched much more, but I think their evidence is rather exaggerated, and in particular they rather overlook the circumstance that Messrs Fullerton, Hodgart, & Barclay were, to say the least, in a very favourable position to compete with any purchaser. They had not only been in use to manufacture for Mr Hodgart his machines, patented and unpatented, but were probably entitled to continue to use after Mr Hodgart's death the nameplate No. 63 of process, which they had been accustomed to attach to his machines, the use of that nameplate giving them very considerable advantages.

"I shall therefore find that the defenders are bound, in accounting with the pursuers, to debit themselves with the sum of £300, with interest from the date of the widow's death at four per cent. . . ."

¹ Bell's Trustee v. Bell, Nov. 8, 1884, 12 R. 85, Lord Kinneir (Ordinary), 89.

² Cooper v. Metropolitan Board of Works, 1883, L. R., 25 Ch. D. 472, L. J. Cotton at p. 479.

³ Bain v. Munro, Jan. 10, 1878, 5 R. 416.

case had anything so intangible and shadowy been recognised as capable of realisation.¹ The deceased had not even an exclusive right to the use of the name "Hodgart."² Besides, after the expiry of the patent right, it was the make of the machines and not the name of the patentee which recommended them to purchasers, and the right to the title "successor to Mr John Hodgart" would have been of no avail apart from or in competition with the makers of the machines.

Argued for the pursuers ;—The sale had realised £100. It was proved, therefore, that the trustees had failed to realise an asset of the estate, whatever that asset might be called. It was, in fact, the goodwill of the truster's business, and must be credited as such to his estate.³ The interest in the business was not so personal as to be intransmissible.⁴ *Bain v. Munro*⁵ was very special, and besides, there was no analogy between the goodwill of a profession and the goodwill of a trade.⁶ Even after the expiry of the patent the truster only had right to use the name "Hodgart's Patent," and a purchaser of the goodwill after his death would have been entitled to restrain a stranger from using it.⁷ But that there was value in the goodwill was put beyond all doubt by the action of Mr Jones, who had advertised himself as "successor to" Mr Hodgart. That was just an attempt to trade on Mr Hodgart's reputation, and to make profit out of it, although it may have been made in perfect good faith. And the circumstance that gave peculiar value to the truster's business connection was the conservative tendency of the Indian traders. The delay on the pursuers' part in taking action did not alter the nature of the trustees' duties, and besides was quite justifiable, for no steps were taken by the trustees to wind up the estate until after the death of the liferentrix.

LORD PRESIDENT.—There is one feature in this case which does not strike me as being of great importance: that is the fact that Mr James F. Donald offered and paid £100 for the goodwill of the business in question. In answer to a challenge by the defenders, when he was in the witness-box, he said that he would be willing to give £100, and he proceeded to carry out that undertaking. I regard that as a natural and legitimate enough step for a litigant to take. At the same time, that does not affect my mind as being an important element of evidence in the case.

When we come to look at the other facts, I am disposed to take a broad view. John Hodgart had for a number of years prior to his death succeeded in making a considerable income out of the business he carried on, the business consisting in the supply of cotton presses and other kinds of machinery to the order of customers in India. The figures to which our attention has been drawn speak to a substantial yield from this business, whatever the business is to be called. The next fact which appears to me to be of great importance is the Indian

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¹ *Austen v. Boys*, 1858, 2 De Gex and Jones, 626, Lord Chancellor, p. 635; *Farr v. Pearce*, 1818, 3 Maddock, 74; *Labouchere v. Dawson*, 1872, L. R., 13 Eq. 322; *Arundell v. Bell*, 1882, 52 L. J. Ch. 537.

² *Singer, &c. v. Loog*, 1882, 52 L. J. Ch. 481.

³ *Bradbury v. Dickens*, 1859, 27 Beavan, 53; *Mellersh v. Keen*, 1860, 28 Beavan, 453; *Smith v. Everett*, 1859, 27 Beavan, 446.

⁴ *Sebastian on Trade Marks*, 3d ed. 327, 335.

⁵ *Supra*, p. 250, note 3.

⁶ *Sebastian*, 344.

⁷ *Levy v. Walker*, 1878, L. R., 10 Chanc. Div. 436; *Lindley on Partnership*, 6th ed. 444.

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aspect of the business. Mr Hodgart had been long in India; he had a very wide acquaintance with persons there requiring presses of the kind in question; he had a very great experience in dealing with such persons, and the evidence of gentlemen who are acquainted with the facts and with the country is to the effect that this business was of great importance and value. In this connection, it is not unimportant to note that, according to the evidence, the tendency of the natives of India is to stick to the merchant who has served them well, and to whom they have been in the habit of resorting, to a greater extent than prevails in this country. That being so, it is not of much importance to enter upon an analysis of the grounds on which this connection rested, or to say to what extent they were logical or sound. The fact is that such a connection did exist. When we come to the time of Mr Hodgart's death, we might conceive it possible that the question should be debated by his trustees whether there was a real and substantial goodwill, because of the peculiar nature of the business. But my first observation is that they did not in fact consider the question at all, and indeed were not able to consider it impartially owing to the position of some of their number, and especially of Mr Jones. But even if that question, whether there was a goodwill, was considered or not, we have real evidence that there was a goodwill, for while there were no premises, no plant, no establishment, no staff to which there could be a succession, Mr Jones asserted that he had in fact succeeded to the business and addressed his customers when he commenced business in India, two years after Mr Hodgart's death, as "successor to Mr John Hodgart." This fact seems to me pretty decisive of the question, and really amounts to a declaration on the part of this one of the trustees that Mr Hodgart's business did not necessarily die with him, which is the present contention of the defenders.

Being therefore disposed to hold that there was a saleable goodwill, for which the trustees must account, I do not find it possible to question the pecuniary value put upon it by the Lord Ordinary, and indeed no ground for meddling with that has been suggested by the trustees.

The only other point I wish to advert to is the delay that has taken place in bringing the action. It is to be noticed that the pursuers are two young girls, and it is idle to say that they should have checked or controlled the administration of the trustees,—while any earlier action taken by their father, while it might have been evidence of his opinion on the question whether there was a goodwill,—there being in his view a goodwill,—would not have been a bar to their afterwards taking proceedings. It is clear, however, that Mr Donald and the trustees were at arm's length, and even were this action to be regarded as Mr Donald's action, the challenge came within a reasonable time of the winding-up of Mr Hodgart's estate.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNAR was absent.

THE COURT adhered.

N. BRIGGS CONSTABLE, W.S.—F. J. MARTIN, W.S.—Agents.

PETER GARDNER AND OTHERS (Robert Paterson's Trustees) Real Raisers and Claimants (Reclaimers).—*Lees—Tait.*

WILLIAM CHRISTIE BRAND AND ANOTHER, Claimants (Respondents).—*Salvesen—M'Clure.*

No. 49.

Dec. 9, 1893.
Paterson's
Trustees v.
Brand.

Succession—Testament—Construction—"Survivor."—By a trust-disposition and settlement, dated in 1881, a testator directed his trustees to pay to W. and R., the sons of his half-sister, equally between them, the sum of £2500, "declaring that should both or either of them be at present deceased, or should hereafter predecease me, leaving lawful issue, such issue shall take the share that would have fallen to their parent if in life, equally *per stirpes*, and in default of such issue, the same shall fall and accresce to the survivor of the said W. and R., and the issue of the survivor, whom all failing, the same shall fall into and form part of the residue of my estate."

The testator died in 1889. Both W. and R. predeceased him, W. having died in 1867, leaving two sons who survived the testator, and R. having died in 1872 without issue.

In a competition between the trustees, who claimed R.'s half of the bequest of £2500 as having fallen into residue, and the sons of W., who claimed that half as having accresced to their own share, *held* upon a construction of the terms of the bequest (*diss.* Lord Rutherford Clark) that the word "survivor" was to be read as equivalent to "other," and therefore that the claim of W.'s sons fell to be sustained.

ROBERT PATERSON, merchant in Glasgow, died on 9th March 1889, ^{2d Division.} leaving a trust-disposition and settlement, dated 2d May 1881, by which ^{LdStormonth-} he conveyed his whole estate to trustees, and, *inter alia*, directed them ^{Darling.} "in the seventh place to pay or apply to or for behoof of William Brand and Robert Brand, children of the late Mrs Janet M'Kay or Brand, who was also a daughter of my mother by her first marriage, equally between them, the sum of £2500, declaring that should both or either of them be at present deceased, or should hereafter predecease me, leaving lawful issue, such issue shall take the share that would have fallen to their parent if in life, equally *per stirpes*, and in default of such issue, the same shall fall and accresce to the survivor of the said William Brand and Robert Brand, and the issue of the survivor, whom all failing, the same shall fall into and form part of the residue of my estate." The residue was left to a number of charitable institutions.

William Brand mentioned in this bequest predeceased the testator, having died in January 1867. He was survived by two sons, William Christie Brand and Robert Brand, who received payment of £1250, being one-half of the legacy, as in right of their father.

With respect to Robert Brand, the other nephew of the testator mentioned in the seventh purpose, it was found, in a petition under the Presumption of Life Limitation (Scotland) Act, 1891, that he must be presumed to have died on 31st December 1872, being exactly seven years after the date on which he was last known to have been alive.

In March 1893 Mr Paterson's trustees raised an action of multipoleinding for determination of the question as to the right to the sum of £1250, being the share of the legacy under the seventh purpose left to Robert Brand senior.

The trustees claimed the fund *in medio*, on the ground that Robert Brand senior, being presumed to have died on 31st December 1872, must be held to have survived his brother William, and having left no issue, or at least no issue having appeared to claim his share, and there being no evidence of the existence of any issue, his share of the legacy fell into residue.

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William Christie Brand and Robert Brand junior, the children of William Brand, claimed the fund *in medio*, on the ground that "on a sound construction of the seventh purpose of the trust-disposition and settlement in question, it was the testator's intention that the legacy of £2500 should, in the event of the predecease of William Brand and Robert Brand, fall and accresce to their issue or the issue of either of them failing issue of the other. As both William and Robert Brand predeceased the testator, the latter without leaving any issue, the claimants, as the only children of William Brand, are entitled to the balance of said legacy remaining unpaid."

On 5th August 1893 the Lord Ordinary (Stormonth-Darling) repelled the claim for Paterson's trustees, and sustained that for William Christie Brand and Robert Brand junior, and ranked and preferred them accordingly.*

* "OPINION.— . . . As nothing was heard of Robert for a number of years, a petition was presented to the Court under the Presumption of Life Act of 1891, the result of which was that decree was pronounced finding that he must be presumed to have died on 31st December 1872, exactly seven years after the date on which he was last known to be alive. Though this date is purely statutory and arbitrary, I take it that, for all questions of succession, it must be treated as if it were the true date of death. The result, therefore, is that both the institutes must be held to have been dead before the date, not merely of the testator's death, but of his will, which was executed in 1881. (His Lordship then quoted the seventh purpose.)

"I shall first examine the clause apart from authority. It starts with a declaration that in the event of the predecease of either or both of the institutes, leaving issue, 'such issue' are to take what the parent would have taken 'equally *per stirpes*.' I pause there to ask, What did he mean by 'such issue'? Clearly, he meant the issue of either or both. If both were dead leaving children, each family were to take their parent's share. If one was dead leaving children, and the other survived, then the family of the predeceaser were to take their parent's share, and the survivor was to take his own. Then the testator goes on to deal with the case of there being no 'such issue,' but a surviving brother. In that case the surviving brother was to take the whole fund of £2500, which up to that time had been dealt with as two separate legacies of £1250 each. But what about the case of there being no surviving brother? The testator had already provided for that case, if both brothers were dead leaving issue. But for the case of both being dead and only one having left issue (which is the actual case) there was no provision, except the words 'and the issue of the survivor.'

"Now, are these words to be construed literally, as the trustees for the residuary legatees contend, or does the context of the will compel a wider construction? This part of the clause is introduced and controlled by the words 'in default of such issue.' That plainly means in default of issue to take their parent's share. Then it goes on to say 'the same' (i.e. the share which the brother or his issue would have taken) is to fall and accresce to the survivor, and the issue of the survivor. The testator thereby clearly shews his desire, at all events in one event, that the whole sum of £2500 is to remain in the Brand family. If one of the two *stirpes* fails and another survives, either in the person of one of the two brothers or his issue, the whole is to go to that surviving *stirps*. What possible difference could it make to the testator whether the surviving *stirps* was the family of the brother who died first or second? I can understand the state of mind of a testator who says,—'I shall secure to the issue of each of a number of liferenters their parent's share, but as to accruing shares, I prefer that these should go to the families of surviving liferenters.' That was the state of things in *Forrest's Trustees v. Rae*, 12 R. 389, and in the recent case (only as yet reported in the Scots Law Times, i. p. 138), of

The trustees reclaimed, and argued ;—The words of a will were to be read in their natural and ordinary meaning unless there was a clear implica-

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Morrison's Trustees v. Macgeorge, 13th July 1893. But it is incredible to me that a testator should desire to say, 'I wish to give a legacy to two brothers and their issue, and in the event of both brothers dying and only one leaving a family, I wish that family to get the whole, provided their father died after his brother, but not if he died before his brother.'

"At the same time I am aware that (apart from some settled rule of law like the *conditio si sine liberis*) it is not permissible to supply words, or take away words, or distort words, in a will, merely because the construction otherwise would be capricious or even absurd. There must be something in the context of the will itself to warrant, and indeed to compel, such a liberty being taken with the ordinary meaning of language.

"In England this question has been very much canvassed, and the tendency latterly has been, I believe, towards a strict construction of the word 'survivors.' But the English Courts do still recognise at least one case in which the word must be construed as equivalent to 'others.' It is thus put by Lord Justice James in *Badger v. Gregory*, L. R., 8 Eq. 78 (at p. 84),—'When, for instance, Blackacre is given to A for life, with remainder to his children, and Whiteacre to B for life, with remainder to his children, and in case either should die without children, then his acre to go to the survivor and his children, the presumption is almost conclusive that the word "survivor" is put in contradistinction to "the one so dying," and means the one that does not die childless. If, in addition to this, the will goes on and says and if both shall die without children, then the whole shall go to C, the conclusion that "survivor" means "other" becomes irresistible.' This was the kind of case which I think Lord Shand had in view in *Forrest's Trustees v. Rae*, when he said, 'If a case should arise in which there is a gift over, it will be for consideration whether the effect of the terms in which the gift over is made ought to be to control the destination of accrescing shares to survivors, but in the meantime that question is entirely open.'

"Now, I am of opinion that such a case has arisen here. The gift over, on the strength of which alone the residuary legatees can take, begins with the words 'whom all failing.' Who are the 'all'? Clearly, I think, the issue of both the brothers, because the issue of both have been referred to in the preceding part of the clause. I therefore think I am warranted in adopting the canon of construction which governed the long chain of English authorities, of which *Badger v. Gregory*, *Waite v. Littlewood*, L. R., 8 Ch. App. 70, *Wake v. Varah*, L. R., 2 Ch. Div. 348, and *Lucena v. Lucena*, L. R., 7 Ch. Div. 255, are striking examples. I desire particularly to refer to the very guarded way in which Lord Justice Baggallay puts his judgment in *Wake v. Varah*, limiting the operation of the latitudinarian construction strictly to cases where the context requires it, and sufficiently saving the salutary rule that in all other cases the strict construction shall prevail.

"It is this peculiarity in the present case which enables me to decide it in favour of the claimants William Christie Brand and his brother without infringing to any extent on the authority of the two Scots cases I have mentioned, or of the case of *Hairsten's Judicial Factor v. Duncan*, 18 R. 1158, which was held to be ruled by the case of *Forrest's Trustees v. Rae*. The contest there was between the issue of predeceasing liferenters and residuary legatees, but the clause of residue contained no words declaring or importing that the fund was to fall into residue only on the failure of all the issue.

"Nor am I obliged to resort to English cases merely, as authority for the proposition that, if the context requires it, the word 'survivors' may be read in a non-literal sense. The case of *Ramsay's Trustees v. Ramsay*, 4 R. 243, decided that it may be so read in order to avoid intestacy, and it seems to me that that is a less cogent reason for doing so than where, as here, the terms of the gift over are positively inconsistent with the literal construction of the word."

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tion that the testator intended to use them in another sense.¹ The only case in Scotland in which the word "survivor" had been read as equivalent to "other" was the case of *Ramsay*.² That construction was there reached on the ground that to give "survivor" its strict meaning would have resulted in intestacy. That *ratio* did not apply here, for if "survivor" were read strictly Robert Brand's share would fall into residue. The English authorities founded on by the Lord Ordinary did not apply. The principle of these authorities was this: where the gift over was in terms conditional on the failure of all the children of the primary legatees, "survivor" would be read as equivalent to "other," so that if there were any children of the primary legatees they would take, rather than that the gift should fall into intestacy, which would be the necessary consequence of the strict reading, the gift over being conditional on the failure of all the children. Here, however, the words were "whom all failing." That did not mean "failing children" of both brothers, but simply "failing the prior destination taking effect," and that left the construction of the prior destination where it was.³

The argument for the respondents sufficiently appears from the opinions of the Lord Ordinary and of the Lord Justice-Clerk.

At advising,—

LORD JUSTICE-CLERK.—The point of difficulty in this case arises on the words "and the issue of the survivor." If these words are to be read according to their strict meaning, then the case for the children of William must fail, for Robert survived William, therefore they are not the issue of the survivor. If the words are so read, then the intention of the testator as expressed was that if one of his stepsons should leave issue, but die after his childless brother, his children should take the whole sum of £2500, but that if the childless brother died last then they should only take half of it. Such a provision in a bequest in which the testator is dealing with the case of both his stepsons having predeceased him, seems upon the face of it so irrational in itself as to make it quite inconceivable that it was intended. To suppose that he meant to give the whole to the same issue of one stepson if he survived his childless brother, but to deprive them of half if he predeceased his childless brother, is impossible. In the words of Vice-Chancellor James in the case of *Badger*,—"It is scarcely possible to attribute to an ancestor the intention that the position of his descendants in the second degree is to depend on the accident of whether their parent dies first or second." It seems to me therefore that this case falls within the cases quoted by the Lord Ordinary, in which it has been held possible and right to read such words as we have here according to what it is certain was the intention of the testator, viz., that those should succeed who did survive him, whether stepsons, or issue of either stepson surviving. And when we have as here a gift over only in the event of "all failing," the conclusion becomes irresistible that what the testator meant was that as long as there were children of either to take, the whole should go to such issue. I think we have here, to use the words of Lord Hatherley in the case of *Corbett*, a case in which "a clear and necessary inference can be drawn from the terms of the will."

¹ *Fergusson v. Dunbar*, 1781, 3 B. C. C. 468, note; *Lee v. Stone*, 1848, 1 Exchq. 674; *Crowder v. Stone*, 1827, 3 Russ. 217.

² *Ramsay's Trustees v. Ramsay*, Dec. 21, 1876, 4 R. 243.

³ *Hurry v. Morgan*, 1866, L. R., 3 Eq. 152; *Wake v. Varah*, 1875, L. R., 2 Chanc. Div. 348.

I do not think it right that any general rule should be laid down. The only rule which is fixed is that the words of a will must be read according to their strict and natural meaning unless in the particular case it be opposed, as above expressed, to a clear and necessary inference.

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Holding it to be so here, I proceed entirely in this case upon the specialties of the case.

I concur with the Lord Ordinary in the very clear views expressed in his opinion, and move your Lordships to adhere to his interlocutor.

LORD RUTHERFURD CLARK.—I am very glad that your Lordship has been able to arrive at the opinion which you have expressed. I daresay it is in accordance with what we may conjecture would have been the intention of the testator in the circumstances which have occurred. I can only say that I cannot concur. In my opinion the judgment is contrary to what I believe to be a settled rule of construction.

LORD TRAYNER.—I concur with the Lord Ordinary and agree with his opinion. I am further of opinion that the judgment which we are now to pronounce neither introduces a new rule of construction of such settlements nor interferes with the construction of any existing rule.

LORD YOUNG was absent.

THE COURT adhered.

F. J. MARTIN, W.S.—SIMPSON & MARWICK, W.S.—Agents.

MARGARET JACK CRUICKSHANK, Pursuer (Reclaimer).—*Sym.*
MRS CATHERINE MUIR OR THOMAS AND OTHERS, Defenders (Respondents).
—*Clyde.*

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Trust—Inter vivos trust—Whether trust one for behoof of creditors—Jus quæsitum tertio—Personal liability of trustee.—By trust-disposition A, a married woman, conveyed to B, as trustee, all her interest under the will of her deceased father, for the purposes (1) of realising the same and converting it into cash; (2) of paying all debts due by her at the date of the deed; and (3) of thereafter paying over the balance to her.

B accepted the trust, and thereafter inserted the following advertisement in a newspaper,—“A having granted a trust-disposition in favour of the subscriber, all parties who have claims against her are therefore requested to lodge the same with him, along with the vouchers thereof, within fourteen days from this date.” Signed B.

C lodged a claim with B, which A had docketed as correct. Subsequently A informed B that the docket was a mistake and instructed B not to pay C. B (having paid all A's other creditors) paid over the balance of the estate to A, without having satisfied C's claim.

In an action by C against A and B, in which it was established that C's claim was due by A, *held* that B having represented that the trust in his person was a trust for creditors, and C having intimated her claim to him, he was not entitled to pay over the balance of the trust-funds to A without satisfying C's claim, and consequently that he was personally liable to C.

By trust-disposition granted by Mrs Catherine Muir or Thomas, residing 1st Division, in Kirkcaldy, and her husband, William Robert Thomas, dated 19th, and registered in the Sheriff Court books of Fifeshire 29th January 1892, on the narrative that Mrs Thomas was entitled to one-fourth share of the estates left by her deceased father, to whom her mother had been decerned

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executrix, and further, "considering that it is necessary for our interests that we should grant the following conveyance," the spouses conveyed to "Thomas Jackson, solicitor, Kirkcaldy, and his assignees, All and Whole the fourth part or share of the property, heritable and moveable, real and personal, conveyed by the said disposition and settlement by the said William Muir, my father," with the whole titles thereof, and "with full power, warrant, and authority to him to make up titles to the said heritable or moveable property in the name of me, the said Catherine Muir or Thomas . . . Declaring that these presents are granted in trust for the ends, uses, and purposes, and under the conditions following, viz. :—(First) That the said Thomas Jackson, as trustee foresaid, shall with all convenient speed realise the estate hereby conveyed and convert the same into cash . . . (Second) that Thomas Jackson, said trustee, shall pay all debts due by us at the date of these presents, and the expenses of this trust-deed, and the expenses of the trust hereby created, including a reasonable gratification for his trouble; and in particular, that he shall pay" certain specified debts, "it being hereby provided that the said Thomas Jackson shall be entitled to conduct the said trust as law-agent on the footing that he shall be paid the usual charges as such for his trouble, or that he shall be entitled to employ any law-agent he may appoint: (Third) the said trustee, after satisfying the whole foregoing trusts and purposes, shall pay or convey to me, the said Catherine Muir or Thomas, the balance or residue of the said trust-estate, . . . and we consent to the registration hereof for preservation and execution."

Mr Jackson accepted the trust, and proceeded to realise the estate.

On 20th February 1892 he inserted the following advertisement in the *Fife-shire Advertiser* newspaper :—

"Mrs Catherine Muir or Thomas, wife of William Robert Thomas, residing in Kirkcaldy, having, with the consent of her said husband, granted a trust-disposition in favour of the subscriber, all parties who have claims against Mrs Thomas are therefore requested to lodge the same with him, along with the vouchers thereof, within fourteen days from this date. THOMAS JACKSON, Solicitor, Kirkcaldy.

"Kirkcaldy, 15th February 1892."

A few days after the advertisement appeared Miss Margaret Jack Cruickshank lodged an account with Mr Jackson against Mrs Thomas for £39, 6s. 10d., which Miss Cruickshank held as assignee of her father. This was not one of the debts specified in the trust-deed.

Mr and Mrs Thomas at first instructed Mr Jackson not to pay this account, but on 13th December they handed it to Miss Cruickshank with the following docquet written thereon, holograph of Mrs Thomas :—

"I, Kate Muir or Thomas, authorise you, Thomas Jackson, Esq., to pay sum as claimed. This correct from me. KATE MUIR OR THOMAS. WILLIAM R. THOMAS.

"13th December 1892."

On 19th December they again instructed Mr Jackson not to pay the account, in the following letter written by Mr Thomas,—“After considering about Miss Cruickshank’s account, we find that we made an error by signing it, as it is not just, so please do not pay it.”

The estate realised by Jackson was sufficient to pay all the debts of Mr and Mrs Thomas, including Miss Cruickshank’s account, but in consequence of the letter last quoted he declined to pay her, and after satisfying the other purposes of the trust he paid over the balance of the trust funds to Mr and Mrs Thomas.

In May 1893 Miss Cruickshank raised an action in the Sheriff Court at Kirkcaldy against Mr and Mrs Thomas, and also against Jackson, for

decree against the defenders, ordaining them, jointly and severally, to pay to the pursuer the sum of £39, 6s. 10d. No. 50.

The pursuer founded on the trust-disposition, the advertisement, her claim, and the docquet thereon, and pleaded, *inter alia*;—(2) The defenders Thomas having granted the trust-disposition condescended on for payment of their debts in favour of the defender Thomas Jackson, and he having realised sufficient funds to pay said debts, the pursuer is entitled to decree against him. (3) The defenders Thomas having by holograph docquet annexed to said account certified the correctness of the same, and authorised the defender Jackson to pay same, are not entitled to challenge the accuracy of or to repudiate said account. (6) The defender Jackson, in the circumstances condescended on, not being entitled to wind up the trust or part with any balance of funds in his hands without making provision for payment of said debt, and in the event of there not now being funds in his hands available for payment thereof, he is liable as an individual therefor.

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The defenders lodged common defences, in which they stated, *inter alia*, that the docquet was "got from the Thomases when in drink."

The defenders pleaded, *inter alia*;—(6) The pursuer or her author being no parties to the trust-deed, never having acceded to it, their names not appearing in it as creditors, and having produced to the trustee no authenticated claim upon either of the trustees, the trustee was entitled to pay over any balance of the trust-funds in his hands to his constituents, especially as he was directed by the trustees not to pay the claim on the ground that it was not due. (9) The docquet to the pass-book is not holograph of the defenders Thomas, and having been impetrated from them when under the influence of drink, is not binding on the defenders.

On 5th July 1893 the Sheriff-substitute (Gillespie) pronounced this interlocutor (after findings in fact in conformity with the foregoing narrative):—"Finds that the defenders Thomas having granted the said docquet, no relevant and sufficient grounds have been stated which would entitle them to challenge the accuracy of or repudiate the said account; that the defender Thomas Jackson was not entitled to part with the balance of funds in his hands without making provision for payment of said account: Finds . . . that each of the defenders have made themselves liable for the said account: Repels the defences: Decerns against the defenders in terms of the prayer of the petition, . . . reserving the claim of relief of the defender Thomas Jackson against the other defenders."*

On appeal the Sheriff (Mackay) pronounced this interlocutor:—"Recalls the finding in the interlocutor of the Sheriff-substitute of 5th July 1893 that the defender Thomas Jackson was not entitled to part with the balance of funds in his hands without making provision for payment of said account, and also in so far as it finds the said Thomas Jackson liable for such payment; and in lieu thereof, finds that no

* "NOTE.— . . . Coming now to the question of Mr Jackson's liability, there is perhaps no very direct authority as to the liability of a trustee under an *inter vivos* trust; but the general proposition was hardly disputed that a trustee who parted with the trust funds without providing for a claim of which he had notice incurred personal liability if the claim proved a good one. It is not necessary that vouchers should have been submitted to the trustee. It was his duty to call for them if he thought them necessary. But it may be added that in the case of an open account like this, vouchers would not be required even in a sequestration. The trustee was not of course bound to run any risk, and being interpellated by the trustees from paying this claim, his proper course was to raise an action of multipointing and exoneration—Bell's Com. ii. 504.

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relevant grounds are stated for holding the said Thomas Jackson personally liable for the said account, and assailing the said Thomas Jackson from the conclusions of the action. . . . *Quoad ultra* adheres to the said interlocutor of the Sheriff-substitute.*

The pursuer appealed, and argued;—The judgment of the Sheriff assailing the defender Jackson ought to be recalled. This was a trust for creditors, which could not be recalled while there were creditors unpaid. That being so, Jackson, as the trustee, was not entitled to pay over the trust funds to the trusters before he had satisfied all their creditors, and having so paid over while the pursuer's debt was unpaid, he was personally liable to her.¹ Even if the trust were not strictly a trust for behoof of creditors, Jackson, after he had advertised for claims, and had received notice of the pursuer's debt, was not entitled to pay the balance of the trust-estate to the trusters without satisfying the pursuer's claim.

The argument for the defenders sufficiently appears from the Sheriff's note.

At advising,—

LORD JUSTICE-CLERK.—The pursuer in this case sues Mr and Mrs Thomas as being originally the debtors for the debt due to her, and also Thomas Jackson,

* "NOTE.— . . . Mr Jackson became under the trust-deed trustee or mandatary for the defenders Thomas in a trust for payment of their debts. But the pursuer's author was not a party to and is indeed not named in that deed. There was therefore no direct contract under the trust-deed between the pursuer's author and either Mr Jackson or the other defenders, Catherine and William Robert Thomas. It was in the power of the parties to this voluntary trust-deed to terminate the trust at any time, and it has in fact been terminated by Mr Jackson's discharge. Neither do any of the provisions of the trust fall within the doctrine *jus quesitum tertio*, by which a right accrues to a party who is not a party to the contract. In that quite exceptional class of case it is necessary that it should be clearly shewn that a right was intended to be created in favour of a third party who is not himself a party to the contract or in any way bound by it. There is nothing of the kind here. The intention of the trust-deed was not to guarantee payment to the creditors, but that as between the Thomases and Mr Jackson so long as he had funds of theirs in his hands a convenient method should be provided for paying their debts. When Mr Jackson was discharged, and the balance of the funds paid over by him to the trusters, that obligation of course ceased. But it is said Mr Jackson advertised for claims, and the pursuer's claim was intimated. This is true, but such an advertisement cannot be construed as an obligation by Mr Jackson either to pay the creditors out of his own funds, or not to pay over the balance of the trusters' funds in his hands before liquidating all their debts. . . . When the balance of the funds was paid over to the trusters, the pursuer's author continued to have the liability of his proper debtors just as before; and if he has failed to enforce it until they have dissipated their funds he is himself to blame. . . . The distinction between a *mortis causa* trust, in which the trustee or executor represents the truster, and is liable to make his whole funds forthcoming in the proper order of preference as between creditors and beneficiaries, and an *inter vivos* trust, in which the trustee is only the agent of the truster, and subject to his directions, is very clearly brought out by the recent cases *Lucas' Trustees v. Beresford*, 19 R. 943; and *The Heritable Securities Company v. Miller*, 20 R. 675, 30 S. L. R. 354. . . . The trustee in a sequestration or under a trust to which creditors have acceded, and so bound themselves to accept a composition if the funds fall short, is of course in a different position, and must not part with the funds till the debts have been paid. . . ."

¹ Bell's Comm. (7th ed.) ii. 383; *Globe Insurance Co. v. Scott*, Feb. 16, 1849, 11 D. 618, aff. Aug. 5, 1850, 7 Bell's App. 296, 22 Scot. Jur. 625; *Nicolson v. Johnston & Wright*, Dec. 1872, 11 Macph. 179, 45 Scot. Jur. 100.

as trustee under the trust-disposition of Mr and Mrs Thomas. The trust-deed made over to Mr Jackson, in trust for the purposes therein mentioned, all and whole the fourth part and share of the property, heritable and moveable, real and personal, conveyed by the disposition and settlement of William Muir, the father of Mrs Thomas, and the second purpose of the trust was that Mr Jackson should pay all debts due by Mr and Mrs Thomas at the date of these presents. No. 50.

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I think the grounds on which this case must be dealt with are found in what followed after the trust-deed was granted. Mr Jackson having received that disposition, and holding the sums contained therein as a trustee for payment of the debts of the granters, advertised in the *Fife-shire Advertiser* for claims on the general statement that Mrs Thomas having, with consent of her husband, granted a trust-disposition in favour of the subscriber—"All parties who have claims against Mrs Thomas are therefore requested to lodge the same with him, along with the vouchers thereof, within fourteen days from this date." Mr Jackson therefore took up the position of one to whom a debtor had made a trust-disposition of his estate, and who was to settle claims of creditors of the trustor therefrom. Thereafter Miss Cruickshank lodged her account with Jackson. Mr and Mrs Thomas at first disputed this account, but ultimately signed a docquet certifying it as correct. No doubt they now say that when they signed the docquet they were intoxicated, but I agree with the Sheriff-substitute that the averment on this point on record is insufficient, and that we must hold the docquet to have been duly signed by Mr and Mrs Thomas. What happened thereafter? Mr Thomas, on behalf of himself and his wife, writes to Mr Jackson,—"After considering about Mr Cruickshank's account, we find we made an error by signing it, as it is not just, so please do not pay it." Therefore Mr Jackson's position was this, that he advertised for claims, that he got a claim certified by the debtors as correct, and that he was thereafter interpellated from paying it by the statement that it was not correct. What he did was to hand the balance of the trust funds to Mrs Thomas and her husband, and he thus left the creditor to recover her money in the best way she could. In these circumstances, I think the Sheriff-substitute was right in holding that as a trustee for creditors Mr Jackson was not entitled to hand back the money to Mrs Thomas without satisfying himself that all claims of creditors had been satisfied. If he had doubts about the claim his proper course, as stated by the Sheriff-substitute, was to raise an action of multiplepounding.

I am of opinion we should recall the interlocutor of the Sheriff, and pronounce judgment in terms of the interlocutor of the Sheriff-substitute.

LORD RUTHERFURD CLARK.—I am of opinion that the deed created a trust for creditors, and that the trustee acted as if it did so. I therefore concur in the judgment of the Sheriff-substitute.

LORD TRAYNER.—I concur in the result which your Lordships have reached.

I do not regard the trust-deed with which we are here concerned as a trust-deed for creditors in the ordinary sense. It was, I think, primarily a trust for behoof of the granters, although it contains a clause authorising the trustee to pay "all debts due" by the trusters at the date of the deed. But then the defender Jackson, by the advertisement which he published calling on all parties having claims against the trusters to lodge the same with him within a limited period, may reasonably enough be held to have thereby represented that the

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trust in his person was for behoof of those whose claims he desired to be sent to him, and further, that he had funds for the purpose of meeting those claims. The claim now sued for was duly lodged with Jackson, and after that was done I doubt his right to part with the estate in his hands until that claim had been settled, or at all events to part with the estate without due notice to the claimants that he intended to do so. The pursuer lodged with Jackson an account of his claim, docqueted by the trustees as correct, and authorising him to pay it. The defenders Thomas now say that the docquet was obtained from them when they were "in drink." I think such a defence cannot be listened to here. The docquet must stand until it is regularly set aside, and standing that docqueted account, I think Jackson cannot excuse himself for parting with the trust funds before paying the debt which was not only admitted but payment of which out of the trust funds was authorised. I prefer to affirm Jackson's liability for the sum sued for rather on the ground of his own actings in the circumstances which I have stated than upon the view that the trust-deed was in itself one for behoof of creditors in the ordinary sense.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff appealed against: Find in fact in terms of the findings in fact of the interlocutor of the Sheriff-substitute of 5th July 1893: Decern against the defenders in terms of the prayer of the petition."

W. J. LEWIS, S.S.C.—JAMES SKINNER, S.S.C.—Agents.

No. 51.

SCOTTISH INVESTMENT TRUST COMPANY, LIMITED, Appellants.—*Ure—Peddie.*

Dec. 12, 1893.
Scottish
Investment
Trust Co.,
Limited, v.
Inland
Revenue.

SURVEYOR OF TAXES, Respondent.—*D.-F. Sir Charles Pearson—A. J. Young.*

Revenue—Income-tax—Investment Trust Company—Profits or gains—Property and Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), Schedule D—First case.—The memorandum of association of a company stated that its objects were to raise money by share capital and invest the same in stocks and shares, to vary "the investments of the company, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company."

Held that gains made by the company by realising investments at larger prices than those paid for them were to be reckoned as "profits and gains" of the company, in the sense of the Property and Income-Tax Act, 1842, Schedule D.

Northern Assurance Company v. Inland Revenue (reported as branch of *Scottish Union and National Assurance Company v. Inland Revenue*), Feb. 8, 1889, 16 R. 473, *followed*.

1ST DIVISION.
Exchequer
Cause.

THE SCOTTISH INVESTMENT TRUST COMPANY, LIMITED, appealed to the Commissioners of Income-Tax for the county of Midlothian against the following assessment under Schedule D of the Income-Tax Act, 1842,* for the year ending 1st November 1892:—

* The Property and Income-Tax Act, 1842, Schedule D, First Case, Rule First, enacts,—“The duty to be charged in respect thereof” (i.e., “in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act”), “shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, &c. upon a fair and just average of three years, ending on such day of

Balance on revenue account, after allowing for taxed income and dis-allowing debenture interest and income-tax,	£3964	3	0	No. 51.
Net profits on sales of securities during the year stated on page 1 of annual report,	2138	17	3	Dec. 12, 1893.

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Total (after deduction of loss on sales of stock), £6103 0 3

Upon which the duty at 6d. was £152, 11s. 6d.

The ground of appeal was that the sums second above mentioned (£2138, 17s. 3d.) being "increases on realisation of stocks of this company are capital sums, and therefore not liable to assessment for income-tax."

The Commissioners refused the appeal.

The company obtained a case for the opinion of the Court of Exchequer.

The case stated, *inter alia*, that the company was established in 1887 "for the objects set forth in the original prospectus, and in the memorandum of association."* The articles of association did not form part of the case.

"II. The capital of the company is invested in various securities, and its revenue is derived from dividends and interest. It was registered 27th July 1887, and has issued five annual reports and statements of accounts to its proprietors. From these it appears that balances of profits on sales of securities have been made annually from the commencement, but they are entered in the 'revenue' account in the report and statement for year to 1st November 1891 only.

"III. The present assessment is based upon the fifth annual report and statement for year to 1st November 1892."

Then followed the schedule of assessment as given above. The case then proceeded,— "It appears from the report by the trustees, appended hereto, that these profits on sales of securities were applied to write down the 'book value' of the company's investments, as also was a further sum of £40,000, making a total of £42,138, 17s. 3d., the whole of which the trustees consider permanent loss."

The case stated that the Surveyor of Taxes "did not," before the com-

the year immediately preceding the day of assessment in which the accounts of the said trade, &c. shall have been usually made up," &c.

* The prospectus of the company contained, *inter alia*, the following statements,— "The object of the Scottish Investment Trust Company is to apply the principle of co-operation to the investment of money, so that investors may by uniting their means spread their investments over a wide field, thus obtaining a higher rate of interest with greater security and exemption from liability than if the amount subscribed by each shareholder were independently invested."

The memorandum of association provided, *inter alia* :—" 3. The objects for which the company is established are :—(a) To raise money by share capital, on such terms and conditions as may be thought desirable, and invest the amount thereof in, or otherwise acquire and hold, any of the investments following,—that is to say, the shares, stock, &c. of any company. (b) To borrow or raise money by the issue or sale of any bonds, mortgages, debentures, or debenture stock of the company, whether perpetual or otherwise, and to invest any money so raised in any such investments as aforesaid. (c) To acquire any such investments as aforesaid by original subscription, tender, or otherwise, and whether or not fully paid-up, and to make payments thereon as called up, or in advance of calls, or otherwise, and to subscribe for the same, either conditionally or otherwise, and to vary the investments of the company, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company."

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missioners "dispute that loss on sales would have been a deduction from profit, but pointed out that the sum now in question was 'net profit.'"

From a schedule of the stocks sold during the year of assessment, appended to the case, it appeared that the cost of these stocks amounted to 3·6 per cent of the original cost of investments, and that in the cases of five out of seventeen of the stocks, both the purchase and sale (resulting in a profit) had taken place within the year in question.

The Commissioners stated that they, being of opinion "(1) that the net profits on sales of securities during the year, fell to be reckoned among the profits and gains of the company, irrespective of the manner of book-keeping; and (2) that writing such profits against reduction of 'book value' of securities held by the company did not afford a ground of relief, refused the appeal."

The questions for the opinion of the Court were:—"1. Whether the net gain made by the company during the year, by realising investments at larger prices than were paid for them, falls to be reckoned among the profits and gains of the company for assessment under the Income-Tax Acts? 2. Whether the fact that such profits and gains have been written against depreciation in book value of investments held by the company, as part of its capital, is a ground for relief from such assessment?"

Argued for the company;—The profits on the sales of stocks had been properly charged to capital account, and had never entered the income account; they were therefore not liable to income-tax. The schedule of particulars of stocks sold appended to the case shewed that the original cost of the company's investments was £804,165, 13s. 1d. That was book value, but the real value was much less, and they were entitled to set off the appreciation in the value of certain of the stocks, as shewn by the proceeds of the sales, against the much larger depreciation of others, some of which were not only much depreciated, but were unsaleable and of no value at all. The gain on the sales was not profit of the company in the sense of being earnings on its capital, but was an appreciation of capital, and the general depreciation being, in the opinion of the directors, permanent, it was only their duty to keep the capital at as nearly as possible its true value, as opposed to its book value, by setting off appreciation on the capital against depreciation. If it had been the business of the company to trade in stocks, and if they had looked to such trading for payment of their dividend, then the assessment would have been right, but such trading was no part of their business. The power given to the company in article 3 (c) of the memorandum, "to vary the investments of the company," did not contemplate trading in shares, but was ancillary and necessary to the power of acquiring and holding shares or stock of other companies. It was just such a power as trustees had in ordinary trusts to enable them to carry on the trust to the best advantage. That it was no part of the business of the company to trade in stocks and shares distinguished the case from those quoted by the Surveyor, and particularly from the case of the *Northern Assurance Company*.¹ In all those cases the question had come to be—what was the nature of the fund, and how had it been applied? In the *Northern Assurance* case the directors had barred themselves from saying that profit on realisation of assets was not true profit, because they had treated it so themselves by bringing it into their "profit and loss account," out of which they paid dividends. The decision of that case, therefore, only decided the question on those circumstances. Here the company had

¹ A branch of the case reported under the name of *The Scottish Union and National Insurance Co. v. Inland Revenue*, Feb. 8, 1889, 16 R. 461, at p. 473.

never treated the sum gained as profits in the true sense of the word, but had always kept it in the capital account. Again, the case of the *Edinburgh Southern Cemetery Company*¹ was distinguishable from the present, because there the profits out of which payments were made to capital account were the profits on the ordinary business of the company to which the company looked for payment of dividend, and by the constitution of the company they were devoted to income purposes. So also the ground of judgment in the *Coltness Iron Company* case,² was that the sum invested in sinking new pits was in reality a deduction from annual profits of capital employed in the company's business.

Argued for the respondent;—The case was precisely ruled by the *Northern Assurance Company's*³ case. The rule laid down by the Court there (16 R. at p. 475) was not qualified in any way, and indeed the present case was less favourable to the company objecting to the tax than the other, because it was admittedly no part of the business of the *Northern Assurance Company* to traffic in shares, while one of the objects of the appellants' company was, as stated in article 3 (c) of their memorandum "to vary the investments of the company, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company." These words clearly pointed to a traffic in shares as one of the objects of the company, and the schedule of "Particulars of Stocks" appended to the case shewed that the company had themselves taken that view of their business, as in five of the sales there recorded the purchases had evidently been made with a view to a rise, as the shares bought were only held for a few months, or even days. The question the Court had to decide was, what was the nature of the money proposed to be taxed? Was it profits or gains? If it was, then the Court had nothing to do with its destination. That was the view taken by the Court in the cases of the *Northern Assurance Company*,³ the *Coltness Iron Company*,² and the *Edinburgh Southern Cemetery Company*,¹ and there were other cases to the like effect.⁴ Here, where it was evident that the company had carried on business in buying and selling shares, the profits of that business must be looked on as ordinary income, and, just as in the *Edinburgh Southern Cemetery* case, the Court would not take into account that the profits or income won by that business had been applied to capital purposes.

At advising,—

LORD PRESIDENT.—The Commissioners have amended the case in terms of our remit, and we have now before us the memorandum of association of the appellant company. I observe that the articles of association are not made part of the case, but the memorandum affords information as to the business and objects of the company, which is of the highest importance for the decision of the questions submitted to us.

As its name indicates, this is an investment company, and the memorandum makes it plain that its profits are to be derived from various operations relating to the investments. The third head of the memorandum professes to state the objects of the company, and in head (c) of this enumeration occur the words, "to vary the investments of the company, and generally to sell, exchange, or

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¹ *Edinburgh Southern Cemetery Co. v. Surveyor of Taxes*, Nov. 29, 1889, 17 R. 154.

² *Coltness Iron Co. v. Solicitor of Inland Revenue*, Jan. 7, 1881, 8 R. 351.

³ *Supra*, note, p. 264.

⁴ *Mersey Docks v. Lucas*, June 1883, L. R., 8 App. Cas. 891; *Forder v. Handyside*, 1876, L. R., 1 Exch. Div. 233.

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otherwise dispose of, deal with, or turn to account any of the assets of the company."

It is true that the doing of any of these things might be incidentally necessary in the conduct of the business of any company. It is also true that this memorandum states in the latter heads of the same article several things which are less properly described as objects of a company than as incidental acts of administration. But from the structure of the memorandum it appears that the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business. In my view, such speculations are among the appointed means of this company's gains. Accordingly, I should consider it legitimate for the directors to divide profits so made, although, in determining the amount divisible they would necessarily have regard not alone to the individual transaction yielding profit, but to the general results of their changes of investments. It would be right that they should maintain as strictly as possible the relative rights of separation between capital and income, and make all apportionments necessary in that behalf.

My view of this company is, therefore, that its position in the present question is entirely distinguished from that of a private individual or an ordinary trader. Accordingly I think that it is wrong in its contention that increases on realisations of stocks of the company are capital sums and therefore not liable to assessment for income-tax. As regards the sums in question, they are stated in the report of the company to be net profits on sales of securities during the year. There is nothing before us to shew that a wider view of the operations of the company would prove this statement to be misleading, and if the appellants point to their third contention in the case,—“In the year in which the tax is charged, the capital account of the company has had greater losses than profits, and the permanent loss on the capital account during the year has been considerable,”—I must observe that there is no statement of fact in the case to instruct it. This remark applies with the more force now that, after the various points had been mooted in debate, the case has been reconsidered and amended by the Commissioners.

In determining this question I own to being influenced by the decision of this Division in the *Northern Assurance Company v. Inland Revenue*, which is cited in the case. The words quoted from it in the present case are evidently well considered; they form part of the judgment of the Court; they are laid down as forming a rule for subsequent practice, and they in terms apply to the case before us. I should be slow to depart from so authoritative an expression of opinion, and the argument has failed to satisfy me that it is erroneous.

I am for answering the first query in the affirmative, and the second in the negative.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent when the case was advised, concurred in the judgment.

THE COURT affirmed the determination of the Commissioners.

J. & A. PEDDIE & IVORY, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

INCORPORATED SOCIETY OF LAW-AGENTS IN SCOTLAND, Petitioners.—
Dundas.

No. 52.

RICHARD LAING, Respondent.—*W. Campbell—Forsyth.*

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Society of
Law-Agents
in Scotland v.
Laing.

Public officer—Jurisdiction—Nobile officium—Notary-public.—Held that the Court of Session has jurisdiction to deprive a notary-public of office.

Circumstances in which the Court *deprived* two notaries-public of office.

1ST DIVISION.

ON 30th October 1893 the Incorporated Society of Law-Agents in Scotland presented a petition to the First Division of the Court of Session, in which they prayed the Court to deprive Richard Laing, Alloa, and John Stevenson, Kilmarnock, of the office of notary-public, and to direct the clerk to the admission of notaries to strike their names off the list of notaries-public.

The petitioners averred that John Stevenson, writer in Kilmarnock, was in the year 1881 admitted to the office of notary-public; that the said John Stevenson, having pleaded guilty to a charge of embezzlement, was, on 14th January 1891, sentenced by the High Court of Justiciary to five years' penal servitude, and is now undergoing that sentence; that Richard Laing, writer in Alloa, was, on 12th January 1891, tried before the High Court of Justiciary for breach of trust and embezzlement, and, being found guilty, was sentenced to twelve months' imprisonment; that in May 1891 the petitioners presented a petition to the Court setting forth these facts in regard to the said Richard Laing, and praying that his name should be struck off the register and roll of law-agents, and that no answers having been lodged, the Court granted the prayer of the petition; that the said Richard Laing had been in the year 1873 admitted to the office of notary-public.

Laing lodged answers, in which he admitted the facts stated in the petition, but submitted that the petition should be refused in respect of "(a) Incompetency. The charter under which the petitioners exist contains no power entitling them to interfere with notaries-public; and (b) *Mora*. The respondent, after enduring the punishment awarded him by the Court, and notwithstanding the proceeding adopted by the petitioners for the removal of his name from the register of law-agents, found that he retained the confidence, and still does, of a considerable number of clients who previously entrusted to him their concerns. Accordingly, he resumed business as a writer in Alloa, and continues so to act. In any view, suspension ought to be enough."

Stevenson did not lodge answers.

Argued for the respondent;—The Court had no power to deprive a notary-public of office. Notaries were appointed by the Crown, and they were not servants of the Court. Their office was as much a public office as that of a Judge, and the Court had no jurisdiction over them. The only function of the Court with regard to notaries was to see that, at the time of their appointment, they were duly qualified in learning and in conduct. After the Court had certified to that, they had no further jurisdiction over them.¹ Further, this petition was presented by an incorporated society which had nothing to do with notaries-public, though it chanced that most of its members were undoubtedly notaries. They had therefore no title to insist in the prayer. But, in any event, the prayer should not be granted, as the respondent had already suffered his punishment for the offence he had committed, and it would be hard if, when he had succeeded in recovering the confidence of the public, he should, at the end of two years, be debarred from practising as a notary.

¹ Act 1563, c. 79.

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Argued for the petitioners;—(1) The Court had power to grant the prayer, and this was a most proper case for their interference, considering the international character of the office of notary. The Court was the hand appointed by the Crown, not only to superintend the admission of notaries, but to see that notaries did their duty while they held office. In the middle ages there were two classes of notaries—the papal and the royal notaries. This distinction continued down to the end of the 16th century, when the former class was abolished in Scotland. By the Act, 1503, c. 64, power was given to the bishops to deprive all notaries who had misbehaved of their office, and Sir George Mackenzie, in his observations on the Scots Acts (p. 112, written in 1686), stated that though originally the bishops alone had that power, the Court of Session had, at the date of writing, the jurisdiction which the bishops originally held. By the Act 1563, c. 79, it was ordained that all notaries were to be presented by the Crown and to be examined by the Court, and by the Act 1587, c. 45, which appointed a general examination of existing notaries, all ignorant notaries were to be deprived of office. By Act of Sederunt, 30th July 1691, it was determined that notaries should be of good fame and breeding, and the Court had on various occasions considered whether applicants were suitable persons in reputation as well as in learning.¹ But, in point of fact, the Court had on two occasions at least removed notaries from office on the ground of malpractices.² In the last case cited the notary was not removed, but he was reprimanded, and the Court considered whether he should be deprived of office. (2) *As to title*. In questions of this kind title depended largely on interest, and the Law-Agents' Society had the strongest interest to keep the office of notary pure. Further, in *Mitchell's case*,¹ the Court considered the title of the writers, and had no difficulty on the question. (3) There had been no undue delay. The petitioners had been in communication with the Lord Advocate, and came to the Court immediately they learned that he would not do anything until application had been made to the Court. Any delay there had been was favourable to the respondent, as he had been practising as a notary ever since he came out of prison.

At advising, the opinion of the Court was delivered by

LORD PRESIDENT.—The authorities cited by Mr Dundas satisfy us that the Court of Session has the power of depriving delinquent notaries-public of office. There is the passage from Sir George Mackenzie expressly stating the power of deprivation to reside in the Court, and the two cases of *Stuart* and *Hope* are instances of the exercise of that power.

This being so, it is the duty of the Court to deprive when cases of delinquency are brought to its knowledge, and there is no valid objection to the Court being moved to act by the present petitioners.

The notaries against whom this petition is directed have been convicted of breach of trust and embezzlement, crimes directly within the region of the office in question, and it is quite plain that persons so situated are unfit holders of that office. It is true that, in the case of the respondent Laing, the conviction was in January 1891, and his sentence expired in January 1892. But it is manifest that, if in May 1891, when the name of that respondent was struck

¹ *Macaulay v. Angus*, 1783, M. 13,137; *Mitchell v. Gregg*, Dec. 7, 1815, Fac. Coll.; *Procurators of Paisley v. Craig*, March 8, 1823, 2 S. 283.

² *Stuart v. Smith*, 1680, M. 15,928; *Hope v. Drummond*, Feb. 28, 1749, Folio Acts of Sed. p. 448; *Hamilton v. Brown*, Dec. 1, 1812, Folio Acts of Sed.

off the register of law-agents, he was not deprived of the office of notary, this was merely because the Court was not apprised of his holding it. We are unable to find, in the circumstances which I have mentioned, adequate ground for refusing now to do what we should unquestionably have done then had we been asked.

The prayer of the petition is therefore granted.

LORD M'LAREN was absent.

THE COURT granted the prayer of the petition.

CARMENT, WEDDERBURN, & WATSON, W.S.—W. RITCHIE RODGER, S.S.C.—Agents.

THOMAS GILFILLAN, Pursuer (Respondent).—*Johnston—Burnet.*
CADELL & GRANT, Defenders (Reclaimers).—*D.-F. Sir Charles Pearson—*
Constable.

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Sale—Sale of heritage—Defect in title—Right to cancel—Tender of valid title after action raised for implement.—A purchaser of heritage objected to the title tendered by the seller on the ground that it was defective. The seller having written a letter refusing to give any other title, the purchaser repudiated the contract.

In the course of an action brought by the seller against the purchaser for implement, the pursuer admitted that the title previously tendered was defective, but tendered a valid title.

Held (rev. judgment of Lord Wellwood) that the purchaser had been justified in rescinding from the contract, and was entitled to absolvitor.

In March 1893 Thomas Gilfillan, writer in Glasgow, advertised for 1st DIVISION.
sale a ground-annual of £40, payable out of property in Glasgow. Ld. Wellwood.

On 27th March, Cadell & Grant, W.S., Edinburgh, made an offer of £810, "subject to the title being in order. . . ." This offer was accepted.

On receiving the titles of the property the purchasers discovered that there were standing on record, undischarged, two bonds, one granted in 1819 for £200, and the other granted in 1822 for £150, in favour of a Mr Henry. It further appeared that Mr Henry had in 1825 sold the property by a disposition, which expressly declared the subjects to be burdened with the two bonds, the sasine following upon this disposition being the basis of the progress of titles tendered to Cadell & Grant. The latter accordingly called upon the seller to clear the record. In the course of a long correspondence (the most important parts of which are quoted *infra* *) which ensued between the parties, the seller's agents,

* 8th April 1893.—Brown & Gilfillan to Cadell & Grant.—" . . . There is no existing burden of £350 affecting the subjects. When Mr Walter Allison bought the property from Mr Henry, when sold under the latter's bond for £200, he granted a bond for £550 to Mr Henry, which was made up of the £200 contained in the bond under which Mr Henry sold and the £200 and £150 contained in bonds, both held by him, mentioned in the sasine in favour of Mr Allison. The bonds for £200 and £150 were consequently superseded by the £550 bond, and have long since been extinguished by prescription. To this effect we enclose a letter from Mr James Gardner, writer, Paisley (the law-agent of Mr Henry's trustees), to Mr R. T. Neilson, dated 15th July last. From it you will see that no interest was paid on the bonds in question, and that Mr Henry only held a bond for £550, while, from the searches we sent you, you have testimony that they were never assigned by Mr Henry or his representatives."

3d May.—Cadell & Grant to Brown & Gilfillan.—" . . . Our object

No. 53. Messrs Brown & Gilfillan, explained that the bonds in question had been extinguished by a subsequent bond, which was discharged in 1850; that they had remained on the record *per incuriam*, and that no interest was paid on them, and they enclosed a letter to that effect which had been written by the agent of Mr Henry's trustees to a Mr Neilson. Ultimately, being unable at that time to clear the record, they brought the correspondence on this head to a close by intimating that unless the purchaser agreed to accept the title offered, along with a letter similar to that written to Mr Neilson, they would raise an action to have the sale implemented. The purchasers declined to accept such a title, and declared that they cancelled the transaction.

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Mr Gilfillan then raised an action on the 16th May 1893 against Cadell & Grant to have them ordained to implement the sale.

in writing this letter—which we mean to found on—is to state clearly, once and for all, that we are willing to implement our contract if the title to the property is made good; and that if you agree to clear the record we are further willing to allow you a reasonable time in which to do so. Though it is not our business to suggest how this might be done, we may state that we should be satisfied if you obtained and put on record a discharge by the late Mr Henry's representatives, they, of course, first making up a title to the bonds. Failing this, we should be satisfied with the recording of a decree of declarator of payment and extinction, such as was suggested in various reported cases. Or we are willing to consider any other method you can suggest which will enter the record, and make us safe in questions with future purchasers.

"We shall be glad to hear whether you are prepared to remedy the title in the respects to which we have called your attention, as, failing your undertaking to do so within three days, we must declare definitely that negotiations are at an end, and we shall find another investment for the money we had in view."

5th May.—Brown & Gilfillan to Cadell & Grant.—"We duly received your letter of the 3d inst. It is quite impossible for us to let you have an answer in the course of 'three days.' We shall endeavour to write you early next week."

6th May 1893.—Cadell & Grant to Brown & Gilfillan.—"Unless we have a satisfactory obligation to rectify the points which we hold are wrong by the morning post of Wednesday, 10th inst., the transaction is off."

9th May.—Clark & Macdonald to Cadell & Grant.—"Referring to your letters to Messrs Brown & Gilfillan of 3d and 6th inst., they are not prepared to either give a discharge by Mr Henry's representatives, or obtain a decree of declarator of payment and extinction. They are, however, prepared to give a holograph letter by Mr Gardner, the agent for Mr Henry's representatives, on the same lines as his letter to Mr R. T. Neilson of 15th July last. Your letter might, if you so desire, go somewhat more fully into the details of the matter than Mr Neilson's did, but beyond that our correspondents are not prepared to go.

"Unless we hear from you agreeing to what we now propose between this and Thursday morning, our instructions are to go on with the action of implement. If, therefore, you do not write us agreeing, be so good as let us have a note of your client's name and designation by the morning of Thursday first."

10th May.—Cadell & Grant to Brown & Gilfillan.—"We have to-day heard from Messrs Clark & Macdonald that you are not prepared either to give a discharge by Mr Henry's representatives or to obtain a decree of declarator of payment and extinction, and we regret that we cannot see our way to accept a holograph letter by Mr Gardner, the agent for Mr Henry's representatives, such as you mention, as we do not consider that it would be sufficient evidence, either now or in the future, of the extinction of the burdens in question.

"We have accordingly, in terms of our letter of 3d inst., no recourse but to cancel the transaction. . . ."

The pursuer stated ;—" The pursuer was not at first aware whether Mr Henry had left any representatives, and could not therefore at once undertake to obtain a formal discharge of the said two bonds, but he at once set to work to trace out Mr Henry's representatives, and having discovered the existence of his last surviving trustee, the pursuer at once intimated to the defenders that he was prepared to raise an action of declarator of payment and extinction of the said two bonds. He has since done so [on 16th June 1893], and obtained decree therein. An extract of the said decree will be produced in the course of this process."

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The defenders pleaded ;—(2) The pursuer having refused to purge the record as stated, and the defenders having thereupon rescinded the contract, the defenders should be assoilzied. (3) The pursuer having failed to produce a good title and to purge the record from incumbrances affecting it, the defenders are (a) at common law and (b) in terms of their offer entitled to resile from the contract sued on.

The Lord Ordinary (Wellwood) on 7th November, *inter alia*, repelled the second and third pleas in law for the defenders.*

The defenders reclaimed, and argued ;—The consideration of time did to a certain extent enter into the contract, for it was intended to be a Whitsunday transaction. The defenders did not however press that view, for it was really immaterial—looking to what had actually happened—whether time was or was not of the essence of the contract. The defen-

* "OPINION.— . . . The second and third pleas in law for the defenders are based on the ground that the defenders were entitled to rescind the contract because, before this action was raised, the pursuer refused to purge the record of two bonds for £200 and £150 respectively, granted in 1819 and 1822. The position at first taken up by the pursuer in regard to these bonds was that they were extinguished by a later bond for £550, granted in 1825 ; that no interest had been paid upon them since that time ; and that they were prescribed. The pursuer was in this difficulty, that he was unable to discover the representatives of a Mr Henry, who was once in right of the bonds, and so was unable to obtain a decree of declarator of payment and extinction. Relying on the soundness of his view as to the extinction of the bond, he raised the present action of implement, but, shortly after it was raised, he discovered the representatives of Mr Henry, and obtained decree of declarator of payment and extinction of the said two bonds, an extract of which he has now produced. The decree was dated 30th June 1893, and I understand it is admitted that it will effectually clear the record.

"I am of opinion that the defenders are not entitled to resile simply because the pursuer took up what I assume to be an erroneous position at the outset. He lost no time in presenting the matter for determination by the Court ; and, finding himself in a position to remove all difficulty, at once tendered the defenders the decree of declarator of payment and extinction, and this within four months of the date of the contract.

"If time had been of the essence of the contract, the defenders might have been entitled to resile if a clear title had not been tendered within the time specified ; but here no time was stipulated for, and the transaction was for investment only. I am, therefore, of opinion that this is not a ground upon which the defenders are entitled to resile from the contract. The cases of *Raeburn v. Baird*, 5th July 1832, 10 Sh. 761, per Lord Balgray 765, and *Carter v. Lornie*, 20th Dec. 1890, 18 R. 353, per Lord Adam, 364, and Lord M'Laren, 365, substantiate, I think, the view which I take of this case. It is true that, in the latter case, there was an element (which is not here) upon which the Lord President proceeded to a certain extent, namely—that possession of the subjects had been taken by the purchaser ; but this was not, I think, essential to the judgment, as appears from the opinions of Lords Adam and M'Laren. . . ."

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ders had in fact been willing to allow the pursuer a reasonable time for curing the defect in the title, but he had, on the 9th May, tabled as the only title which he could or would produce a title which he now admitted the defenders were not bound to accept. The terms of his letter were precise and peremptory, and amounted to an election by the pursuer to stand on the title then proffered. The defenders therefore were entitled to cancel the transaction.¹ The pursuer had no right to hold the contract indefinitely in suspense, and, in the circumstances, his offer of a valid title came too late.

Argued for the respondent;—In the present case time was not of the essence of the contract. Different considerations applied where, as in the case of a lease or purchase of a house for personal occupation, with entry at a definite date, time was of the essence of the bargain. The respondent was precisely in the position of the pursuer in *Carter v. Lornie*,² who had been held to be wrong in insisting upon the acceptance of the title which he offered, and yet even after final judgment was allowed to tender what the Court held to be necessary to the validity of his conveyance. Here the pursuer's agents took up the position that they would only do what it must be admitted was technically insufficient, though technically only, because the bonds which still stood on record were not represented to be practical incumbrances. They offered all they could offer, and did so in the *bona fide* belief that they were tendering what was sufficient. The pursuer was entitled to have a judgment as to whether the tender was sufficient or not, but having found himself in the position of being able to avoid going on to final judgment on that point, he at once tendered all that the defenders asked. In these circumstances, time not being of the essence of the bargain, the defenders were not entitled to cancel the transaction any more than the pursuer in *Carter's* case. The defenders were not damnified by the delay.³

At advising,—

LORD PRESIDENT.—In the view which I take of this case the second plea in law for the defender states the legal question which we have to decide.

The contract of sale could have been fulfilled by the tender by the seller within a reasonable time of a good title, the adjustment of a title being often, as we know, a matter of negotiation. The Dean of Faculty admitted that in this contract of sale it did not look as if time were of the essence of the contract, and the seller was entitled to a reasonable allowance of time within which to give a good title. But then the question is, whether a definite and sharp issue having been raised the pursuer did not, by his own choice, take up a position which amounts to a definite refusal to implement the contract.

A long correspondence took place between the parties, but comparatively early in that correspondence Messrs Cadell & Grant put their finger on the fact that two bonds on the property were undischarged, and with much pungency drew the attention of the pursuers' agents to their existence. Upon 3d May they used very definite language. They state clearly, once for all, that they are willing to implement the contract if the title is made good; and further, that if the seller agrees to clear the record they are willing to allow him a reasonable time for doing so. They then go on to say that, although it is not their busi-

¹ *Turnbull v. M'Lean & Co.*, March 5, 1874, 1 R. 730; *Stair*, i. 10, 16; *Erskine*, iii. 3, 86.

² *Carter v. Lornie*, Dec. 20, 1890, 18 R. 353; *Tilley v. Thomas*, 1867, L. R., 3 Ch. Ap. 61; *Raeburn v. Baird*, July 5, 1832, 10 S. 761; *Bell's Prin.* sec. 892.

³ *Howard & Wyndham v. Richmond's Trustees*, June 20, 1890, 17 R. 990.

ness to suggest how the difficulty might be got over, they should be satisfied with a discharge from the representatives of the holder of the bonds, and they conclude by stating that they will be glad to hear that the seller is prepared to remedy the title, but failing an undertaking to do so being given within three days they declare the negotiations definitely at an end.

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The pursuer's agents demur to give an answer within three days, but promise to endeavour to write within a week. Next day Cadell & Grant repeat, that failing a satisfactory obligation to rectify the title being received in four days "the transaction is off."

I pause here to observe that disclosed on the face of the correspondence is a perfectly definite and intelligible objection to the title, and one thoroughly understood by the seller's agents, who, however, are most reasonably offered time, if they will undertake to remove the objection.

Their answer is dated 9th May, and in that letter they say that they are not prepared to give a discharge by Mr Henry's representatives or obtain a decree of payment and extinction, but that they are prepared to give a holograph letter by the agent of Mr Henry's representatives. They go on to say, that unless they hear from the purchasers agreeing to what they propose they will at once raise an action for implement. To that letter the purchasers reply, in very definite terms, that they cannot see their way to accept what is offered, and that they accordingly cancel the transaction and return the titles.

Following upon that letter there is no offer to reopen the matter, and in these circumstances I must say I think the second plea in law for the defenders is made out. It is quite plain that, rightly or wrongly, the seller's agents decided that they could do no more, and informed the defenders that more was not to be looked for. Issue having been joined by the parties, and the seller's agents having said they were not prepared to do more, the question of whether time was of the essence of the contract or not goes by the board. The question really is, was the position of the seller's agents sound and defensible or not? They thought it was, and accordingly brought this action. They make no suggestion when they come into Court that they will reconsider their position; they wish it declared to have been a proper one. The defenders say that they cancelled the contract, and adhere to that position.

Now Mr Johnston, with deliberation, admitted that he could not ask us to hold that the position taken up by the seller's agents was sound, and virtually conceded that the defenders were right in what they required regarding the title. He only argued that if we thought the production *post litem motam* of the decree of declarator of payment and extinction sufficient to dislodge the defenders from their position of holding the contract to have been broken we should declare the bargain to be binding on the defenders. But I am of opinion that the defenders were entitled to hold the pursuer's letter of 9th May as an ultimatum, and that they were entitled to intimate, as they did, that the contract having been broken by the pursuer was no longer binding on them.

I think we should recall the Lord Ordinary's interlocutor and assoilzie the defenders.

LORD ADAM.—I am of the same opinion.

The pursuer and defenders entered into a contract for the purchase of a certain ground-annual. When the titles came to be examined an objection appeared on the face of them. It was not incurable, but still it was an objection. Now,

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parties being willing to complete such a contract may come into Court to have it decided whether the title offered by the seller is a good one or not, with the view of having something further done should it be found insufficient, but that is not the position of parties here. The pursuer, when the objection was pointed out to him, did not come forward and say, "I propose to do so-and-so, but if the Court find that is not sufficient I will do what may be found necessary." The pursuer's position was quite different. He was not in a position to rectify the title, because the heir was amissing. He said what he was prepared to do, and that that was the only thing he would do, and then matters came to an issue. The purchasers pointed out the mistake and what would satisfy them, but they said that, failing this being done, they would cancel the bargain. This was on 3d May. The seller's agents replied, on 9th May, that they would not do what was asked, and that the only thing they would do was to give a letter from the agent of Mr Henry's representatives, but that beyond that they could not go.

The parties accordingly came to an issue upon whether the position taken up by the seller was or was not defensible, and upon nothing else. The correspondence shews that the seller had stated an ultimatum, and I think the purchaser was right in refusing that final offer, and was entitled to resile from the bargain.

LORD KINNEAR.—I am of the same opinion. I think that there is no question in this case as to whether time was of the essence of the contract or not, or whether the pursuer had lost his bargain by delay in performance of his part of the contract. That is not the true nature of the question between the parties.

When a contract of purchase and sale is to be carried into effect, if the purchaser objects to the title as defective, and it turns out that although defective it may be made good at some expense of time and money, then it may be that any delay in performing the contract which may be caused by the controversy will not dissolve the contract or deprive the seller of his bargain.

But that is not the nature of the objection. The objection, although it has since turned out to be curable, was not known to the seller to be curable when the time for performance of the contract arrived, and therefore he raised no question as to the expense of making good the title. He intimated to the purchaser, in perfectly plain and peremptory language, that he proposed to enforce the contract although the title was defective; he intimated that the only thing he would do towards clearing it would be to give the purchaser a letter in certain terms. There can be no question that the title so offered was insufficient. But, at the same time, it is clear that the position of the seller's agents was not adopted from an unreasonable or erroneous view of their client's obligation, but simply because they could not do more. They did not then know of the existence of the representative of Mr Henry, and accordingly declined to bring an action against him. But then it was candidly admitted by Mr Johnston that he could not maintain that the offer in the seller's letter of 9th May was an offer which the buyer was bound to accept. That being so, there was plain intimation by the seller that he was not ready or able to perform the contract. By his own writing he put himself in breach of his contract, and gave the seller a right to say, "If that is all you will do I cannot accept your terms, and the contract is off." I am of opinion that the bargain was at an end, and that it is too

late to set up an answer to the purchaser's objection that the seller has now discovered that the defect may be remedied. No. 53.

LORD M'LAREN was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defenders. Dec. 12, 1893.
Gilfillan v.
Cadell &
Grant.

CLARK & MACDONALD, S.S.C.—CADELL & GRANT, W.S.—Agents.

JOHN G. RHIND, Pursuer (Reclaimier).—*Shaw—T. B. Morison.* No. 54.
JOHN KEMP & COMPANY, Defenders (Respondents).—*C. J. Guthrie—*
Watt. Dec. 13, 1893.
Rhind v.
Kemp & Co.

Process—Proof or jury trial—Reparation—"Special cause"—Evidence Act, 1866 (29 and 30 Vict. cap. 112), sec. 4.—In an action of damages, held that the probability that only a trifling award of damages would be recovered was not a "special cause" which entitled the Court to refuse to send the case to a jury.

Reparation—Agent and principal—Taking decree in absence for debt paid after action raised—Malice—Want of probable cause—Issue.—In an action for damages brought by B against X, a debt collector, the pursuer averred that the defender had been employed by A to recover a claim against the pursuer, and that the defender had raised an action in A's name in the Debts Recovery Court against him; that two hours before the diet of appearance X had received notice from A that the debt and expenses had been paid, and instructions to stop proceedings, but that notwithstanding he had maliciously caused decree in absence to be taken against B. Form of issue adjusted, in which "malice," but not "want of probable cause," was inserted.

THIS was an action of damages at the instance of John G. Rhind, 1st Division, grocer in Glasgow, against John Kemp & Company, debt collectors there, Ld Stormonth-Darling, concluding for payment of £500.

The pursuer stated, *inter alia*, that in May 1893 Meglaughlin, Marshall, & Company had employed the defenders as agents to recover from him a claim of £14, 1s.; that as there was a dispute about the amount, he had called on the defenders, and made an offer to settle; that on account of "illegal, improper, and malicious conduct" on the defenders' part, no settlement was effected; and that therefore the defenders had caused a debts recovery summons and expenses to be served upon the pursuer.

He further stated that on the morning of Monday, 22d May, on which day the summons was due to be called at twelve o'clock, he paid £8, 8s. 6d. in full settlement of the debt, at the instance of Meglaughlin, Marshall, & Company, to Mr Meglaughlin, who granted him a discharge, and "in his presence wrote a letter to the defenders telling them to stop proceedings at once against the pursuer, as the firm's claim against him had been settled. Mr Meglaughlin, considering that the matter was of great urgency and importance to the pursuer, sent a special messenger with said letter to the defenders. Said letter was delivered at defenders' place of business and received by them at five minutes before ten o'clock, more than two hours before the diet of appearance in the action above referred to. . . . It was the duty of the defenders to have stopped said legal proceedings and to withdraw said action forthwith. But contrary to the instructions of their clients, the defenders illegally, wrongfully, and maliciously caused decree in absence to be taken against the pursuer for said sum of £14, 1s. and expenses. This decree was taken by the defenders most wrongously and oppressively, in the knowledge that the case had been settled and ought to have been withdrawn, and in the face of the explicit written instructions timeously

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received by them from Messrs Meglaughlin & Company to stop said proceedings at once. This the defenders did in order to gratify their feelings of ill-will towards the pursuer, and for the purpose of ruining his business as a merchant in Glasgow."

The pursuer made further averments, to the effect that the defenders' conduct in acting as they did was malicious.

The defenders in answer denied that they had in any way been actuated by malice towards the pursuer, and explained that they had on the instructions of their clients on the 25th April transferred the case to a solicitor. They admitted receiving the letter of 22d May stating that the debt had been settled, but averred that immediately on receiving it they had written to the solicitor acting for them to do nothing further. They denied that the pursuer had suffered any damage.

The pursuer pleaded;—(1) The pursuer having suffered loss, injury, and damage through the illegal, wrongful, and malicious conduct of the defenders in the circumstances condescended on, they are liable in reparation.

The pursuer was appointed to lodge issues. On 23d November 1893 the Lord Ordinary (Stormonth-Darling) dispensed with the adjustment of issues, and allowed the parties a proof of their averments.*

The pursuer reclaimed, and argued;—The action was one for damages, and therefore must be sent for trial by a jury unless of consent, or on special cause shewn.† Even if the amount concluded for were trivial, that was not a "special cause" in the sense of the Evidence Act.¹ Here, however, the conclusion was for £500 of damages in respect of a malicious wrong, and the assumption by the Lord Ordinary that the actual award would be trifling was premature and unwarranted. The rubric in the case of *Nicol v. Picken*² was not borne out by the report.³

Argued for the respondents;—The Lord Ordinary was justified in assuming that the award of damages, if any, would be very small, and that being so he was entitled in his discretion to allow a proof rather than send the case to a jury.² The Court was always averse to interfering

* "OPINION.—This is an action of damages, and would naturally fall to be tried by a jury, but I think the defender has succeeded in shewing cause for its being tried by way of proof. The principal wrong complained of is the failure of a firm of debt collectors to stop an action in the Debts Recovery Court after a settlement had been effected with the client who instructed them.

"This is a kind of wrong which has been held to be actionable as against a principal only when malice is alleged, and I do not see why a different rule should be applied to an agent—(*Davies & Company*, 5 Macph. 842). In that case great stress was laid on the fact that the party complaining of the wrong did not take the trouble to go to Court and see that the action was dismissed.

"Now, that was the case here; and therefore, although the pursuer may have a right to recover damages if he can shew that the defender acted maliciously, it is plain that the damages cannot be heavy. I think it would be an abuse of the forms of Court to invoke the aid of a jury for determining so trivial a matter. . . ."

† The Evidence (Scotland) Act, 1866 (29 and 30 Vict. cap. 112), sec. 4,— "If both parties consent thereto, or if special cause be shewn, it shall be competent to the Lord Ordinary to take proof . . ." notwithstanding the provisions of the Judicature Act, 1825 (6 Geo. IV. cap. 120), and the Court of Session Act, 1850 (13 and 14 Vict. cap. 36) *d.*

¹ *Trotter v. Happer*, Nov. 24, 1888, 16 R. 141; *Crabb v. Fraser*, March 8, 1892, 19 R. 580; *Willison v. Petherbridge*, July 15, 1893, 20 R. 976; *Donnachie v. Thom*, Dec. 15, 1892, 20 R. 210.

² *Nicol v. Picken*, Jan. 24, 1893, 20 R. 288.

³ The pursuer also cited *Taylor v. Rutherford*, March 17, 1888, 15 R. 608.

with the Lord Ordinary's discretion in a matter of that kind. This No. 54.
interlocutor therefore should be allowed to stand.

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LORD PRESIDENT.—I do not agree with the Lord Ordinary in the conclusion he has come to. I should certainly be very slow to interfere with the discretion of the Lord Ordinary if the question were as to any peculiarity which in his opinion rendered this particular action unsuitable for the ordinary course being followed, namely, of sending the case for trial by a jury.

But his Lordship has proceeded on this ground : He says that it is plain that the damages recovered cannot be heavy, and that he thinks "it would be an abuse of the forms of Court to invoke the aid of a jury for determining so trivial a matter."

Now, that is a ground of judgment of very wide and general application, and I cannot agree with it. The existing statute law is that (unless of consent of parties) actions of damages must go to a jury unless special cause be shewn to the contrary. Here we have an action for malicious wrong concluding for £500 of damages, and the mere fact that one can conjecture that there will not be a large award is not in my opinion a "special cause" which satisfies the statutory requirement. If any vindication of the course prescribed by the statute law is needed, it may be found in this,—that it affords a more rapid mode of finally settling such matters, be they trivial or weighty.

LORD ADAM.—I am of the same opinion. This being an action of damages it goes in ordinary course and of right to a jury, unless the party objecting can shew special cause why it should not go, and if the Lord Ordinary, in the exercise of his discretion, thought that in an action of this kind a special cause had been shewn, I should be very slow to interfere with his judgment. But here he has not found a special cause in the peculiarity of this particular case, but on general grounds, because he considers that the amount of damages which would be recovered would, if any, be small, and therefore he thinks (holding that a proof is a less expensive mode of trial) that the case is not fitted for jury trial. But that goes against the statute law of the matter, for the statute says that (subject to special exceptions) every action for damages must go to a jury, except where the parties consent or special cause is shewn ; and the Legislature thus saying that every action of damages must go to jury trial, we cannot hold that merely because we think the amount of damages that will be recovered will be small in any particular case, then that case is not to go to trial by jury. There is no room, in my opinion, for the exercise of any discretion in such a state of circumstances.

LORD KINNEAR.—I am of the same opinion. If actions which the Lord Ordinary may think would result in only a small amount of damages being recovered are excluded from the operation of the statute, I suppose that those actions which from the first conclude for only a small amount of damages would also be excluded from going to jury trial. But that would be going in the face of the statute, for the statute says that all actions of damages, except on special cause shewn, are to be tried by a jury.

LORD M'LAREN was absent.

On the Issue.—The pursuer argued ;—Neither malice nor want of pro-

No. 54. bable cause should be inserted. The case of *Davies*¹ did not apply. There the defender was a person who had taken a decree for a debt due to himself. Here the defenders who had caused the decree to be taken were not the creditors, and they were not legal practitioners acting for the creditors in the Court. No privilege whatever therefore attached to their position. They were simply persons who were bound to obey the instructions of their employers, and they had failed to do so.

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The defenders argued;—The same considerations arose here as in the case of *Davies*,² and both malice and want of probable cause should be inserted. The defenders here maintained that they had a probable cause for taking the decree, because they had not received timeous notice that the debt had been paid.

THE COURT recalled the interlocutor of the Lord Ordinary, and appointed the cause to be tried on an issue in the following terms:—"Whether on or about the 22d day of May 1893 the defenders wrongfully and maliciously caused a decree in absence at the instance of Messrs Meglaughlin, Marshall, & Company, provision merchants, No. 46 North Albion Street, Glasgow, for the sum of £14, 1s. sterling, and expenses, to be taken against the pursuer in the Debts Recovery Court at Glasgow, to the loss, injury, and damage of the pursuer? Damages laid at £500."

PETER MORISON Junior, S.S.C.—WINCHESTER & NICOLSON, S.S.C.—Agents.

No. 55.

ALEXANDER FRASER, Petitioner (Respondent).—*Jameson*—*C. N. Johnston*.

Dec. 13, 1893.
Fraser v.
Turner.

DANIEL TURNER, Respondent (Appellant).—*Trotter*.
JOHN LANDALE (Clerk to the Heritors of the Parish of Dunfermline), Respondent.

Church—Churchyard—Heritors—Compromise—Ultra vires.—Held that it is within the powers of the heritors of a parish to compromise questions regarding the extent of the churchyard, arising with a contemninous proprietor, subject to the control of the Court at the instance of anyone having a legitimate interest.

2D DIVISION.
Dean of Guild
Court, Dun-
fermline.

In June 1892 Alexander Fraser, merchant, Dunfermline, presented a petition in the Dean of Guild Court there for warrant to erect a building upon property belonging to him within the burgh. This property was described in the petitioner's titles, *inter alia*, as bounded by "the churchyard upon the south," and the plans produced with the petition shewed that the petitioner proposed to raise the height of a wall which separated the churchyard from his property so as to convert it into the back wall of the proposed tenement. He averred that this wall was his exclusive property, as having been built wholly on his ground.

The heritors of the parish lodged answers, in which they averred that "said wall is the enclosing wall of the churchyard and belongs wholly to the heritors, or at least is mutual to them and the petitioner. The heritors and those holding of them have used the said wall from time immemorial for the purposes of inserting or building tombstones therein, and at the present time there are four tombstones inserted or built into said wall. . . . The petitioner's plans shew that he proposes taking

¹ *Davies & Co. v. Brown and Lyell*, June 8, 1867, 5 Macph. 842, 39 Scot. Jur. 471.

² *Davies & Co. v. Brown and Lyell*, *supra*; *Ormiston v. Redpath, Brown, & Co.*, Feb. 24, 1866, 4 Macph. 488, 38 Scot. Jur. 225.

down the said enclosing wall and rebuilding and carrying it up as the back wall of a large warehouse. In particular, the said plans shew that the petitioner proposes inserting windows in said wall below the level of the tombstones presently inserted therein. Such operations and uses would form an encroachment on the heritors' sole or mutual right of property, and be inconsistent with the purposes to which said wall has been and is dedicated." No. 55.
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On 10th July Daniel Turner, solicitor-at-law, Edinburgh, was sisted as a party to the process, and was allowed to lodge answers. He averred that "the ground to the north of the Abbey Churchyard of the parish of Dunfermline, with its enclosing walls, has been dedicated as a place of sepulture, and for the insertion and erection of tombstones or memorial stones, recording the tenancy for many generations. It has also been properly designated . . . and is still in use." Further, that he was in right of a burial-place in the churchyard, conform to a minute of the kirk-session, dated 11th April 1838, in which the burial-place was described as bounded "on the north by the north wall of the churchyard" (being the wall in question); that his grandfather, to whom the right of burial was originally granted, and other relatives were buried there; that a tombstone for this burial-place had been inserted in the wall; that he proposed either to enlarge this tombstone or to insert another; and that the proposed operations of the petitioner would frustrate this object.

The petitioner pleaded, *inter alia*;—1. As the proposed alterations are lawful, and will be beneficial to the petitioner's property, and as they can be carried through with perfect safety, the petitioner is entitled to warrant as craved. 3. The said Daniel Turner not having any *locus standi* in reference to the matters referred to in the petition, he is not entitled to be heard in opposition to the prayer of the petition. 4. The said wall being the exclusive property of the petitioner, and the memorial tablet or tombstone inserted in said wall not being to be interfered with, the prayer of the petition ought to be granted.

The heritors pleaded, *inter alia*;—2. The said back wall being the sole property of the heritors, or at anyrate they having a joint or mutual right thereto, the petitioner is not entitled to interfere therewith.

Turner pleaded, *inter alia*;—3. The prayer of the petition *quoad* the said wall is inept, and ought not to be granted, in respect (1) of the dedication and designation aforesaid, followed by undisturbed possession for forty years and upwards; (2) of the wall not being the exclusive property of the petitioner; (3) of the terms of the petition and plans; and (4) the proposed operations of the petitioner in the churchyard and on the wall thereof are unlawful, *ultra vires*, and contrary to good morals and common decency. 4. *Esto* that the wall in question of which the tombstone forms a part is the property of the heritors, or a mutual or party wall, the petitioner has no title to interfere therewith as prayed without the consent of the heritors and respondent.

On 14th August 1893 the Dean of Guild pronounced this interlocutor:—"Finds that the pleadings of parties raise a question of competition of heritable rights to the wall in dispute, which it is not competent for this Court to decide, and therefore sists process, leaving it to the petitioner, if so advised, to have the question as to the extent of his right to the said wall settled by a competent Court."

On 4th September the petitioner and the heritors lodged a joint minute, in which they concurred in stating that they had "agreed without prejudice to their rights and pleas, and in order to obviate further litigation, to settle the action on the following footing, namely:—That the respondents the heritors agree to give their consent to petitioner's proposed operations,

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conform to the new plan, No. 52 of process, and relative letter by Mr Houston, architect, No. 54 of process; * that petitioner will place the existing copestone on the top of the wall when it is lowered to the height at which it stood before it was raised by petitioner's predecessors; that the petitioner's windows shall not come below the copestone when so lowered and placed, which copestone shall form the sole of the windows to be put in the back wall of petitioner's property; that the petitioner shall relieve the heritors, respondents, of all claims for damages or expenses which may be made good against them by decree at the instance of Mr Daniel Turner, solicitor-at-law, Edinburgh, or other parties claiming to have rights in said wall." They then concurred in craving the Court to recall the sist, and to grant warrant in terms of the prayer of the petition, as varied by and under the conditions expressed in the minute.

On the same day the Dean of Guild pronounced this interlocutor:—"Recalls the sist pronounced on 14th August last: Allows the joint minute for the petitioner and the respondents the heritors of the parish of Dunfermline to be received; and having considered the said joint minute and relative amended plan of petitioner's south wall, and heard the respondent Daniel Turner, and the agents for the petitioner and heritors, finds that by the amended plan, No. 52 of process, as varied by the joint minute, the petitioner's operations will be carried out without any interference with the memorial tombstones or tablets in the wall in dispute, including that belonging to the respondent Daniel Turner, and without prejudicially affecting any rights which the said Daniel Turner may have in the said wall; therefore grants warrant for the erection of the south wall of the petitioner's tenement in terms of the said amended plan, as varied by and under the conditions expressed in said joint minute."

Turner appealed, and argued;—There could be no doubt that the wall was the property of the heritors in trust for the church. It was the duty of the heritors of a parish to see to the erection and repair of the walls of the churchyard, and it was not to be supposed that the petitioner's predecessor would have allowed this wall to be erected on his property. At the least the wall was mutual to the heritors and the petitioner. On either view, this joint minute was a breach of trust on the part of the heritors, whose duty it was to vindicate the right to property which *prima facie* belonged to the church. The respondent, as the proprietor of a burial-place in the churchyard, had a title to prevent encroachment on his ground.¹

Argued for the petitioner;—The appellant had no title to appear in this application. If he suffered any injury in consequence of the proposed alteration in the wall his remedy was against the heritors,

* This letter was in these terms,—“Mr Fraser having reconsidered the rebuilding of south boundary wall of his proposed buildings, Maygate Street, I have made the modifications shewn on the accompanying plan for the approval of the heritors and Dean of Guild Court. Description—The existing south boundary wall of his property wherein four tablets are inserted, not to be interfered with. The portion of wall above tablets to be taken down, and the new building to start at this level; and build conform to said plan. . . .”

¹ Earl of Mansfield v. Wright, March 17, 1824, 2 S. App. 124; Ure v. Ramsay, June 5, 1828, 6 S. 916; Hill v. Wood, Jan. 30, 1863, 1 Macph. 360, 35 Scot. Jur. 216; Turner v. West Greenock Church, Feb. 16, 1869, 7 Macph. 538, 41 Scot. Jur. 283; Brown v. Gibson & Wilson, June 29, 1859, 31 Scot. Jur. 607; Wright v. Lady Elphinstone, July 20, 1881, 8 R. 1025; Russell v. Marquess of Bute, Dec. 8, 1882, 10 R. 302.

who were the legal guardians of the churchyard and represented all interested therein, and not against the petitioner. Heritors were not bound to litigate every question of disputed right relating to the church property, but might compromise; and if in any particular case they exceeded their powers, or interfered with private rights, they could be brought to account in a proper form of action.

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LORD YOUNG.—The property of the *solum* of the churchyard is vested in the heritors, but as trustees with a duty to use it, and see that it is used, only as a churchyard, and in the performance of that duty they may be controlled by this Court at the instance of anyone having a legitimate interest. Should a question arise as to the limits of this *solum*,—as, for instance, whether it includes the site of a surrounding wall, or of the wall bounding it on any side or at any part, or whether it is altogether within the wall,—the proper parties to try the question are, on the one hand, the heritors as the proprietors of the *solum* of the churchyard, and on the other, the proprietors of the *solum* immediately adjoining at the place in dispute.

Here such a question occurred regarding the site of the wall on the north side of the churchyard of Dunfermline, where the respondent was and is proprietor of the *solum* immediately adjoining that of the churchyard—the respondent maintaining that the wall at that part was on his *solum*, and the heritors that it was on theirs—i.e., part of the churchyard. The question occurred in the Dean of Guild Court, and the Dean of Guild properly, I think, thought that this, being a question of heritable right, was not within his competency, and therefore sisted process that the respondent might take steps to have it settled by a competent Court.

In these circumstances it was, I think, very proper that the heritors should consider whether it was fitting and required of them, in the discharge of their public duty as the trustees and guardians of all legitimate interests in the churchyard, that they should engage in such a litigation with the respondent, or whether it would be more prudent to come to terms with him regarding his contemplated operations. They did so consider the matter, I assume with a becoming desire to do their duty as the guardians of all legitimate interests in the churchyard, which they certainly are, and with the result that they saw fit to arrange the matter with the respondent in the manner expressed in the joint minute of 4th September 1893.

No one interested in the churchyard, no one in the parish, questions or complains of this proceeding on the part of the heritors except the appellant, a fact which is *prima facie* adverse to the notion that the heritors have thereby violated or neglected their trust duty as guardians of the public interest in the matter, so as to call for or warrant the interference of this Court under the controlling power which I have referred to. Another fact of similar tendency was mentioned to us, viz., that other and immediately adjoining parts of the same north wall have been used in the same way by the conterminous proprietors.

But the appellant contends that under his burying-ground right he is entitled to stop the operations as assented to by the heritors until the question of heritable right which I have referred to, and which the Dean of Guild has held himself incompetent to try, is tried in the competent Court in an action with him, or (which seems the only other alternative view on which we could hinder the Dean of Guild from acting on the arrangement with the heritors) that we should hold that it is the public duty of the heritors to litigate this question of

No. 55. heritable right, and that they violated this duty by becoming parties to the joint minute.

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I am unable to assent to either of these views. I think it was within the power of the heritors to make the arrangement expressed in the joint minute, and that they did not thereby violate or neglect, but legitimately, and, so far as I can judge, reasonably and judiciously performed their duty as the proprietors of this churchyard in trust and as guardians of the public interest therein.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT refused the appeal.

CARMICHAEL & MILLER, W.S.—PARTY—Agents.

No. 56.

Dec. 13, 1893.*
Ogston v.
Stewart's
Trustees.

ALEXANDER MILNE OGSTON, Pursuer (Respondent).—*Murray—Abel.*
DAVID STEWART AND ANOTHER (John Stewart's Trustees), Defenders
(Reclaimers).—*Sol.-Gen. Asher—Jameson—Dundas.*

Fishing—Salmon-fishing ex adverso of adjacent lands—Title to sue—Possession—Prescription.—Estates belonging to A and B lying on the south side of a river marched with one another inland, but at the river side were separated by a glebe, which extended along the river for about 350 yards. No right of fishing in the river belonged to the glebe. The titles of A and B included a right to the salmon-fishings "belonging to" their respective lands, but contained no express grant to the fishing *ex adverso* of the glebe.

A raised an action against B to have it declared that he had an exclusive right to the fishing *ex adverso* of the glebe for a distance of 130 yards from his march at the river bank. The Crown was not made a party to the action. After a proof, in which A failed to prove that the glebe had been designated from his estate, or to prove prescriptive possession of the fishings *ex adverso* of the 130 yards, *held* that even assuming the defender to have no right to the salmon-fishings claimed, as the pursuer had failed to produce an express grant to the fishings, or to shew by exclusive possession for the prescriptive period that his general title to salmon-fishings included them, the defender was entitled to absolvitor.

Opinion that a right of salmon-fishing was an estate in land in the sense of the Conveyancing Act of 1874, and that possession of salmon-fishings for twenty years was prescriptive possession.

1ST DIVISION.
Ld. Wellwood.

THE estates of Ardoe and Banchory, in Kincardineshire, were bounded on the north by the River Dee, except for a space of 350 yards between them where the glebe of Banchory-Devenick included the river bank.

In 1892 Alexander M. Ogston, of Ardoe, the riparian proprietor to the west of the glebe, raised an action against David Stewart and another, trustees of the late John Stewart, of Banchory, the riparian proprietors to the east of the glebe, concluding for declarator, *inter alia*, that "the pursuer has the sole exclusive right to the salmon-fishings in the River Dee . . . *ex adverso* of that portion of the glebe lands of the parish of Banchory-Devenick extending eastwards from the point where the said glebe lands meet the lands of Ardoe on the river bank to a point" [about 130 yards east of the pursuer's march] "*ex adverso* of the office-houses of the manse of Banchory-Devenick, or the drain proceeding from the said office-houses to the river, which drain forms the eastmost boundary of the said fishings"; that the defenders had no right of salmon-

fishing in the River Dee *ex adverso* of the glebe lands for the distance claimed by the pursuer; and for interdict against the defenders so fishing.

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It appeared that the lands of Ardoe marched inland with the lands of Banchory or Banchory-Devenick, which bounded them on the east.

Ardoe was purchased by the pursuer's father in 1840. In the disposition then obtained by him, and in the instrument of sasine following thereon, and also in a charter of confirmation obtained by him from the Crown in 1853, the subjects conveyed were described as follows:—"All and Whole the town and lands of Ardoe or Ardoch, both sunny and shadowy halves thereof, . . . together with the salmon-fishings on the Water of Dee, belonging to said lands . . ."

The lands of Banchory consisted of Banchory-Devenick, and the Kirkton of Banchory, the latter estate having been acquired by the proprietor of Banchory-Devenick in 1618. In none of the titles of Kirkton as a separate subject was there any mention of salmon-fishings. Before 1645 the whole lands of Banchory had been formed into a barony, and in 1650 John Forbes, the proprietor, obtained a crown charter to the lands of Banchory, and the salmon-fishings of the same on the Water of Dee. In the later titles the description of the salmon-fishings was in similar terms, and the title of the defenders described the subjects as the lands of Banchory, "together also with the whole salmon-fishings upon the Water of Dee belonging to the said lands."

No right of salmon-fishing belonged to the glebe. The defenders averred that the glebe itself originally formed part of the lands of Kirkton of Banchory. The pursuer denied this.

The pursuer averred;—"The pursuer and his predecessors and authors have, in virtue of said titles to the estate of Ardoe, exercised peaceably and without interruption the sole and exclusive right of fishing for salmon in the River Dee *ex adverso* of the lands of Ardoe, and also *ex adverso* of the said glebe lands from the point where the lands of Ardoe meet the glebe lands on the river bank eastwards to a point opposite the manse offices, or a drain running from the offices to the river, from time immemorial, or at least for upwards of forty years. They have always understood that the said office-houses or drain formed the eastmost boundary of their fishings, and that has been the understanding in the neighbourhood. Owing to the nature of the bank, it is impossible to fish the south side of the River Dee *ex adverso* of the glebe with net and coble, but the proprietors of Ardoe have always exercised the right by fishing with rod and line and other lawful and possible modes. The defenders never had or exercised any right of salmon-fishing *ex adverso* of said lands."

The defenders answered;—"Admitted that owing to the nature of the bank it is impossible to fish the south side of the River Dee *ex adverso* of the glebe with net and coble. *Quoad ultra* denied. Explained that until about four years ago neither the pursuer nor any of his predecessors ever asserted any right to the salmon-fishing now in question, nor did they nor any of them, up to the said date, exercise any acts of possession of the said salmon-fishing. On the contrary, it is explained and averred that so far as the said salmon-fishing was capable of being possessed it has been possessed for time immemorial, or at least for more than forty years, by the defenders and their predecessors, by fishing with rod and line, and all other lawful and possible modes."

The pursuer pleaded;—(1) The pursuer having, in virtue of his title and possession following thereon, the exclusive right of salmon-fishing in the portion of the River Dee referred to, and the defenders having no right or title to fish for salmon in the same, decree of declarator and interdict

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should be pronounced as craved, in terms of the leading conclusions of the summons, with expenses.

The defenders pleaded;—(1) The defenders having the exclusive right of salmon-fishing in the portion of the River Dee in question in this case, they are entitled to absolvitor.

On 18th November 1892 the Lord Ordinary (Wellwood) allowed a proof. The import of the evidence sufficiently appears from the opinions of the Lord Ordinary and Lord Adam.

On 8th February 1893 the Lord Ordinary found, declared, and interdicted in terms of the conclusions of the summons above given.*

* "OPINION.—The peculiarity of this case is that the salmon-fishings in the River Dee, which are the subject of dispute, are not *ex adverso* of the lands of either of the parties. The pursuer's lands of Ardoe and the defenders' lands of Banchory march inland, but at the river there is interjected between them the glebe of Banchory-Devenick, which extends along the river for about 300 or 350 yards. It is common ground that the fishings do not belong to the glebe, and it is admitted that both the pursuer and the defenders have in their titles a grant of salmon-fishing. It therefore appears that the fishings *ex adverso* of the glebe belong either to Ardoe or Banchory, or partly to both properties. The pursuer admits that the defenders have an exclusive right to the salmon-fishings to a point on the river opposite the offices of the manse of Banchory-Devenick, but he claims the exclusive right to the fishings to the west of that point.

"If it could have been shewn that the glebe was taken from the lands of Banchory that, if not conclusive in the defenders' favour, would have gone far to support his contention. But I agree with the pursuer's counsel that the evidence on this point is entirely inconclusive, and that no aid is to be derived from it. The pursuer's counsel passed by the point with that observation, and although the defenders' counsel did not give up the point, I was not favoured with any detailed argument. It appears that the lands of Kirkton of Banchory were originally bishop's lands, but the property of the lands was parted with at a very early date, and after the thirteenth century only the superiority remained with the church. On the other hand, the lands of Ardoe were also church lands, having originally belonged to the monastery of Arbroath, and the property as distinguished from the superiority was not parted with until long after the lands of Kirkton Banchory were in the hands of a layman. So long as the lands of Kirkton appear alone in the titles they have no grant of salmon-fishings attached to them. And it is not until 1744 when they are included in the same crown charter with the lands of Banchory that there is mention of 'the fishings belonging to the whole of said lands.' Lastly, there is positively no evidence to shew out of what lands the glebe was designed. . . .

"The evidence for which one would naturally look in such a case is evidence of possession. But unfortunately the evidence of possession by rod-fishing is unsatisfactory and inconclusive, and it is admitted for the pursuer that upon that evidence alone he cannot succeed. It is not surprising that the evidence upon this point should not be more decisive. At best the fishing in dispute is, even now, of comparatively little value. The river at that point cannot be fished with net and coble, and even for the purposes of rod-fishing it cannot be of much value, because at the upper part there is back water, and lower down it is difficult to fish. Add to this, that until recently rod-fishing was of little value in the market, and therefore proprietors of salmon-fishings were not so particular in preventing rod-fishing in those parts of a river where it would not interfere materially with the net-fishing, and they were more liberal in giving leave to fish when that was asked by friends or neighbours, or even by strangers.

"No aid is to be obtained from the older titles of the parties, because they each have a right of salmon-fishings described in general terms as belonging to their respective lands.

"In the absence of aid from the titles and satisfactory evidence of possession,

The defenders reclaimed. At the hearing in the Inner-House they were allowed to amend their record by adding the following plea:—
(1) The defenders are entitled to absolvitor in respect the pursuer has no title or right to the salmon-fishings in question.

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Argued for the defenders;—The Lord Ordinary had assumed that, because *ex concessis* the fishings in dispute did not belong to the glebe, they must belong to either Ardoe or Banchory, and treating the question as one of boundary had decided in favour of the pursuer. But there was no warrant for such an assumption. The legal presumption was that salmon-fishings remained in the Crown, unless a subject could produce an express grant of them. Now, the pursuer had produced only a grant in general terms, and had endeavoured to explain the grant, which, *prima facie*, referred only to fishings *ex adverso* of Ardoe, to include the fishings *ex adverso* of the glebe. But he had failed to shew that any part of the glebe had been once a part of Ardoe, or to establish exclusive possession of the fishings in question for the prescriptive period. He had therefore no title to the fishings. It was not necessary for the defenders to shew that they had a title to these fishings.¹

beyond doubt the most important evidence in the case is to be found in the terms of the leases of salmon-fishings granted by the respective proprietors of Ardoe and Banchory. The terms of the leases of the Banchory fishings are of themselves almost conclusive against the defenders' contention, because they shew that not merely from 1851, but for long before, the western boundary of the Banchory fishings as defined in the leases was the manse offices, which is the boundary claimed by the pursuer as the eastern boundary of the Ardoe fishings.

"No 70 of process is an admittedly correct copy of the conditions on which the witness Robert Clark took the Banchory fishings in 1851. They are headed 'Conditions on which Banchory salmon-fishings are to be let.' . . . The limits of the fishings are thus described:—'The fishing to be let as formerly possessed by Hector. The eastern boundary is 200 yards or thereby below the burn of Hildontree, marked by a stone. The western boundary is at the manse offices.' It will be seen that the limits there described are said to have been those observed by the previous tenant, Hector; and that carries the evidence back far beyond the years of prescription. . . .

"The leases of the Ardoe fishings are not so conclusive, because I do not find a description by boundaries in the earlier leases; but, supplemented by parole evidence, they complete the pursuer's proof; and, taken in connection with the Banchory leases, present, it seems to me, an irresistible body of evidence that the drain is the true boundary. . . .

"There is a good deal of conflicting parole evidence as to this or that place having been pointed out as the boundary of the fishings. I think on the whole that the evidence on that subject given for the pursuer is more reliable, because the witnesses who speak to the drain having been pointed out as the boundary applied for and received information in most cases from the persons who had the most accurate information, viz., the lessees of the respective fishings, or Dr Paul, the venerable minister of Banchory-Devenick. There is some of the evidence, however, which cannot easily be explained on the ground of mistaken recollection on the one side or the other. . . .

"As I have said, the evidence of rod-fishing is inconclusive. There is evidence on both sides, but its value is much diminished by considerations which I have already indicated, and it is still further confused by the fact that many of the persons who, from time to time, fished that piece of water had permission to do so both from Banchory and Ardoe.

"On the whole matter, I think that the pursuer is entitled to declarator and interdict, in terms of the first alternative conclusions of the summons."

¹ Richardson v. Hay, March 12, 1862, 24 D. 775, 34 Scot. Jur. 383.

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The pursuer argued;—While, owing to the antiquity of the event, there might be no clear proof of the actual designation of the glebe, there was a strong presumption that it had been taken partly out of Ardoe and partly out of Banchory, both these estates having been church lands, and there being no evidence of the existence at any time of a third estate intervening which had a right to salmon-fishings. It came, therefore, to be a question of boundary or extent of fishing belonging to each estate. Now, on the evidence it was established that the proprietors of both Banchory and Ardoe had invariably recognised the manse drain as the march, and that this was the march also recognised by the people in the neighbourhood. The proprietor of Banchory had consistently during the prescriptive period leased his fishings up to but not beyond the drain. The evidence throughout contradicted the suggestion that there intervened between the fishings of Banchory and Ardoe a piece of water claimed by no man. It might be that Ardoe had not fished with net and coble, but that was simply because such a mode of fishing was there impracticable. In the circumstances fishing with rod was sufficient.¹ Besides, a grant of fishing in general terms might be explained to comprehend the right of fishing *ex adverso* of adjacent lands.² The evidence clearly established that the pursuer had for the prescriptive period fished the waters in question in the only practicable way, to the exclusion of other persons, and he had therefore a title to sue.

At advising,—

LORD ADAM.—The pursuer is proprietor of the lands of Ardoe, situated on the south bank of the River Dee. Immediately adjoining the lands of Ardoe on the east is the glebe of the parish of Banchory-Devenick, and adjoining this glebe are the defender's lands of Banchory. All these subjects are bounded by the River Dee on the north, the glebe lands lying between the lands of the pursuer and defenders.

The object of the action is to have it declared that the pursuer has sole and exclusive right to the salmon-fishings in the River Dee *ex adverso* of the lands of Ardoe, and also *ex adverso* of that portion of the glebe lands extending eastwards from the point where the said glebe lands meet the lands of Ardoe on the river bank, to a point *ex adverso* of the office-houses of the manse of Banchory-Devenick, or the drain proceeding from the said office-houses to the river; and to have the defenders interdicted from fishing for salmon in any part of the river *ex adverso* as aforesaid.

There is no question as to the pursuer's right of fishing *ex adverso* of the lands of Ardoe. The sole controversy is as to the right of fishing *ex adverso* of the portion of the glebe lands above specified.

The Lord Ordinary has decided the case in favour of the pursuer. After describing the situation of the subjects, he says,—“It is common ground that the fishings do not belong to the glebe, and it is admitted that both the pursuer and the defenders have, in their titles, a grant of salmon-fishings. It therefore appears that the fishings *ex adverso* of the glebe belong either to Ardoe or Banchory, or partly to both properties.” It is on that assumption that the Lord Ordinary has decided the case. But it does not follow that the fishings in question, because they are not claimed as belonging to the glebe, necessarily belong either to the pursuer or defenders. I think that as the

¹ Warrand's Trustees v. Mackintosh, Feb. 17, 1890, 17 R. (H. L.) 13, Lord Watson, p. 23.

² Fraser v. Grant, March 16, 1866, 4 Macph. 596, 38 Scot. Jur. 212.

fishings in question are not *ex adverso* of the lands either of the pursuer or defenders, the legal presumption is that they belong to the Crown, and that in order to displace that presumption the pursuers or defenders, as the case may be, must establish a right to them, either by shewing an express grant, or by proof of possession following upon and explaining a general grant of salmon-fishings. That this is the ordinary rule of law cannot, I think, be disputed; but it is maintained that there are specialities in this case arising from the fact that the fishings are *ex adverso* of the glebe, and from the circumstances attending its designation, which are sufficient to displace that presumption.

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It is said by the pursuer that the glebe was designated partly out of the lands of Ardoe and partly out of the lands of Banchory, but that the right of salmon-fishing *ex adverso* of the lands designated did not pass to the proprietors of the glebe, but remained with the proprietors of these lands, and hence it is, he maintains, that the pursuer and defenders are now in right of the fishings. On the other hand, it is maintained by the defenders that the glebe was designated solely out of the lands of Kirkton of Banchory, which are now part of the lands of Banchory, and that the fishings remained with the proprietors of these lands.

As it appears that the glebe was designated about the year 1602, and as it further appears that the right of salmon-fishing was attached to the lands of Ardoe prior to that date—if it had been shewn that part of the glebe had been designated out of these lands, that might have been sufficient to overcome the presumption in favour of the Crown as regards these lands. But there is no evidence that any part of the glebe was designated out of Ardoe.

As regards the lands of Kirkton of Banchory, it appears, from the titles, that these lands were originally held as a separate subject from the lands of Banchory-Devenick, and belonging to different proprietors. In 1618, the proprietor of Banchory-Devenick purchased Kirkton of Banchory, and these lands have since belonged to the same proprietor.

In the titles of Kirkton of Banchory, however, there is no mention of salmon-fishings so long as it remained a separate subject. In November 1743, James Gordon of Banchory disposed to Alexander Thomson the whole lands of Banchory, including the Kirkton, with "the whole salmon-fishing in the Water of Dee belonging to the said whole lands," and that was followed by a crown charter of resignation in Thomson's favour, dated 8th May 1774, in similar terms. This is the first time a grant of salmon-fishings appears in the titles in connection with Kirkton of Banchory. It appears to me, therefore, that at and prior to the date of the designation of the glebe the salmon-fishings of Kirkton of Banchory presumably belonged to the Crown, and if it be that the glebe was designated out of these lands there is nothing to displace the presumption that these fishings now belong to the Crown. But, as has been pointed out by the Lord Ordinary, there is no evidence to shew out of what lands the glebe was designated, whether wholly out of Kirkton of Banchory, or partly out of these lands and partly out of Ardoe.

In these circumstances, it appears to me that the pursuer must, in order to succeed in this action, shew a title to the fishings either by express grant or by a general grant followed by possession.

This view of the case, however, does not appear to have been presented to the Lord Ordinary, and has not been considered by him, but the defenders were allowed, in the Inner-House, to add a plea to the effect that the

This view of the case, however, does not appear to have been presented to the Lord Ordinary, and has not been considered by him, but the defenders were allowed, in the Inner-House, to add a plea to the effect that the

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The grant of salmon-fishings on which the pursuer founds is expressed in his titles in the following terms :—" All and Whole the town and lands of Ardoe or Ardoch, both sunny and shadowy halves thereof, with the mill of Ardoe or Ardoch, mill lands, astricted multures, sucken, sequels, and knaveships of the same, together with the salmon-fishings on the Water of Dee belonging to the said lands."

The pursuer has, it thus appears, no express grant of these fishings, and the question therefore is whether he has proved exclusive possession of them for the time requisite to give him a right to them.

I may premise that although there have been some changes in the extent of the glebe since it was designated, none of these affect the present question. Thus in the year 1797 the march between the lands of Ardoe and the glebe was straightened, but there is nothing to shew that any alteration was made where these lands met at the river.

It also appears that, when the turnpike road was made along the banks of the river in 1837, certain parts of the lands of Banchory facing the river were added to the glebe in place of part of the glebe which was taken for the road, but this was at the east boundary of the glebe, where it joins the lands of Banchory, and does not affect the present question.

The part of the glebe *ex adverso* of which the fishings are claimed by the pursuer is of limited extent, being only about 130 yards in length. It is common ground that the river at this place cannot be fished by net and coble in the usual way, and it further appears that there is at the upper part of it a back water in which fishing for salmon, even with the rod, is not practicable, so that the dispute between the parties in fact relates merely to the angling in a small portion of the river between the end of this back water and the top of the manse pool, the fishing in which admittedly belongs to the defenders.

The pursuer avers that he has exercised, peaceably and without interruption, the sole and exclusive right of fishing for salmon in this water from time immemorial, or at least for upwards of forty years. I doubt, however, whether the pursuer requires to undertake so heavy an *onus*. A right of salmon-fishing is a heritable subject, and is therefore an estate in land in the sense of the Conveyancing Act of 1874, and by the 34th section of that Act possession for twenty years would appear to be sufficient to constitute a prescriptive right to the fishings.

This action was raised in September 1892, and therefore I think the question is whether the pursuer has proved that he, and his predecessors and authors, have had sole and exclusive possession of these fishings for at least twenty years prior to that date. I further think that fishing by net and coble being, in fact, impracticable in the water in question, proof of such possession by rod-fishing would be sufficient to establish the pursuer's right.

On considering the evidence in the case, one finds a great deal of evidence as to the supposed boundary of the fishing between Ardoe and Banchory, on the supposition that it belonged to one or other of these estates, but there is not much proof as to the actual possession had by the pursuer of the fishings.

Such evidence as there is appears to me to shew that, down to a comparatively recent date, everybody who chose angled on the water in question without objection. For example, David Collison, one of the pursuer's principal wit-

nesses, says,—“When I was a boy (he was born in 1835) I used to fish at and about Ardoe and Banchory-Devenick. There was no permission wanted at that time. Rod-fishing was of little repute then. In my early days everybody fished anywhere up and down without asking permission. I have seen other people fishing there besides myself,” and there is plenty of other evidence to the same effect.

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But perhaps it is enough to refer to the evidence of the pursuer himself as to this. In order to understand his evidence, however, it is necessary to mention that in 1853 Mr Ogston, the pursuer's father, sold to Dr Gillan certain parts of the estate of Ardoe which marched with the glebe on the east, with the salmon-fishings *ex adverso* of the parts so sold. These lands and fishings, which were subsequently known as Cotbank, were thus interjected between the glebe and the parts of Ardoe which remained with Mr Ogston. Cotbank and the fishings were, however, reacquired by the pursuer in 1873.

The pursuer's evidence is in these terms :—“(Q.) During the whole time,” he is asked, “from 1853 till you bought back Cotbank, did anyone from Ardoe, or in right of the proprietor of Ardoe, fish that detached portion opposite the manse? (A.) It could not be fished by net and coble. (Q.) Did anybody fish it in any way? (A.) I cannot say; I knew there was very little rod-fishing during that time. I was absent for three or four years, from 1851 or 1852. I was frequently going about Ardoe from 1855 to 1873. (Q.) During that time did you see people sometimes fishing in the Ardoe water, friends of your father or yourself? (A.) No. I do not recollect seeing anyone fishing with rod and line there in the Ardoe water. There was not much angling in those days, it only commenced when the Dee Association took over the nets. From 1853 to 1873 I cannot name anyone who fished this piece of water in dispute, in right of the proprietor of Ardoe,” and he refers to the terms of the leases. Leases have been produced covering the period from the year 1833 till 1887. The fishings are described in general terms in the earlier leases. But in November 1878 the pursuer lets the fishings to Mr Booth and others for three years from February 1879. In that lease, for the first time, there is a description of the extent of fishings let. They are described as being “the net and rod-fishings on the south bank of the River Dee, on the estate of Ardoe, extending from the mill of Ardoe burn down to the Established Church manse of Banchory-Devenick.” The same description of the subjects let is contained in the subsequent leases.

It is not, of course, material what description of the subjects let the pursuer may have inserted in his leases, unless exclusive possession has followed thereon; but it is not immaterial to notice that it was not until 1878, after the pursuer had reacquired Cotbank, and when, as I think, he first thought of asserting a claim to the fishings in question, that these fishings were included *nominatim* in the subjects let.

It will be observed that the pursuer in his evidence says he cannot recollect seeing anyone fish in the disputed water with rod and line between 1853 and 1873, that he cannot name anyone who fished in right of the proprietor of Ardoe, and he does not say that anyone was ever challenged for fishing during these years.

There is, I think, no evidence that anyone angling in the water in question was ever interfered with by anyone before 1873, and there is no evidence that anyone was interfered with by the pursuer, or those in his right prior to 1887. In the year 1873 Dr Arthur, who had a Banchory permission, was challenged

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while angling in the disputed water by Ritchie, a water-bailiff. But Ritchie did this at his own hand, and not under the authority of the pursuer or anyone in his right, and he does not appear to have had any business to interfere in the matter. Dr Arthur is asked why he left,—“Well,” he says, “I was a boy, and water-bailiffs are water-bailiffs. I had an idea that he was a keen fisher himself, and probably wanted to preserve the best part of the pool for his own benefit, and he being a water-bailiff I did not want to come into collision with him.”

There is no evidence that anyone else was challenged until one of the fishery inspectors, a good number of years after 1881, challenged a man who had a Banchory permission. “I had no right,” he says, “to put him off the water where he was fishing legally, but I told him he was over his march.” I do not see how the pursuer can found on these two acts of interruption. They were not done by him or by his authority.

The only instances of interruption on the part of the pursuer, or those in his right, to be found, are those spoken to by James Ogg, who was gardener to Dr Stewart, who was tenant of the Ardoe fishings from 1887 to 1890 inclusive. He says that it was part of his duty to look after the fishings, and that he used to challenge people who came upon the Ardoe water without permission. “I challenged people,” he says, “on several occasions fishing at the extreme eastern boundary, and turned them off. I remember several of them saying they had a right to be there. They said they had a right from Mr Clark (the tenant of Banchory fishings). I told them they must go by the march, and they went.”

Such being the evidence adduced by the pursuer in support of his claim, I do not think it necessary to examine in detail the evidence for the defender. It shews, however, that many persons, some with and some without permission from Banchory, angled in the disputed water during the last twenty years without interruption or challenge. It shews that on one occasion a Mr Mathieson, who had a Banchory permission, while so fishing, was challenged by Mr Booth, who was tenant of Ardoe fishings for some years subsequent to 1878. But Mr Mathieson asserted his right to fish where he was fishing. “I took no notice,” he says, “and fished away. I went back and fished the same place afterwards.”

I concur in the view of the evidence expressed by the Lord Ordinary. “The evidence,” he says, “for which one would naturally look in such a case is evidence of possession. But unfortunately the evidence of possession by rod-fishing is unsatisfactory and inconclusive, and it is admitted for the pursuer that upon that evidence alone he cannot succeed. It is not surprising that the evidence upon this point should not be more decisive. At best the fishing in dispute is, even now, of comparatively little value; the river at that point cannot be fished with net and coble; and even for the purposes of rod-fishing it cannot be of much value, because at the upper part there is back water, and lower down it is difficult to fish. Add to this, that until recently rod-fishing was of little value in the market, and therefore proprietors of salmon-fishings were not so particular in preventing rod-fishing in those parts of a river where it would not interfere materially with the net-fishings, and they were more liberal in giving leave to fish, when that was asked by friends or neighbours, or even by strangers.”

I am therefore of opinion that the pursuer has failed to prove that he has had sole and exclusive possession of the fishings in question for the prescriptive

period, and that the plea now insisted on by the defenders, that the pursuer has no title to them, must be sustained. No. 56.

If that be so it is enough for the decision of the case. It is not necessary to consider whether the defenders, as they claim, have made out a right to these fishings. In the absence of the Crown, I do not think it would be right to find that either party had made out such a right. Dec. 13, 1893.
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I therefore think that the interlocutor of the Lord Ordinary should be recalled.

LORD M'LAREN.—I have had an opportunity of reading Lord Adam's opinion, and I concur in it.

LORD KINNEAR.—I am of the same opinion. I think the observation of the Lord President in the case of *Richardson v. Hay* (24 D. 775) that the pursuer's case was not based upon the strength of his own position, but upon the weakness of his opponent's, is a very apt description of the argument which was addressed to us by the pursuer in this case; and indeed it expresses accurately also the ground of the Lord Ordinary's judgment, because the judgment appears to me to be based upon the hypothesis that if the fishings in dispute are not shewn in this action to belong to the defender, they must of necessity belong to the pursuer. Now that might be a very legitimate mode of reasoning in a question of disputed marches between conterminous proprietors; but in the present case the riparian properties of the pursuer and defender are separated from one another by the glebe lands of Banchory-Devenick, which extend for about 350 yards along the river, and we cannot assume that their fishing rights are in fact conterminous until one or other has established an exclusive right to fish *ex adverso* of the glebe. But no one can have such a right except by grant flowing from the Crown; and if neither party can shew a title which either includes the fishings in dispute in terms, or can be shewn by competent evidence to have been intended to embrace them, the inference is that these fishings remain in the hands of the Crown, if they have not been given out to some other grantee. The pursuer's conclusion is that he has right not only to the undisputed fishings of his estate of Ardoe, but that he has an exclusive right to the salmon-fishings in the River Dee *ex adverso* of that portion of the glebe lands of the parish of Banchory-Devenick, extending from one point described in the conclusion of the summons to another. Now, that is an assertion of a good right to a specific heritable estate; and before we can affirm that proposition in the pursuer's favour, he must produce a clear title to that specific subject. The earliest title which he has produced is a crown charter of 1594, including the sunny half of the estate of Ardoe, with the salmon-fishings in the Water of Dee adjacent to the said lands. The second is a feu-charter by a subject of the shadow half of the estate of Ardoe, with the fishings. Now, the first of these titles contains words of limitation. It is a fishing adjacent to the land granted out which is given to the grantee. The second title does not contain any express words of limitation, but it is a grant of the shadow half of the lands with the salmon-fishings. The two halves came to be combined in one proprietor in 1840. The connecting links have not been traced; but it is not disputed that the title of 1840, upon which the present pursuer founds, is connected by a valid series with the charters I have mentioned, and by this title he holds the estate of Ardoe, both shadow half and sunny half, with the salmon-fishings in the Water of Dee belonging to the said lands. Now, there again we

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have words of limitation. The question is what is meant by the salmon-fishings belonging to the lands of Ardoe. There can be no doubt at all that that is a perfectly good title to the fishings *ex adverso* of the lands included in the charter, but it is not an express title to fishings lying beyond these limits. It may be explained by evidence to comprehend fishings *ex adverso* of the adjoining lands, or altogether discontinuous from the lands conveyed, but without such evidence it cannot, by force of its own terms, be made to cover any adjacent or discontinuous water. *Prima facie* it means the fishings *ex adverso* of the lands conveyed. Now, the kind of evidence by which a title of that kind may be extended so as to comprehend fishings that are not precisely *ex adverso* of the lands was very fully considered in the case of *Fraser v. Grant*, and the principle upon which such evidence is to be considered is there laid down by the late Lord President,—then Lord Justice-Clerk. His Lordship points out, in the first place, that such a title may be explained by evidence of possession; but then he goes on to say that it is also perfectly competent to shew by proof of a different kind that the true meaning of the grant is more comprehensive than could be assumed without such evidence, because the words used have a certain definite and well-known signification, and had that signification at the time that the grant was made. Now, it appears to me, in the application of that principle, that if the pursuer could have shewn that the glebe of Banchory-Devenick had been taken in whole or in part from his estate of Ardoe, or that the lands which are now glebe lands were part of Ardoe at the date of the crown grant, that would have been evidence tending to shew that the fishings *ex adverso* of the glebe land had been part of his salmon-fishing right. But then there is no evidence from which any inference of that kind can be drawn; and indeed the pursuer himself does not contend that there is, because his case upon record with reference to the glebe of Banchory-Devenick is that it is impossible to determine with certainty whether the glebe lands had been taken from the lands of Ardoe or from the lands of Banchory, or partly from the one and partly from the other. There is no evidence of the date when the glebe was first designed; and there is certainly no evidence by which we can identify the portion of the glebe in dispute with any part of the estate of Ardoe. And therefore the pursuer must fall back on the other kind of evidence,—the only evidence which can really be relied on in this case to shew that the salmon-fishings belong to the estate of Ardoe,—that is, evidence that from time immemorial he has exercised a right of salmon-fishing beyond the limits *ex adverso* of his own lands, and extending to the lands within the glebe of Ardoe, to which the conclusions of the summons relate. Now, upon the kind of evidence which is necessary to clear a title which is to be explained by possession only, the Lord Justice-Clerk, in the case I have referred to, says this,—“If the pursuer and his predecessors as proprietors of the land and fishings contained in the infeftment can shew that for forty years, or from time immemorial, they have exercised the right of salmon-fishing *ex adverso* of the disputed land, that will be sufficient to explain the title as applying to and comprehending these fishings.” But then his Lordship goes on to say,—“I know no authority for holding that possession to explain the terms of a crown grant of salmon-fishing can be possession for anything short of time immemorial, or forty years.” Now, agreeing with Lord Adam that the pursuer may probably be entitled in this case to substitute the period of twenty years for the period of forty years, I entirely agree with him also that there is no evidence of exclusive possession of the salmon-fishings in

dispute by the pursuer or his predecessor for the period of twenty years. If the pursuer's case be considered on its own merits, apart from any weakness, real or supposed, in the defenders' case, it can hardly be maintained that he has established a right to salmon-fishing by exclusive possession during that period. I am therefore of opinion with Lord Adam that the pursuer has failed to make out his case. But while we must therefore negative the right alleged by the pursuer, I agree that we are not in a position to affirm the right put forward by the defender. Whether he may or may not be in a position to make out a title against the Crown, or any undoubted grantee of the Crown, we do not know. It is not necessary for the purposes of the present action to decide that, and, therefore, I think we can do nothing more than affirm the plea in law added in this Division.

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THE COURT recalled the interlocutor of the Lord Ordinary, sustained the plea in law added for the defenders, and assolizied the defenders.

AULD & MACDONALD, W.S.—T. J. GORDON & FALCONER, W.S.—Agents.

STEWART, BROWN, & COMPANY, AND OTHERS, Pursuers (Respondents).—*Johnston—Ure.* No. 57.

BIGGART & FULTON, Defenders (Appellants).—*Dickson—Younger.*

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Stewart, Brown, & Co. v. Biggart & Fulton.

BIGGART & FULTON, Pursuers (Appellants).—*Dickson—Younger.*
STEWART, BROWN, & COMPANY, Defenders (Respondents).—*Johnston—Ure.*

Sale—Principal and Agent—Title to sue.—On 31st March Stewart, Brown, & Company sent the following sale-note to Biggart & Fulton:—"We have this day sold to you, on account of Stevenson & Company, Manila, 100 tons of sugar at £10, 17s. 3d. c. i. f. Liverpool . . . we to accept shippers' drafts at 3 m/s."

Biggart & Fulton authorised Stewart, Brown, & Company to take delivery of and sell the sugar on arrival in Liverpool and to credit themselves with the proceeds against the price, and their outlay in taking delivery of the sugar and selling it. The proceeds of the sale in Liverpool were insufficient to meet the price, &c., and Stewart, Brown, & Company (together with Stevenson & Company) sued Biggart & Fulton for the difference.

In defence Biggart & Fulton pleaded no title to sue, in respect that Stewart, Brown, & Company, as agents for a disclosed principal, had no title, and that Stevenson & Company had no title, as they had made no contract with Biggart & Fulton.

On a proof it appeared that Stevenson & Company were in the custom of sending cargoes of sugar to this country for sale, but instead of breaking the cargoes into quantities to suit purchasers they disposed of them entire to brokers upon contracts which bore that the broker was "buyer" of the cargo at a certain sum per ton. The broker then disposed of the sugar in lots to the buyers whom he had secured at a somewhat increased rate per ton, he receiving the difference. Stewart, Brown, & Company held the cargo, of which the 100 tons in question was a part, on a contract in these terms, and disposed of it in this way to different purchasers.

Held (diss. Lord Rutherford Clark) that Stewart, Brown, & Company, as agents for Biggart & Fulton in paying the price, taking delivery of the sugar, and reselling it at Liverpool, were entitled to recover the sum sued for.

Question (per Lord Trayner), whether the pursuers had a title to sue upon the sale-note of 31st March.

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2D DIVISION.
Sheriff of
Lanarkshire.

In November 1892 Stewart, Brown, & Company, merchants and produce-brokers, Glasgow, with consent of W. F. Stevenson & Company, merchants, Manila, and W. F. Stevenson & Company, for all right and interest competent to them, raised an action in the Sheriff Court at Glasgow against Biggart & Fulton, shipowners there, for payment of £31, 14s. 4d., subsequently restricted to £29, 9s. 10d.

The pursuers averred ;—(Cond. 1) "On 31st March 1892 the pursuers Stewart, Brown, & Company entered into a contract with the defenders in the following terms :—

"116 St Vincent Street, Glasgow, 31st March 1892.

"Messrs Biggart & Fulton, Glasgow.—Dear Sirs,—We have this day sold to you, on account of Messrs W. F. Stevenson & Company, Manila and Iloilo, about 100 tons usual American assortment of Iloilo sugar at £10, 17s. 3d. c. i. f. Liverpool.

"Shipment by steamer and/or steamers from Iloilo during the months of April and/or May and/or June 1892.

"Payment.—We to accept shippers' drafts at 3 m/s. with shipping documents attached deliverable against payment.

"Insurance.—Horsley, Kibble, & Company to insure on their floating policies f. p. a. at buyers' expense.

"Contingent Comn.—Buyers to return to shippers half the profit (if any), but not exceeding half of first 10 per cent profit.—Yours truly,

"STEWART, BROWN, & COMPANY."

(Cond. 2) "The pursuers Stewart, Brown, & Company were afterwards instructed by the defenders to sell the sugar on its arrival, and credit themselves with the proceeds. They did so, but the price realised was not as much as the price due under the contract quoted. To account of the difference the defenders have paid £100, but there is still left a balance of £31, 14s. 4d." which balance the defenders refuse to pay.

In defence Biggart & Fulton averred ;—(Ans. 1) "Said letter is referred to for its terms, beyond which no admission is made. Explained (1) the alleged contract is *ex facie* made on behalf of the pursuers W. F. Stevenson & Company, and the defenders aver and believe that the pursuers Stewart, Brown, & Company had no authority from the said W. F. Stevenson & Company to enter into the same ; (2) that *ex facie* of said alleged contract the pursuers Stewart, Brown, & Company are merely brokers for W. F. Stevenson & Company, and have no title to sue ; (3) that no contract has been completed between the pursuers W. F. Stevenson & Company and the defenders, and said pursuers have no title to sue."

In a statement of facts, Biggart & Fulton further averred that they had authorised Stewart, Brown, & Company, as their brokers, to purchase on their account 100 tons of a proposed shipment of sugar by W. F. Stevenson & Company ; that they themselves had no knowledge of the sugar trade, and were induced to purchase the sugar solely by the representations of William Govan, a partner of Stewart, Brown, & Company, and by concealment of material facts on his part ; that "he stated his firm strongly recommended the purchase, and were so confident of the result that their commission would be contingent on a profit being made, and he assured the defenders that unless the transaction turned out profitably his firm would derive no benefit whatever from it" ; but that on the contrary, as the defenders had recently ascertained, Stewart, Brown, & Company, instead of being interested in a contingent commission as represented, were themselves the principals, as being owners of the sugar at the date of the alleged sale to the defenders, and that they derived a profit out of the sale ; and consequently that no con-

tract of sale had been effected between Stevenson & Company and Biggart & Fulton. There were certain other misrepresentations and concealments alleged by Biggart & Fulton which are not necessary to be here detailed.

The pursuers pleaded, *inter alia*;—(2) The defenders being, in terms of the contract libelled, justly indebted and resting owing to the pursuers the sum sued for, the pursuers are entitled to decree as craved, with expenses.

The defenders pleaded, *inter alia*;—(1) No title to sue. (3) The defenders never having been indebted to the pursuers, are entitled to be assolizied. (4) *Separatim*, The alleged contract having been entered into on the faith of statements by the pursuers Stewart, Brown, & Company, which were false and fraudulent, or were at least misrepresentations of matters material to the contract, the falsity of which they knew, or ought to have known, the defenders are entitled to repudiate said contract.

Biggart & Fulton subsequently raised an action against Stewart, Brown, & Company for repayment of the £100 paid by them to Stewart, Brown, & Company to account of the price of the sugar. They averred that they had made this payment before they became aware that no contract had been made between themselves and W. F. Stevenson & Company.

The two actions were conjoined, and a proof was allowed. The evidence was to the following effect:—W. F. Stevenson & Company were in the custom of sending cargoes of sugar to this country for sale, the sales being effected through their representatives, who were Horsley, Kibble, & Company in London, Horsley, M'Laren, & Company in Liverpool, and Stevenson & Fleming in Glasgow. Neither Stevenson & Company nor their representatives were in the way of breaking up the cargoes into quantities to suit purchasers. Mr H. F. Stevenson, of Stevenson & Fleming, deponed,—“We never sell in these small quantities; we only sell in large quantities by a cargo at a time.” Their practice was to intimate to a broker when they had a cargo for sale, and if the broker could find purchasers whose offers in the aggregate were equal to the amount of the cargo, he himself offered for the whole, and if the price suited Stevenson & Company the transaction was completed. In this way the cargo, of which the 100 tons now in question formed a part, came to Stewart, Brown, & Company under a contract expressed as follows:—

“Liverpool, 31st March 1892.

“Messrs Stewart, Brown, & Company,

“per Messrs Stevenson & Fleming, Glasgow.

“Dear Sirs,—We have this day sold to you, on account of Messrs W. F. Stevenson & Company about 700 tons usual American assortment of Iloilo sugar at £10, 12s. 3d. c. i. f. Liverpool.

“Shipment by steamer and/or steamers from Iloilo during the months of April and/or May and/or June 1892.

“Payment.—Buyers to accept shippers' drafts at 3 m/s., with shipping documents attached, deliverable against payment.

“Insurance.—Horsley, Kibble, & Company to insure on their floating policies f. p. a. at buyers' expense.

“Contingent Comm.—Buyers to return to shippers half the profit (if any), but not exceeding half of first 10 per cent profit.

“Brokerage $\frac{1}{2}$ per cent to buyers.—Yours truly,

“HORSLEY, M'LAREN, & COMPANY.”

In some of the contracts with Stewart, Brown & Company, there was a clause entitling them to so much of the price by way of commission—

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usually 5s. per ton, but under the contract just quoted the whole price (£10, 12s. 3d. per ton) was to be paid to Stevenson & Company, Stewart, Brown, & Company being entitled to add 5s. per ton in fixing the price to be paid by their buyers, thus bringing out the £10, 17s. 3d. per ton set forth as the price in the sale-note to Biggart & Fulton (*supra*, p. 294).

John Stewart, of Stewart, Brown, & Company, deponed,—“Our understanding as to our position with Stevenson & Company was that we were entirely their agents. . . . Cross-examined.—(Q.) How did you come to sell the sugar for the defenders? (A.) We got the sugars from them to sell in the usual way. (Q.) Did the increase in price that you put on not cover the selling? (A.) Yes, that was part of it. The selling was part of that item of 5s. (Q.) So that you were acting for them there also? (A.) We do not admit that we were acting for them in buying. (Q.) But you were acting for them in selling? (A.) Yes. (Q.) And you charged for it in your original price? (A.) No. Of course the 5s. includes the selling at the beginning to Biggart & Fulton. By the Court.—(Q.) Does it also include the selling for them? What remuneration did you get for selling for them? (A.) We got nothing for selling for them. Cross continued.—(Q.) Did the 5s. not include the selling for them? (A.) It included the financing and looking after the transfer and all that. (Q.) And the selling for them? (A.) Yes, it would include that too. By the Court.—You regard the selling for them as part of your financing? (A.) Yes. (Q.) It is a consequence of your financing? (A.) Yes. Cross continued.—(Q.) So that you were paid for this selling for them in your original price? (A.) You can take that as the position if you wish it.”

Mr Govan, of Stewart, Brown, & Company, examined as a witness by Biggart & Fulton, deponed,—“(Q.) What particulars did you give to your buyer (Biggart) when you got this order? (A.) I told him the price. I gave him the price and the ship. (Q.) What further particulars did you give him? (A.) I told him about the contingent commission. I told him all about the contract, as far as I remember. (Q.) What particulars did you give as to your position in the transaction? (A.) I did not begin to talk about that at all. I did not say anything about that. (Q.) What did you say about your brokerage? I said nothing about brokerage. I told him about the contingent commission; that was all I said. I told him the first advance of ten per cent was to be divided between the shippers and the receivers of the sugar, the buyers. (Q.) Did you represent that you were only to have a brokerage in the event of it turning out profitable? (A.) I did not. I told him that our people had sold the sugar at a price so near the bone that unless the market advanced and they participated in the contingent commission, it would leave them practically nothing. . . . (Q.) Did you undertake to carry through the transaction to a close, and simply render accounts? (A.) I told Mr Biggart we could do all that—that they would not need to take up the drafts—that we would see the sugar sold, and that sort of thing. (Q.) You arranged that you would do so? (A.) That we would see it done. (Q.) And you so arranged? (A.) Yes—that is, that they would not need to take up their sugar when it arrived—that they would not need to pay for the sugar—that they would not be saddled with 100 tons of sugar that they did not know what to do with. (Q.) So you had a conversation about realising the sugar? (A.) Yes, about that. (Q.) And at the time you arranged to undertake that? (A.) To see the transaction completed. (Q.) Was this to be taken along with your financing, the realising of it? (A.) No; that did not include any commission for the selling of the sugar. (Q.) I am not asking about commission; was this work to

be taken along with the financing, that you would carry the transaction right through and render accounts at the close? (A.) Yes, I should say so. (Q.) They were to have no trouble whatever until it was all closed? (A.) Just so. (Q.) And you would render accounts? (A.) Yes."

John F. Fulton, of Biggart & Fulton, deponed that Stewart, Brown, & Company had "acted purely and simply as brokers. We dealt through them as brokers. . . . I never discussed with them any business matters in any other position. . . . Govan said that his commission was to be a contingent commission on the profit. That was to be his entire commission, that if we had no profit on our transaction, they, as a firm, would have no profit either. They were willing to enter into this arrangement, because they were so very strong in the belief that the market would rise. This was held forward to us as an inducement. He also said that we would have no trouble whatever in the transaction—that they would accept the shippers' drafts—that in all probability the cargo would be sold before arrival, and that we would have no financing whatever to do—that they would do everything for us and sell the sugar, and the selling commission was also to be covered by this contingent commission." Mr Fulton further deponed that he was not familiar with the sugar trade.

Mr Biggart in substance corroborated this evidence.

The sugar was sold in Liverpool through a firm of brokers there, who charged $\frac{1}{4}$ per cent on the price realised by the sale, and of this commission Stewart, Brown, & Company got one-half, but they received nothing by way of commission on the sale in Liverpool from Biggart & Fulton direct. The sum realised by the resale was about £130 short of that required to pay the price and the costs of the resale. Biggart & Fulton paid Stewart, Brown, & Company £100 to account, and the sum sued for by the latter was the balance.

On 28th July 1893 the Sheriff-substitute (Guthrie) pronounced this interlocutor:—"Finds that by contract, dated 31st March 1892, the parties Stewart, Brown, & Company, as agents for W. F. Stevenson & Company, Manilla, sold 100 tons of sugar to the parties, Biggart & Fulton, on the terms condescended on by Stewart, Brown, & Company: Finds that Stewart, Brown, & Company were not in said sale acting as brokers or as agents for Biggart & Fulton: Finds that the said sale was not induced by fraud or misrepresentation of Stewart, Brown, & Company: Finds that the parties Stewart, Brown, & Company sold the sugar on arrival on behalf of the parties Biggart & Fulton, and that on a true accounting between the parties the sum of £29, 9s. 10d. is due and resting owing by Biggart & Fulton to Stewart, Brown, & Company: Therefore in the action Biggart & Fulton v. Stewart, Brown, & Company assoilzies the defenders, and decerns; and in the action Stewart, Brown, & Company v. Biggart & Fulton, decerns in terms of the petition as restricted by minute," &c.

Biggart & Fulton appealed, and argued;—(1) Stewart, Brown, & Company had no title to sue upon the sale-note of 31st March 1892 granted by them to Biggart & Fulton, for in it they were described as agents, and when a broker gave a sale-note describing himself as acting for a named principal, he could not sue personally on the contract.¹ Nor had W. F. Stevenson & Company a title to sue, for though described as principals in the sale-note they were not so in fact. They had sold the sugar to Stewart, Brown, & Company. It was clear on the proof that Stevenson & Company were not sellers under any contract with Biggart & Fulton as

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¹ Benjamin on Sale, 4th ed. p. 211.

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buyers, and that Stewart, Brown, & Company were *de facto* at the date of the alleged sale the owners of the sugar. It was true that Biggart & Fulton, if it had been their interest to do so, might have sued Stewart, Brown, & Company for damages, and Stewart, Brown, & Company might have met the action by tendering the sugar, but Stewart, Brown, & Company would have been sued, not as sellers under a contract of sale, but as brokers who were in breach of a contract to effect a sale between Stevenson & Company and Biggart & Fulton. Stewart, Brown, & Company, therefore, had no converse right of action. Nor (2) had Stewart, Brown, & Company a title to sue as on an accounting with respect to the sale of the sugar in Liverpool. Doubtless independent brokers employed by Biggart & Fulton could have recovered their outlay and commission, notwithstanding any invalidity in the contract between Stevenson & Company and Biggart & Fulton, but Biggart & Fulton's action against Stewart, Brown, & Company for damages for breach of contract would have remained. Stewart, Brown, & Company, however, were not in the position of independent brokers selling sugar which had come into the hands of Biggart & Fulton under a contract of which they knew nothing. What they had contracted with Biggart & Fulton to do was in the first place to effect a sale between Stevenson & Company as sellers and Biggart & Fulton as buyers; and secondly, to sell the sugar so purchased for behoof of Biggart & Fulton. If, then, they had never effected a sale to Biggart & Fulton they were not entitled to plead any rights which they might otherwise have had as brokers effecting a resale. If the sugar had never been sold to Biggart & Fulton the sale in Liverpool was either on account of Stewart, Brown, & Company themselves or on account of Stevenson & Company. Biggart & Fulton, therefore, were entitled to recover the £100 paid by them to account of a contract which *de facto* had no existence.¹

Argued for Stewart, Brown, & Company and Stevenson & Company;—
(1) The true relation between Stevenson & Company and Stewart, Brown, & Company was that of principals and agents, not that of sellers and purchasers. That for their own convenience, and in accordance with the custom of the trade, they had chosen, in the contract-note between themselves, to describe themselves as sellers and buyers respectively, was a matter with which Biggart & Fulton had no concern. If they had chosen to call themselves principals and agents the result to Biggart & Fulton would have been the same. Biggart & Fulton had got the sugar which they had contracted for, at the price which they had stipulated, and they had resold it, and what they now wished to do was to saddle the loss arising on a resale on someone else. The pursuers of the principal action consequently had a title to sue. But (2) even if the title to sue as on the sale-note of 31st March could not be sustained, Stewart, Brown, & Company had a title to sue for recovery of the outlay incurred by them on account of Biggart & Fulton. In selling the sugar in Liverpool they were acting, and that for the first time in this transaction, as the agents of Biggart & Fulton, and any technical informality in the contract as between Stevenson & Company and Biggart & Fulton could not affect Stewart, Brown, & Company's rights as agents of Biggart & Fulton. Had they been independent brokers no question on this head

¹ Robinson v. Mollett, 1875, L. R., 7 Eng. and Ir. App. 802, per Brett, J. at p. 820; Bostock v. Jardine, 1865, 3 Hurl. and Colt. 700; *Ex parte Whyte*, 1871, L. R., 6 Chanc. App. 397, 1871, 21 Weekly Reporter, 465; Rothschild v. Brookman, 1831, 2 Dow and Clark, 188; Maffet v. Stewart, March 4, 1887, 14 R. 506.

could have arisen, and it made no difference that in one view they were themselves the sellers of the sugar to Biggart & Fulton, when in truth and substance the sellers were Stevenson & Company. Biggart & Fulton had suffered no prejudice.

At advising,—

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LORD JUSTICE-CLERK.—In this case, though there has been a long proof, the circumstances may be shortly stated. Stevenson & Company had a cargo of sugar—700 tons—which they wished to dispose of, but they did not sell in small lots, but only in large lots, and they applied to Stewart, Brown, & Company with the view that Stewart, Brown, & Company should endeavour to get the sugar placed with a number of buyers. Biggart & Fulton, the defenders in this case, had interviews with a representative of Stewart, Brown, & Company, and as the result of these interviews they agreed to take 100 tons of sugar, and the form which the transaction took is shewn by the letter of 31st March 1892. It bears on the face of it that Stewart, Brown, & Company “sold on account of Stevenson & Company, of Manila and Iloilo, sugar, about 100 tons usual American assortment.” It appears that Stevenson & Company stipulated with Stewart, Brown, & Company that the sugar was not to be sold for less than £10, 11s. 3d. per ton, while in point of fact there was more paid for the sugar per ton in the transaction between Biggart & Fulton and Stewart, Brown, & Company, and what Biggart & Fulton complain of is that Stewart, Brown, & Company were taking a profit out of the transaction—in reality, that they had arranged only to sell at a lower price, and that the sale to Biggart & Fulton has been at a higher rate than that which they were authorised to take. Now, I am not satisfied that as regards that part of the case there was anything wrong in the transaction at all. I think it is satisfactorily made out that Stevenson & Company, while they stipulated that they were not to get less than £10, 11s. 3d., were quite willing that the sugar should be sold for them at such higher price as Stewart, Brown, & Company could get, the latter keeping the difference for their trouble in working the transaction. Biggart & Fulton's case is this—that this was not the nature of the transaction at all, but that they, Biggart & Fulton, purchased the sugar direct, and that in the transaction Stewart, Brown, & Company were only acting for them. I have been unable on consideration of the evidence in this case to come to any such conclusion. The case as presented by Stewart, Brown, & Company is, I think, the true one. I do not attach the same weight to Biggart & Fulton's evidence on the matter as to the evidence given for Stewart, Brown, & Company. But then what happened was this, the price was paid to Stevenson & Company. Biggart & Fulton, who were not themselves dealers in sugar at all, and were engaged in other business—a class of work of quite a different kind, and who were entering into this as a speculation in the hope of making some money out of it—arranged with Stewart, Brown, & Company that on the arrival of this sugar Stewart, Brown, & Company should act as their agents in getting it disposed of. The market for sugar fell remarkably, and the result was that on the realisation of the transaction by Stewart, Brown, & Company for Biggart & Fulton there was a considerable loss. Now, it seems to me that it is upon this latter part of the transaction that the true question between the parties arose. Stewart, Brown, & Company sell for Biggart & Fulton, and a loss of £130 ensues. £100 had been already paid to Stewart, Brown, &

No. 57. Company by Biggart & Fulton to account for the sugar, and Stewart, Brown, & Company sue for the balance of £30.

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I think the pursuers in the action at the instance of Stewart, Brown, & Company are entitled to prevail, and are not liable in the action at Biggart & Fulton's instance to pay back the £100.

I have stated my views very shortly after perusing the opinion of Lord Trayner, in which I entirely concur.

LORD RUTHERFURD CLARK.—On 31st March 1892 the respondents advised the appellants that they had sold to them on account of Stevenson & Company 100 tons of sugar at £10, 17s. 3d. per ton. The appellants paid to the respondents £100 to account of the price, and instructed them to sell the sugar on arrival. The respondents did so, but they say that the sum realised, after crediting the £100, fell short of the price by £29, 9s. 10d. We have before us two actions, in the one of which the appellants seek to recover the sum of £100 before mentioned, and in the other the respondents sue for the foresaid sum of £31, 14s. 4d.

The case of the appellants is that there was no sale by Stevenson & Company to them, that they paid £100 to the respondents in ignorance of that fact, and that in the same ignorance they desired them to sell the sugar on arrival. They further say that the respondents represented themselves as acting as their brokers in making a contract with Stevenson & Company, while the fact was that the respondents had bought the sugar from Stevenson & Company at the price of £10, 12s. 3d. per ton, being 5s. less than the price advised to themselves.

On turning to the proof we find that Stevenson & Company are produce merchants on a large scale, and that they never sell so small a quantity as 100 tons of sugar. Mr Stevenson says,—“We only sell in large quantities by a cargo at a time.”

In March 1892 Stevenson & Company had 700 tons to sell, of which it is not disputed that the sugar in question was a part. By a sale-note dated 31st March they sold these 700 tons to the respondents at the price of £10, 12s. 3d. per ton. The clauses expressive of the conditions of the sale are—

“Payment.—Buyers to accept shippers' drafts at 3 m/s, with shipping documents attached, deliverable against payment.

“Contingent Comn.—Buyers to return to shippers half the profit (if any), but not exceeding half of first 10 per cent profit.

“Brokerage.— $\frac{1}{2}$ per cent to buyers.”

With this document before me I cannot doubt that the respondents bought the sugar. It bears that they are purchasers, and they, and they only, are bound for the price. The clause relating to brokerage is unusual, but it is not inconsistent with the existence of a contract of sale. So far from it, the brokerage is given to the respondents “as buyers.”

It is said that the respondents were only acting as the agents of Stevenson & Company in finding buyers of small quantities, and that the contract was a contract of sale in name only. It is true that Stevenson & Company knew that the respondents were endeavouring to procure such buyers, and that they paid them a commission for their trouble. But it is equally certain that the buyers for whom the respondents were seeking were not to contract with Stevenson & Company, for the simple reason that that firm would sell nothing

less than a cargo. The success of the respondents in finding buyers might result in the sale of the cargo. Consequently Stevenson & Company might think it right to give the respondents some remuneration. But as they would not sell less than a cargo, it follows that the respondents must be the buyers from Stevenson & Company, though they might not enter into a contract of sale until they had made arrangements for a re-sale.

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There is evidence to shew that the respondents, though buyers in form, were understood by Stevenson & Company to be their agents only, and that the increase of 5s. per ton which the respondents put on the price is to be regarded as a charge by way of commission, which Stevenson & Company authorised them to make. I can attach no importance to such evidence. It does not and cannot affect what was done. For in saying that they sell in cargoes only, Stevenson & Company reject the idea that the purchasers of small lots have any contract with them. Whatever might happen to these purchasers, the respondents were liable for the price in the sale-note. There was no contract under which they could be so liable except what professes to be a contract of sale, and in my opinion it is what it professes to be. Again, what is stipulated for as price must be regarded as price only. I cannot take it as including a concealed commission.

For these reasons I am satisfied that there was no contract between the appellants and Stevenson & Company; that the respondents improperly represented that they had made such a contract; and that in the belief that such a contract was made, the appellants paid £100 to account of the price and directed the sale on arrival. The question is, whether they are liable for the loss which has arisen, or whether they are entitled to recover the money which they paid under an erroneous belief.

I do not see how the appellants can be liable for any part of the price, or for any loss under a contract which they never made. If nothing had been done I think it clear that they could not have been bound by it. It is said that the respondents could have taken the place of Stevenson & Company, and insisted on implement. I am not of that opinion. It is true that the appellants might have sued them, because they have not bound Stevenson & Company, and in that case they would have been entitled to avoid any claim of damage by offering to deliver the goods. But the converse does not hold. The appellants did not agree to make any contract except with Stevenson & Company, and if that contract was not made they are necessarily free.

Can it matter that the alleged contract was acted on? I do not think so. The appellants did nothing except what they believed themselves to be bound to do, and when they came to know their error they repudiated all liability. They did nothing from which it could be inferred that they took the respondents as their sellers instead of Stevenson & Company. Besides, their error was due to the misrepresentations of the respondents, and I cannot see how they can incur any liability to the respondents by acting under an error so produced.

It is said that the question before us does not arise by reason of the alleged contract of sale, but from the fact that the appellants employed the respondents to realise the sugar on arrival. This is not so. The appellants seek to recover what they paid to account of the price—the respondents to recover the loss on the contract. No doubt that loss is in part made up by debiting their own charges on selling. But apart from these charges, the claims of each depend on

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the existence or non-existence of the contract of sale. The appellants maintain that they were never liable under it. The respondents insist that the appellants are bound to fulfil it. It is only on that ground that the respondents could have any right to retain the £100 which was paid to account of the price, and to require the appellants to make good the loss. Nor are the charges in a different position. If there was no contract, they were incurred on a sale by the respondents of their own goods. No doubt the sale was ordered by the appellants. But the order was due to the misrepresentation of the respondents, and they can take no benefit from it.

For these reasons I am of opinion that the appellants should prevail in both actions. I do not require to enter on the question whether the respondents represented themselves as acting as the brokers for the appellants. It is enough, I think, for the disposal of the case that the appellants were not bound by any contract. Nor need I take any notice of the alleged custom under which it is said that apparent buyers are agents only, and that with the assent of the principals they increase the price in order to obtain a commission under the name of price. It is of no importance in this case, because I hold that the respondents were in truth the buyers from Stevenson & Company. But I am sorry that any such custom should exist. Unless it is known to all concerned, it is a means of deception. If all know of it, it is useless. It is a good rule to call things by their right names. It would be better for all parties if it were strictly followed.

LORD TRAYNER.—I agree with the Sheriff-substitute in holding that in the transaction under which the defenders (Biggart & Fulton) bought the 100 tons of sugar in question, the pursuers (Stewart, Brown, & Company) did not act as brokers or buyers for them. I think it is established on the contrary that the defenders in that transaction bought for themselves, and further, that they were not induced to make the purchase by fraud or misrepresentation on the part of the pursuers.

The defenders, however, maintain that the pursuers are not entitled to the decree which they ask, on the grounds (1) that the pursuers being represented in the contract of 31st March 1892 as agents for a disclosed principal, are not entitled to sue on that contract, the principal alone being entitled to do so; (2) that no such contract as is there expressed was made between Stevenson & Company and the defenders; and (3) that in making said contract the pursuers were not acting as agents for Stevenson & Company, or with their authority.

I am not sure that the ascertained facts support these contentions in law, but I am of opinion on another ground, which I shall state hereafter, that these pleas cannot receive effect in the present case. The facts appear to be these:—Stevenson & Company had about 700 tons of sugar to dispose of, and indirectly—that is, through their representatives in Liverpool and Glasgow—placed them in the hands of the pursuers for sale. Stevenson & Company would not sell this sugar in small quantities; they desired to place the whole 700 tons by one transaction; but they knew that the pursuers as commission-agents were or might be in a position to place the whole quantity. Accordingly the 700 tons were placed at the disposal of the pursuers at a certain price by Stevenson & Company, the latter knowing that the pursuers were not themselves buyers of the sugar, that they would merely procure buyers, and that they would get as

much higher a price than Stevenson & Company required as they could, the excess obtained beyond Stevenson's price to belong to the pursuers as their remuneration for their trouble in placing the sugar. In this way Stevenson & Company got their whole quantity of sugar sold for them at the price they named, and the pursuers were remunerated for their trouble according to their success in getting a higher price than Stevenson had fixed. The defenders bought 100 tons of this sugar. Now, it may very well be said in one view of the facts as thus stated that Stevenson & Company were not the sellers to the defenders of, and never agreed to sell to the defenders 100 tons of sugar; that the price paid by the defenders for the sugar was not the price which Stevenson & Company asked or received; and that the pursuers were not directly authorised by Stevenson & Company to make as their agents the contract expressed in the sale-note of 31st March 1892. On the other hand, the truth and substance of the transaction is as stated by the pursuers. The sugar was Stevenson's and not the pursuers'; it was sold by the pursuers for Stevenson at the price fixed by the latter, with an additional price which Stevenson knew of and approved, and which went to remunerate the pursuers for their trouble in placing Stevenson's goods. It was not incorrect, therefore, for the pursuers to represent themselves as selling sugar for Stevenson which they were doing, and as to the price ultimately obtained it was no concern of the buyers how that was divided between the principal and agent; and, lastly, although Stevenson did not authorise directly a sale in his name of 100 tons of sugar to the defenders, yet he authorised it indirectly by allowing the pursuers to sell 700 tons of sugar in such quantities and to such persons as the pursuers might agree upon or with, at a price not less than that fixed, but at a price as much greater as could be obtained. In this view of the facts the pursuers were the agents for Stevenson, and the contract made with the defenders was one which came within the limits of the pursuers' authority as Stevenson's agents.

I am not, however, to be held as expressing the opinion that the view of the facts which I have last presented would have been a sufficient or successful answer to the defenders' pleas had it been necessary to decide this case upon them. I think those pleas, as well as the plea of no title to sue, would have presented very formidable difficulties in the pursuers' way if this had been an action for implement of the contract of 31st March 1892. But in my opinion this action, and the right which the pursuers seek to enforce, are not based or dependent upon that contract at all.

This transaction in sugar was, I understand, a speculation on the part of the defenders. It was not a transaction entered into in the ordinary course of their own business. Being an isolated transaction, not in the course of their own business, they arranged with the pursuers to finance the transaction for them, and on their behalf to look after the sale of the sugar on its arrival at the port of delivery, which happened to be Liverpool. This the pursuers did. The price obtained for the defenders' sugar when sold realised less (when the expenses of landing, sale, &c., were deducted) than the price they owed for it. It is for the difference thus arising that the pursuers now sue. The debt sued for therefore arises, not out of the contract of 31st March 1892, but out of the agreement entered into subsequently to that contract by the pursuers and defenders. The defenders took delivery of the sugar (by their authorised agents) on its arrival and sold it, and the contract of 31st March was then at an end. The sugar contracted for had been delivered to the defenders, they

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No. 57. had paid the contract price through the pursuers, and it is too late now for the defenders to plead that there was no contract of that date at all. If there was not, on what title did the defenders take delivery of the 100 tons of sugar and sell it? The pursuers made disbursements on the defenders' behalf which the sum realised by the sale of the sugar was not sufficient to repay. The balance or deficiency is the defenders' debt to the pursuers for which they are now sued. This is the view taken of the case by the Sheriff-substitute, and I think he is right. If the defenders had employed some person other than the pursuers to finance the transaction—that is, to pay the price of the sugar, and then to take delivery and sell—they would clearly have been liable to him for the difference between what he had advanced for the defenders and the amount realised by the sale of the sugar. But it was nothing more than an accident that the person authorised to sell the sugar for the defenders was the same as the person who had sold it to them. That accident does not affect the defenders' liability.

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LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Find in fact (1) that in the purchase of the 100 tons of sugar in question, the pursuers (Stewart, Brown, & Company) did not act as brokers for the purchasers, the defenders (Biggart & Fulton); (2) that defenders were not induced to make the said purchase by fraud or misrepresentation on the part of the pursuers: Find it unnecessary in the circumstances to determine whether in said transaction the pursuers were principals or only agents for Messrs W. F. Stevenson & Company: Find further in fact (3) that the defenders arranged with the pursuers that the pursuers would finance the transaction for them, and undertake the sale of the sugar on their behalf on its arrival at Liverpool, the port of discharge; (4) that the defenders took delivery through the pursuers as their authorised agents of said sugar at the port of discharge under the contract of sale to them, and that the pursuers did on behalf of the defenders pay the sale price of £10, 17s. 3d.; (5) that the pursuers, as agents for the defenders resold the said sugar at Liverpool at a price less than said contract price; (6) that the defenders on 28th August 1892 paid £100 to account to the pursuers; and (7) that after debiting the said contract price and crediting the net price obtained for said sugar, and said payment to account, there remains on a true and just accounting between the parties the sum of £29, 9s. 10d. due and resting owing by the defenders to the pursuers: Therefore, in the action Biggart & Fulton against Stewart, Brown, & Company, assoilzie the defenders and decern; and in the action Stewart, Brown, & Company against Biggart & Fulton decern against Biggart & Fulton for payment to Stewart, Brown, & Company of the sum of £29, 9s. 10d., with interest thereon at the rate of 5 per centum per annum from 12th October 1892 till payment: Find Stewart, Brown, & Company entitled to expenses," &c.

MORTON, SMART, & MACDONALD, W.S.—N. BRIGGS CONSTABLE, W.S.—Agents.

MRS ROLLO BOWMAN BALLANTINE, Pursuer (Respondent).—*Shaw—W. Campbell.*

No. 58.

THE EMPLOYERS' INSURANCE COMPANY OF GREAT BRITAIN, LIMITED,
Defenders (Reclaimers).—*Jameson—Salvesen.*

Dec. 15, 1893.
Ballantine v.
Employers'
Insurance Co.
of Great
Britain,
Limited.

Insurance—Accident insurance—Post-mortem examination—Contract—Condition precedent.—A person insured against death by accident fell into a river, while fishing, and his dead body was subsequently recovered. In an action upon the policy, the insurance company, in defence, averred that his death resulted from disease and not from drowning.

Evidence on which *held* that death from drowning was instructed without a *post-mortem* examination.

An accident assurance policy contained the following condition:—"In the case of death the legal representatives of the assured . . . shall furnish all such other information and evidence as the directors may require from time to time, or may consider necessary or proper to elucidate the case."

Opinion (*per* Lord Young) that upon a sound reading of the condition the refusal by the representatives of a person insured to comply with a demand by the company for a *post-mortem* examination, in circumstances which made the demand not unreasonable, did not of itself liberate the company from the obligations in the policy.

In December 1892 Mrs Rollo Bowman Ballantine, general disponente and sole executor of her deceased son James C. Rollo Bowman Ballantine, of Castlehill and Ashgrove, Ayrshire, brought an action against the Employers' Insurance Company of Great Britain, Limited, having its chief office in Glasgow, concluding for payment of £1000, being the sum payable under a policy of insurance taken by Mr Ballantine with the defenders, in the event of the death of the insured through accident.* The

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* By the policy it was, *inter alia*, agreed,—“(1) The company, if, during the currency of this policy, the assured shall sustain any personal injury caused by accidental, external, and visible means within the conditions of this policy, and the direct effect of such injury shall occasion the death of the assured within three calendar months from the happening of such injury, shall pay to the legal personal representatives of the assured, within three calendar months after it shall have been proved to the satisfaction of the directors of the company that the death of the assured was occasioned as aforesaid, the sum of one thousand pounds.”

The policy also contained this proviso,—“Provided always, that this policy is subject to the conditions indorsed hereon, which are to be taken as part hereof, and are hereby agreed to be conditions precedent to the right of the insured to sue or recover hereunder.”

Among the conditions indorsed on the policy were the following,—“(3) The assured shall not be entitled to make any claim under this policy for any injury from an accident unless such injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished, and that this assurance shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease, or by any medical or surgical treatment or operation rendered necessary by disease, or to any death arising from disease, although such death may have been accelerated by accident.

“(4) In the event of any accident (whether fatal or not) occurring to the assured, it is a condition, precedent to any right of the assured or his representatives to make any claim, that notice thereof in writing must be delivered to the company at their chief offices in Glasgow, or their chief offices, within fourteen days after the occurrence of the accident, stating the nature and

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pursuer averred that Mr Ballantine met his death through accidental drowning when fishing in the River Orchy, Dalnally, Argyllshire.

In defence, the company stated;—(Ans. 4) “ . . . Explained that the circumstances under which the pursuer's son met his death were so peculiar that the defenders had reason to believe that he died from natural disease, or some other cause against which they do not insure, and not by drowning, as alleged by the pursuer. Their consulting physician, Dr Duncan, having had the details, so far as known, laid before him, stated that he could not certify the cause of death as from accident without a *post-mortem* examination of the deceased's body, and accordingly he wired on 3d October to that effect to Dr Allan, the pursuer's family doctor, and asked him to see the friends and arrange for a *post-mortem* examination being held the following day. Dr Allan telegraphed back that the deceased's relatives, before whom he had laid Dr Duncan's request, declined to allow of the examination. The defenders at once intimated, by letter, dated 4th October 1892, to the pursuer's agents, that they were of opinion that death did not occur by accident within the scope of the policy, and that the only way of ascertaining whether it did or not was by *post-mortem* examination. They accordingly repeated their request that the pursuer would consent to a *post-mortem* examination, and that their medical adviser should be present, otherwise they would found upon the refusal. This request and other requests of the same nature were refused. The pursuer has thus failed to comply with the conditions of the policy, . . . which were declared to be conditions precedent to a claim under it. The pursuer has never offered any evidence to the defenders, with a view to satisfying them that the cause of Mr Ballantine's death was an accident within the meaning of the policy founded on. On the pursuer furnishing evidence to this effect, satisfactory to the directors, the defenders are willing to pay or consign the sum in the policy.”

In answer, the pursuer averred;—(Cond. 4) “ . . . The correspondence referred to in the explanations in answer is referred to for its terms. *Quoad ultra* said explanations are denied; and it is explained that no request of the nature indicated in the answer was ever made by defenders to pursuer.”

The pursuer pleaded;—The said Mr Ballantine having effected said policy on his life, and having been accidentally drowned, the sum sued for falls to be paid to the pursuer, as concluded for.

The defenders pleaded;—(1) The pursuer having failed to comply with the conditions of the policy, which were thereby declared conditions precedent to her right to sue or recover under the same, the defenders should be assoilzied. (2) *Separatim*, The pursuer's son not having met his death from accident within the meaning of the policy founded on, the defenders should be assoilzied, with expenses.

A proof was allowed. The evidence was to the following effect:—Mr

date of the injuries, the place where and the manner in which they were received. . . .

“(5) In case of death, the legal representatives of the assured must deliver to the company a certificate from the medical attendant of the assured stating as fully as possible the nature, extent, and duration of the injuries, and the cause of death, and shall produce all documents necessary to prove their title as such legal representatives, and shall furnish all such other information and evidence as the directors may require from time to time, or may consider necessary or proper to elucidate the case.

“(6) In all the above-mentioned cases, the certificates, information, and evidence to be given shall be at the expense of the assured, and shall be in such forms and of such nature as the company may prescribe.”

Ballantine, who was twenty-seven years of age at the time of his death, No. 58. and was unmarried, was a strongly-built man, about 6 feet in height, to outward appearance of a very vigorous constitution, and was a good swimmer. He had gone to Dalmally for some days' fishing, and on the 30th September he left the hotel to fish for salmon in a pool on the Orchy called the Elbow and Treepool. The day was raw and cold, and the river was 4 or 5 feet above its usual height, was running rapidly, and was very cold owing to the melting of snow on the hills. Mr Ballantine put on waders for the first time, as it appeared, in his life. The waders which he put on were trouser waders, coming up to the chest and fastened round his waist by a rope. They were not his own, and as the brogues belonging to them were somewhat too small for him, he put on the waders next his bare feet. He fished down the pool during the forenoon, and, after taking luncheon, was in the course of fishing the pool a second time. Peter MacGregor, the ghillie attending him, gave this account of what then took place,—“While I was preparing an extra cast, I heard a scream, and turned round and saw Mr Ballantine falling in the river, slanting backward. He made a movement with his legs, and that movement of his legs pushed him into the rapids. The moment his legs made the movement, the current caught him and carried him into the rapids. His head got up in the rapids once, and then he disappeared. At the point where Mr Ballantine was fishing the water was going pretty fast, and he was near the place which I have described as the rapids. When he disappeared I had nothing but a short gaff, and I could do nothing with it to help. . . . After Mr Ballantine's head disappeared it reappeared in the eddy, and he gave a low scream, but not so loud as the first one. I heard it quite well, however. Mr Ballantine called out again, but it was a very low scream or gurgle,—more of a gurgle. . . . I kept opposite to Mr Ballantine while he was being carried down the river. In the stream he was carried down very fast. . . . While Mr Ballantine was in the eddy I thought that he was swimming towards me. . . . When I thought that Mr Ballantine was swimming towards the tree I think his eyes were open, but I don't think there was any recognition in his face at that time. He looked flushed and red in the face. . . . About 30 yards below the eddy he appeared again for a minute, and his head turned round, and then he disappeared. . . . That was the last I saw of him. . . . From the time Mr Ballantine fell into the water till I lost sight of him would just be about three minutes altogether, as far as I could judge. Cross.—. . . The gravel bottom on which Mr Ballantine stood is one that gives a good rough footing, if there are no rocks. There were nails in the brogues which Mr Ballantine had on. I had seen the under surface of the brogues, and they were in good condition. At the time he fell into the water he was standing at the edge of what I call the rapids. (Q.) At the point where he was actually standing I suppose it would be comparatively slack water? (A.) No, it was a running stream; it was slack at the edge. He was not standing in the run of the stream. He could not have stood where the stream was most rapid. . . . The depth of the water in the centre of the run would be 6 or 7 feet. The bottom sloped gradually from the point where Mr Ballantine was standing to the centre of the run. At the place where Mr Ballantine fell the water would be fully 2½ feet in depth. As far as I could see he was standing in a perfectly safe place. It was a peculiar scream which Mr Ballantine gave—an undecipherable sort of scream. (Q.) Was it a death-like scream? (A.) A death-like scream, or like one falling in an epileptic fit, or the like of that. (Q.) It was not like a strong, healthy man shouting for assistance? (A.) There was no intelli-

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gence in the scream. My impression was that he was in sudden agony. The second scream which he gave vent to was of the same nature, but lower. There would not be half a minute between the time when he gave the first and second scream. (Q.) A few seconds? (A.) A few seconds. From the time he gave the first scream until he was in the eddy and gave the low gurgle which I have described would be a minute and a-half, or thereabout."

Robert Macdonald, a ghillie who was in attendance on a Mr Radcliffe on the opposite side of the pool, and was on the bank about 250 yards above the point where Mr Ballantine fell in, substantially corroborated MacGregor's evidence, but deponed,—“I could not describe the cry which he gave more than just as an ordinary shout. (Q.) Was it not much more like a scream of a man in pain? (A.) It might—one taking fright, or the like of that. (Q.) In fright or pain? (A.) But I did not observe that at the time. I was 250 yards away, but I heard it quite plainly."

The body was found two days afterwards (2d October) in a pool about 300 yards below the point at which Mr Ballantine fell in. John Ferguson, the defenders' inspector, was present, and Dr Ebenezer Duncan deponed that on 3d October "Mr Ferguson reported to me what he had learned of the circumstances under which the death of Mr Ballantine had occurred. Having heard that report, I advised that I did not think it was possible for any person to be certain of the cause of death in this case, and consequently I thought it necessary to have a *post-mortem* examination to ascertain what the cause of death was. It was arranged that I should telegraph to Dr Allan."

Accordingly Dr Duncan, on the same day, sent the following telegram to Dr Allan:—"As medical adviser of the Accident Company where Ballantine insured, am asked to certify death as from accident; for this *post-mortem* examination necessary; will you see friends? arrange for to-morrow, and wire to-night time fixed."

Dr Allan replied,—“Have seen friends, and your proposal is refused."

Dr Allan deponed that before sending off this telegram he consulted Mr Cleminson and Mr Scott, two intimate friends of the deceased, but not related to him, and that he did not consult Mrs Ballantine,—“I considered it an unnecessary piece of cruelty to inform Mrs Ballantine anything about it. She had very strong feelings on the matter. She expressed herself before the body was found as dreading that there would be any mutilation. I knew her feeling as regards that, and I told her nothing about the proposal. She was suffering dreadful anguish at the time."

It was not disputed that Mrs Ballantine was never asked personally to consent to a *post-mortem* examination.

On 4th October the defenders' manager wrote as follows to Messrs John Emslie & Guthrie, solicitors, Ardrossan:—"Referring to telegram sent yesterday by Dr Duncan to Dr Allan, I have now to intimate to you that from the information we have, we are of opinion that death did not occur by accident within the scope of our policy. The only means of ascertaining whether it did or did not is by *post-mortem* examination, and we have therefore to repeat our request, before it be too late, that you will consent to a *post-mortem* examination, and that our medical adviser be present, otherwise we shall be obliged to found upon your refusal. Meantime we must repudiate all liability under our policy."

Messrs John Emslie & Guthrie replied next day,—“When we intimated on 1st inst. the accident to your office, we did so in the ordinary way, as agents for your company. We had no instructions from Mr Ballantine's representatives to do so, and the terms and tone of your letter were sur-

prising . . . We have no power to consent to a *post-mortem* examination. No. 58.

The letter of the 1st here referred to was a letter sent by John Emslie & Guthrie to the defenders, intimating Mr Ballantine's death. Mr Emslie and Mr Guthrie both deponed that they had sent their letter as local agents for the defenders, through whom the policy had been effected; that they were agents for the Ayrshire Foundry Company, Limited, of which Mr Ballantine had been chairman, but that they were not his own agents; and that, although they became Mrs Ballantine's agents on the 7th October (two days after the funeral) they were not her agents, and had no authority to act for her before that.

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After Messrs John Emslie & Guthrie became Mrs Ballantine's agents some correspondence followed between them and the defenders, from which it, *inter alia*, appeared that the defenders desired to make the present case a test case on the question of their right to demand a *post-mortem* examination. (See letter quoted in Lord Young's opinion.) They made no request for the exhumation of the body.

Dr Allan, who was present when the body was recovered, deponed,—“When he was lifted out of the river the froth came from his mouth and nostrils. I had no doubt that the cause of death was drowning. (Q.) Was that manifest to anyone of ordinary skill who saw him? (A.) It was the natural inference. (Q.) I believe you looked at the body more minutely in the hotel? (A.) I may say only the face; I did not see him undressed. (Q.) You know the peculiar appearance which drowned people have, what is called goose-skin? (A.) I did not see that, but I inquired afterwards, and I found that he had it. Assuming that that was present, that confirms my opinion that death occurred by drowning. I think that the froth coming from the nostrils and mouth is a certain sign of death by drowning. That is caused by attempted breathing—water being drawn into the lungs and mixed with the air already in the lungs.”

Professor T. R. Fraser, of Edinburgh University, deponed that he had examined Mr Ballantine for the Standard Life Assurance Company about three weeks before his death, and that “personally he was a good life.” He further deponed that he had “no doubt that he died of drowning. No other suggestion occurs to me with regard to the cause of death which would be reasonable. . . . With regard to the suggestions which have been made, and taking first the case of epilepsy, the circumstances seem to me entirely against anything of the sort. I take into account particularly the two screams, subsequent to the assumed attack, shewing that he was not unconscious in the water. With regard to the suggested possibility of death from aneurism, I have no doubt that I should have discovered some evidence of aneurism if it had been present. As regards *angina pectoris*, I give entirely the same answer. In the first place, it is most improbable in a man of his years, and I should have found some sign of it when I examined him. With regard to the suggestion of apoplexy, he would not have screamed when he fell into the water, and at his age apoplexy would be caused by some diseased condition of the blood vessels, which I should certainly have found when I examined him. . . . Cross.—(Q.) Where a question is raised as to what has caused death, a *post-mortem* is the proper way of ascertaining an answer to that question? (A.) Not when it can be answered otherwise. I should think a *post-mortem* would be regarded as the last resort. If it is entirely doubtful what a man has died of, the proper course to follow is to have a *post-mortem*. (Q.) Do you not think that in this case it was doubtful to a certain extent, how-

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ever small, whether Mr Ballantine died of drowning or whether he died of something else, and was then swept down the stream? (A.) There is absolutely no doubt in my mind, and I do not think there is any possibility of a doubt about it. My view is that if there had been a *post-mortem* it would not have added any more certainty to what we already possessed. I think that sometimes the *post-mortem* appearances in drowning are very uncertain."

Dr Joseph Bell gave evidence to substantially the same effect as regarded the cause of death, but stated in cross-examination,—“It would have been far better had he been examined *post mortem*.”

On the other hand, Dr Byrom Bramwell deponed, as a witness adduced by the defenders,—“I have read the deposition upon oath by MacGregor, the ghillie. . . . Having the circumstances disclosed in the statement before me, I should certainly have thought it proper to have had a *post-mortem* examination. My reason for saying that is, that I think there were circumstances connected with the death which suggested that perhaps it was not merely due to drowning as one would at first sight suppose. (Q.) If such a *post-mortem* examination had been made, could it have been ascertained with certainty what was the cause of death? (A.) It might have been. There are some diseases which kill suddenly which would produce the same *post-mortem* appearance as drowning—for example, epilepsy; but in other cases you may find a definite cause distinct from drowning. . . . I think there are several conditions which might cause sudden or rapid death, and which might be consistent with the facts as I know them, although I must say I do not think that many of them are very likely, looking to the whole circumstances as disclosed in MacGregor's evidence; and putting drowning aside, I think that the rupture of a deep-seated aneurism would be one of the most likely things to cause such a death. (Q.) Is it consistent with your experience that death may be caused by the rupture of an aneurism which has not been detected, and which it was not possible to detect by an ordinary external examination, such as that made by the medical officer examining for a life insurance company? (A.) That is a fact that one is constantly meeting with; it is a well-recognised fact that there are some aneurisms of the aorta so small or so deeply situated that it is impossible to detect them, and they give rise to no definite and distinct symptoms. I have stated that in my book on the heart . . . It is not an opinion just made for the moment, but it is a well-recognised fact which is in print and acknowledged. . . . In such a case as I have just been referring to death sometimes takes place very rapidly, and at other times more slowly. (Q.) Would it be consistent with death from that cause that a man should have given a death-like scream before falling into the water, then immediately afterwards on emerging with his head from the water, another lower scream, and within half a minute or thereby a gurgle? (A.) I think it is possible that he might have done so. (Q.) Is it possible that in the case of death from certain forms of apoplexy a man may also emit cries? (A.) Certainly in some forms of cerebral hemorrhage death occurs very slowly. The popular idea is that the man falls down unconscious, but in the case of cerebral hemorrhage that is quite erroneous, as that is an exceptional mode of commencement. (Q.) He may be in a conscious or semi-conscious condition for a short time after being seized with the attack? (A.) He may be in a conscious condition from some hours. . . .” Dr Bramwell also deponed that *angina pectoris* might also have conceivably accounted for the death, but that at the same time the serious form of *angina pectoris* was very uncommon under forty years of age. By the Court.—“Looking to this

young man's age, his apparent strength, and the fact of his examination by so careful a man as Professor Fraser three weeks before, would the chances be very much against his having any of the diseases you have mentioned? (A.) Certainly." No. 58.

Dr Duncan and Dr Grainger Stewart gave evidence to a similar effect. Dec. 15, 1893.
Ballantine v. Employers' Insurance Co. of Great Britain, Limited.

On 16th June 1893 the Lord Ordinary (Stormonth-Darling) decreed against the defenders.*

* "OPINION.—I gather from the correspondence that the main object of the defenders in resisting this claim was to test what they call the principle of whether they were within their right in demanding a *post-mortem* examination of the body of the late Mr Ballantine, and whether the refusal to allow that examination has the effect of forfeiting the pursuer's claim. If that was their object all I can say is that they have selected a very unfortunate case as a test, because, where an insurance company intends to make a demand of this kind, and to found on the refusal of it as importing a forfeiture of the right to recover, it is incumbent upon them to be very careful indeed that they make the demand on the right person. I say nothing against the view that the demand was in itself one which ought to have been granted. There is no condition in the policy obliging the representatives to allow a *post-mortem* examination, but they are bound to furnish all such information and evidence as the directors may require, and it is always a question for the Court to say whether the evidence so required was reasonably necessary or not. I can figure cases of death by accident where it would be unreasonable to demand a *post-mortem* examination. Here, however, I think there were circumstances which made it not unreasonable for the insurance company to make the demand which they did. A *post-mortem* examination, however painful—although I think its painfulness has been greatly exaggerated—would have undoubtedly furnished the best and most conclusive evidence on the question whether death was the result of accident or of natural disease.

"But, as I have said, the question is whether the demand was made on the right person. Now, what happened was this: A demand was first made upon 3d October, in the interval between the death and the funeral, and it was made by Dr Duncan of Glasgow, the medical adviser of the company, by telegram addressed to Dr Allan, the medical attendant of the Ballantine family. It was perhaps a natural enough proceeding for the one doctor to communicate with the other, but it is impossible to say that Dr Allan was in any way an agent of the pursuer in this case, or was entitled to grant or refuse the permission asked. Dr Allan thought the request unreasonable, and refused even to lay it before the pursuer. He took it upon him to send a telegram, which was undoubtedly misleading, to the effect that he had seen the friends, and that the friends refused. For any misstatement of that sort, if it did mislead the defenders, Dr Allan may have to answer, but certainly the pursuer cannot be fixed with liability. I do not think it can be said that the defenders were in any way misled or injured by Dr Allan's reply, for the matter did not rest there. A second demand was made, and this time it was made by the defenders themselves on the firm of John Emslie & Guthrie, solicitors in Ardrossan. Now, if John Emslie & Guthrie had at that time occupied the position of law-agents for the pursuer, which they did a few days afterwards, the pursuer might have been bound by their answer, but in point of fact they did not occupy that position. They had, it is true, acted as law-agents for a company in which the late Mr Ballantine was interested, and of which he was chairman; but that was the extent of their connection with the family, and that apparently is what misled the defenders into the belief that they were the agents for the pursuer. Clearly, therefore, the demand made on them cannot in any sense of the word be held as a demand made on the pursuer.

"It happens in this particular case that the course for the defenders to take, if they meant to found upon their demand, was a very plain one. The pursuer, who was the mother of the unfortunate gentleman, was not only the person entitled to make the claim on them, but she was the only person in the world

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The defenders reclaimed, and argued ;—(1) The conditions indorsed on the policy were declared to be conditions precedent to the right to sue

who had any right either to grant or refuse the permission to make a *post-mortem* examination. She was the only near relative that the late Mr Ballantine had, and it was impossible, therefore, for anybody to grant or to refuse the permission without coming to her. It may be that the defenders were actuated by consideration for her feelings in not making their application direct, but unquestionably to her the application must in the long run have come, and if they did not choose to make the application direct, then I think it is quite clear they took upon themselves the responsibility of selecting the intermediary, and if they selected the wrong intermediary they must suffer the consequences. The only other person who can be suggested as having been in any way entitled to bind the pursuer was Mr Cleminson, a witness in the case, who, though no relation, seems to have been on the most intimate and confidential terms with the family, and indeed to have lived in the house. He was consulted by Dr Allan, and agreed in Dr Allan's view. I do not doubt that authority might very likely have been given to Mr Cleminson to act in this matter on behalf of the pursuer, if the necessity for granting that authority had arisen, but it is impossible to say that such authority was ever in point of fact given, and I cannot certainly imply it merely from the friendly relations which are proved to have existed between that gentleman and the pursuer of this action.

"That being so, I approach the consideration of the second question in the case upon the footing that no *post-mortem* examination was in point of fact held, and that the pursuer is not responsible for that, because the demand for it was never made on her. That this most lamentable event bore all the outward semblance of a case of death by drowning cannot for a moment be disputed. The late Mr Ballantine was a man in the prime of life, of the most energetic and buoyant spirit, of temperate habits, and apparently of a very powerful muscular frame. He was certainly the last person in the world of whom one would have expected either an accidental death without a great struggle, or a sudden death from natural causes. There is therefore undoubtedly a certain air of mystery about the occurrence, because it is difficult to account for so powerful a man having been overwhelmed by the stream of the Orchy, and for his having apparently not made so vigorous an effort to save himself as one would have expected. On the other hand, it is a most improbable thing that a man of his temperament and constitution should have been suddenly seized with a fatal affection either of the heart or head while fishing in this Highland stream, and that is really the only suggestion which is made by the defenders. Even although it were proved that Mr Ballantine had fainted in the stream, or had taken an epileptic fit in the stream, that would not absolve the defenders from liability, if it was not a seizure of a necessarily fatal kind. Their only case is that he was suddenly seized with what would have proved fatal, even if he had been on dry land, and that the circumstance of his being in the water was a mere accident, which did not in any way affect the result. Now, I have to choose between these two theories. On the one hand, I have evidence which is admitted, even by the very eminent physicians who were examined for the defenders, as pointing straight to the inference of death by drowning. They all say that that is the natural conclusion from the facts of the case, but they say, on the other hand, that there are certain medical possibilities which did, in their judgment, make the demand for a *post-mortem* examination reasonable, and which a *post-mortem* examination would in all likelihood have effectually disposed of.

"Now, the doubt in the case arises chiefly from the evidence of the ghillie MacGregor, and I shall only say of him that, while I saw no reason to doubt the honesty of his evidence, I was not equally impressed with his intelligence, and I demur very much to setting up a most improbable theory, as the defenders' case involves, upon the strength of an impression formed by this Highland ghillie. He did undoubtedly say that his impression at the time was that the deceased gentleman had taken an epileptic fit. That is excluded by all the

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and recover under it. The 5th condition made it incumbent on the representatives of the insured to furnish all such information and evidence as the directors might require or consider necessary and proper to elucidate the case. That included a *post-mortem* examination, provided that such an examination was reasonably necessary looking to the whole circumstances known to the company at the time the demand for the examination was made, and provided that the demand was made in the proper quarter. The first proviso had here been satisfied. Looking to the evidence of MacGregor and the whole circumstances attending the death, it could not well be said that the demand for a *post-mortem* examination was unreasonable. Then the demand had been made in the proper quarter. It was admitted that no demand had been made to Mrs Ballantine personally, but that in the circumstances was unnecessary. It was a natural and proper course for the defenders' doctor to communicate to the family doctor the fact that the defenders desired that there should be a *post-mortem* examination, and ask him to place the request before the friends of the deceased. The defenders could not be expected to know who were the legal representatives of the deceased, for that depended on his testamentary arrangements. When, then, Dr Duncan had communicated with Dr Allan, and had heard from him that the friends had refused to allow a *post-mortem* examination, the defenders were entitled to found on that as a proper intimation of a refusal. The defenders had also made a similar request to Messrs John Emslie & Guthrie. No doubt, as it now appeared, they were not at the time the agents either of Mrs Bal-

doctors as untenable, and his evidence of the cry having been of a strange and death-like kind is inconsistent with the evidence of the other ghillie, Macdonald, who says the cry was only an ordinary shout. I cannot help thinking that to some extent the theory put forward by MacGregor—for it is really nothing more—may owe its origin to the fact that, through no fault of his own, he was unable to render assistance to his companion, and that it is painful for him to think that death was due to an accidental cause which he was powerless to avert. But if his opinion be discounted from the case, there is really nothing left except bare possibility and conjecture. I acknowledge that it is a little difficult to account for the fact that Mr Ballantine, who was a good swimmer, did not apparently make more strenuous efforts to save himself than he did. At the same time anyone who has used waders in a Highland stream must know how easy it is to slip, and, if one is carried into deep water, what an encumbrance and a danger the waders must be. In this case the danger was increased by Mr Ballantine being unaccustomed to the use of waders, and there may have been some stroke against a stone or a rock which would tend still further to deprive him of the use of his limbs. All that, of course is speculation; but the fact is, that he was using waders, that he was unfamiliar with the use of them, that in the effort to get further into the stream he appeared to lose his balance, and that he was carried into deep water. All the rest is entirely consistent with the idea of accident, and there is nothing to drive one into so improbable a theory as that of a sudden and fatal seizure. But what really I think excludes the latter notion from practical consideration, and puts the case beyond reasonable doubt, is the fact that only three weeks before, this gentleman was examined by one of the most competent and careful physicians in Scotland, and passed, as a good life, for the Standard Life Insurance Company. It is possible that, in spite of Professor Fraser's examination, he may have had some of these deadly diseases which are suggested by the medical witnesses for the defenders, but it is in the highest degree unlikely, and I must proceed not on possibilities, but on the reasonable inferences to be drawn from the evidence in the case. In short, I regard the evidence in favour of death by drowning as really overwhelming. I have, therefore, come to the conclusion that the pursuer has made out her case, and is entitled to decree as concluded for."

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lantine or of Mr Ballantine; but their connection with the family was sufficiently intimate to make the request to them equivalent to a request to Mrs Ballantine. The defenders therefore fell to be assoilzied, the pursuer having failed to fulfil a condition precedent to her right to recover. But (2) assuming that the defenders failed on this ground, the *onus* was on the pursuer to prove her case, and she could not be held to have discharged this *onus* if she declined, or failed, to adduce evidence, which it was in her power, but not in the power of the defenders, to adduce. If, indeed, the evidence otherwise shewed that a *post-mortem* examination would have been wholly unnecessary, the pursuer would have proved her case; but if there was a reasonable doubt, as to whether the cause of death was disease or was accident, which would, or might, have been removed by a *post-mortem* examination (and the evidence shewed that here), then, as there had been no *post-mortem* examination, the pursuer's case failed.

Argued for the pursuer;—The evidence here shewed that Mr Ballantine's death was due to accidental drowning, and not to disease, and shewed further that no other conclusion would have been reached even had there been a *post-mortem* examination. The evidence adduced by the defenders came to no more than this, that there was a medical possibility that the death was due to disease—a possibility which must be regarded as of the slightest, looking to Professor Fraser's evidence. Therefore, apart from the defenders' argument on the 5th condition of the policy, the pursuer must be held to have established her case. The defenders misconstrued the 5th condition. Under that condition the representatives of the deceased were required to "furnish information and evidence"; that meant information and evidence which the representatives might happen to possess, and did not include permission to make a *post-mortem* examination. If the defenders intended that it should be a condition precedent of the right to recover under the policy that the representatives should allow a *post-mortem* examination whenever the directors thought it reasonable to demand one, that ought to have been made an express condition of the policy. In any case the Lord Ordinary's ground of judgment was well founded and was sufficient, for no demand for a *post-mortem* examination had been made to the pursuer or to anyone authorised to represent her.

At advising,—

LORD YOUNG.—This is an action upon a policy of insurance against accident for recovery of the sum which is payable in the event of the death of the person insured through accident, and it is based on the ground that the person insured lost his life through accidental drowning.

The action is defended upon two grounds, each of which is embodied in a plea in law. The first is in these terms :—" (1) The pursuer having failed to comply with the conditions of the policy, which were thereby declared conditions precedent to her right to sue or recover under the same, the defenders should be assoilzied "; and the second is this :—" (2) *Separatim*, The pursuer's son not having met his death from accident within the meaning of the policy founded on, the defenders should be assoilzied, with expenses "; and the case has been argued before us on both these grounds.

With respect to the first plea in law, the defenders make the following averment as to their attitude when they received notice of the accident :—" Explained that the circumstances under which the pursuer's son met his death were so peculiar that the defenders had reason to believe that he died from natural disease, or some other cause against which they do not insure, and not by

drowning, as alleged by the pursuer. Their consulting physician, Dr Duncan, No. 58. having had the details, so far as known, laid before him, stated that he could not certify the cause of death as from accident without a *post-mortem* examination of the deceased's body, and accordingly he wired on 3d October to that effect to Dr Allan, the pursuer's family doctor, and asked him to see the friends and arrange for a *post-mortem* examination being held the following day. Dr Allan telegraphed back that the deceased's relatives, before whom he had laid Dr Duncan's request, declined to allow of the examination. The defenders at once intimated, by letter, dated 4th October 1892, to the pursuer's agents, that they were of opinion that death did not occur by accident within the scope of the policy, and that the only way of ascertaining whether it did or not was by *post-mortem* examination. They accordingly repeated their request that the pursuer would consent to a *post-mortem* examination, and that their medical adviser should be present, otherwise they would found upon the refusal. This request and other requests of the same nature were refused." This averment which is inserted in the answer to the fourth article of the pursuer's condescendence and is somewhat irregularly inserted there—for it ought to have been made the subject of a separate statement of facts—derives any importance which attaches to it from the fifth of the conditions which are indorsed on the policy. That condition is in the following terms :—" (5) In the case of death, the legal representatives of the assured must deliver to the company a certificate from the medical attendant of the assured, stating as fully as possible the nature, extent, and duration of the injuries, and the cause of death, and shall produce all documents necessary to prove their title as such legal representatives, and shall furnish all such other information and evidence as the directors may require from time to time, or may consider necessary or proper to elucidate the case."

Now, it appears that the only near relative of the deceased was his mother, with whom the deceased, who was a young man and a bachelor, resided at the time when he met his death, and she is now his legal representative, and is the pursuer of this action. The averment is that the requests were made by the defenders to the pursuer to allow a *post-mortem* examination to be made. Evidence was led in the Outer-House in regard to these requests, and upon that evidence the Lord Ordinary has decided that the persons to whom these requests for a *post-mortem* examination before burial were made, namely, Dr Allan and Messrs John Emalie & Guthrie, did not, as agents or otherwise, represent the mother of the deceased, and therefore that these requests made to them do not affect her. The Lord Ordinary has in consequence rejected the first plea in law for the defenders as unsound.

It appeared to the Lord Ordinary, from some of the correspondence produced, that the directors of the insurance company desired to make this a test case upon the question of principle, whether the company under their policy are entitled to call for a *post-mortem* examination in any case in which they think fit to do so, and if the request is refused, to decline to pay the sum in the policy. In a letter dated 14th November 1892, written to Messrs John Emalie & Guthrie, who by that time had come to be the agents of the pursuer, the manager of the company says,—“My directors have been anxious to get the fullest information as to their possible liability in connection with this claim, and I have communicated with the managers of a number of similar companies on the subject. The directors have no wish to cavil or bargain, but

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feel that there is here involved an important question of principle. They are therefore inclined to make it a test case, and under the circumstances I hardly care to entertain any compromise such as you seem to suggest." The meaning of that is, that the directors wish to have the question determined whether having regard to the 5th condition attached to the policy, and to the evidence as to the requests, the company are free from liability, although it might appear to our satisfaction on the evidence otherwise that the death of the deceased had occurred through accidental drowning within the meaning of the policy.

Now, it is certainly sufficient for the determination of that question, if the view of the Lord Ordinary is right, that neither Dr Allan nor Messrs Emalie & Guthrie were the proper persons to whom the application to allow a *post-mortem* examination should have been made. If the company intended to plead the refusal to allow a *post-mortem* examination as a defence to the action, and to make it a test case, they ought to have been careful to make the application to the right persons. In this case I think that they had no excuse for any error, for it appears that they certainly had information as to the existence of the mother of the deceased, and also that they knew that she was the proper, or indeed the only, person who could give the necessary authority, yet it is plain that they did not approach her personally with their request. It is said that they did not do so from a desire not to intrude upon her grief, and I have no doubt that that is so, but as a matter of fact they did not approach her personally, and if the company chose the wrong intermediary to convey their request to her, I think, with the Lord Ordinary, that they must take the consequences. I am further disposed to agree with the Lord Ordinary that no request to allow a *post-mortem* examination was made to any person for whom the pursuer is responsible, or whose words and actings were binding on her in this matter. I do not think that it is proved that she would have assented to or approved of the request if it had been made to her—there is indeed evidence that she would not—but I think that it is proved that she was not approached upon the matter, and that she neither gave nor withheld her assent to the proposal. I therefore think that the Lord Ordinary was right in coming to the conclusion to which he did, that the evidence does not support the defenders' first plea in law.

In this view it is not necessary that we should decide anything as to the right of the company, under their 5th condition, to demand a *post-mortem* examination, but although I do not think it necessary for us to decide that question, I have no objection to express my opinion upon it. In my opinion it is not according to the true reading of the 5th condition that the insurance office may demand a *post-mortem* examination and may refuse to pay the sum in the policy, if that demand is not complied with and we are not satisfied on the evidence that the demand was unreasonable as at the date when it was made, and considering that the company's doctor "having had the details, so far as known, laid before him, stated that he could not certify the cause of death as from accident without a *post-mortem* examination." I am not prepared to affirm the proposition that under this condition we must decline to enter into any inquiry as to the cause of the death if it appears that a request for a *post-mortem* examination has been made and refused, even although the demand was made not unreasonably upon the details so far as known and laid before the medical officer. The fact that a demand was made and refused may influence us in reaching a

conclusion as to the cause of death. I shall explain what I mean when I say that it may influence us. I think that the course taken in the Outer-House of allowing evidence to be led on the whole cause, to enable the Court to know the whole circumstances attending the death of the insured and so to judge as to the cause of death, was the proper course; and I am of opinion that the evidence which was led shews that the death of the insured was caused by drowning, and shews it to the exclusion of all reasonable doubt. But if the evidence had appeared to me to suggest a reasonable doubt as to the cause of death, which a *post-mortem* examination would, or might, have cleared up, and ought to have been resorted to to clear up, then I should have come to the conclusion that the case of the pursuer had not been proved; and in reaching this conclusion I should take into consideration the fact that a request for a *post-mortem* examination was made and was refused. But in this case I repeat that, in my opinion, the import of the evidence is overwhelming to the effect that the death of the insured was due to drowning. I can see no reasonable ground for doubt or suspicion which a *post-mortem* examination might have removed.

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On the whole matter, I am of opinion that the first plea in law for the defenders is ill-founded, because the evidence shews that no demand for a *post-mortem* examination was ever made to the pursuer, and the second, because I think that it is proved that the death of the insured was due to accidental drowning.

LORD RUTHERFURD CLARK.—I think that it is proved beyond all doubt that the deceased died by accidental drowning.

It is said that the defenders demanded a *post-mortem* examination, and that the pursuer was bound to furnish it as a condition precedent to her recovery under the policy. It is a sufficient answer that the defenders did not demand it from the pursuer or from any person entitled to represent her. But I may add that if the demand had been made, I have the gravest doubt whether the defenders were under the 5th condition entitled to make it. It was to my mind an unreasonable demand.

LORD TRAYNER.—I am of opinion that the proof in this case establishes beyond reasonable doubt that the late Mr Ballantine met his death through accidental drowning, and that no evidence of the cause of death which the defenders could reasonably demand was refused to them. I offer no opinion on the question whether the construction put by the defenders on the 5th condition indorsed on the policy is or is not sound, but I agree in thinking that even if that contention were affirmed, the defenders can take no advantage from it, because, as the Lord Ordinary has found, the demand made by them for a *post-mortem* examination was not made or addressed to the deceased's legal representatives.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

CARMICHAEL & MILLER, W.S.—EMSLIE & GUTHRIE, S.S.C.—Agents.

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Dec. 19, 1893.
Anderson v.
Glasgow
Tramway and
Omnibus Co.,
Limited.

MARY ANDERSON, Pursuer.—*Comrie Thomson—Abel.*
GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED, Defenders.—
Jameson—Wilton.

Reparation—Personal injury—Contract—Hired vehicle—Responsibility of hirer for fault of owner.—The hirer of a driver and vehicle is not responsible for an accident occasioned by the fault of the driver.

By contract with the post-office officials a tramway company agreed to supply drivers, horses, and vans for the conveyance of officials, mails, &c., from the post-office to a railway station. If the post-office district surveyor disapproved of any of the drivers, it was agreed that the company should be bound, on good cause shewn, to remove them and substitute others to be approved by the surveyor. The drivers were to be bound to start at such times and travel by such routes as the surveyor appointed.

A woman was injured by a hamper falling from one of the company's lorries, which was being driven by one of the company's servants by direction of a post-office official, who was on the lorry, to the railway station. She raised an action against the tramway company. When the case came before a jury it was proved that the accident was caused by the fault of the driver. The defenders asked the presiding Judge to direct the jury that, if they were of opinion that the driver was under the orders of and subject to the control of the post-office, and that he was driving the lorry in furtherance of a special order and direction given by a post-office official, the defenders were not liable for the fault of the driver in consequence of his complying with such special order and direction. The Judge refused the direction. The Court *refused* a bill of exceptions, on the ground that the driver was not subject to the orders and control of the post-office so as to relieve the tramway company from responsibility for the accident which was caused by the fault of their servant.

1st Division.
Lord Low.

MRS MARY ANDERSON raised an action in the Court of Session against the Glasgow Tramway and Omnibus Company, Limited, concluding for £1000 damages for personal injury.

The pursuer averred that, on 23d December 1892, while entering the Glasgow Central Railway Station from Gordon Street by the footpath alongside the carriageway she was struck and severely injured by a hamper which fell from a lorry passing into the station; that the lorry and horses belonged to the defenders; and that the driver was their servant.

The defenders admitted that the lorry and horses belonged to them, but averred that, at the time of the accident, the lorry was loaded with post-office baskets, that a post-office official was on the lorry, and that the driver of the lorry was under the control of this official.

The defenders pleaded that the pursuer was not injured through the fault of anyone for whom they were responsible.

On 18th July 1893 the case was tried before a jury, on an issue whether the pursuer was injured in her person through the fault of the defenders?

It appeared from the evidence that the defenders had entered into a contract, terminable on six months' notice by either party, with the post-office authorities in Glasgow, under which the company undertook to carry post-office officials, mails, and parcels between the chief post-office in Glasgow and the various railway stations, &c., in Glasgow, and to provide for the said conveyance drivers, vans, and horses, all as approved by the district surveyor; further, to maintain discipline among the drivers, and to provide them with regulation uniform. The contract then provided,—“That in case the said first party or his successor in office for the time being shall at any time or times, by notice under his hand, signify to the said second party his disapprobation of any of the said conveyances, horses, or drivers, so to be for the time being provided by the said second party, and require the same respectively to be removed or changed, the said second party shall on good cause shewn, and will

forthwith, after receiving such notice, dismiss any such driver and change any such conveyance or horse so to be disapproved of as aforesaid, and substitute in lieu of such driver, conveyance, or horse, as the case may be, such other driver, conveyance, or horse, for the purposes aforesaid as shall be approved by the said first party or his successor in office for the time being, and so from time to time, so often as the like case shall happen: That the drivers so to be employed as aforesaid shall start with their conveyances from the several places before mentioned at such time or times, and shall travel between such places by such route, and shall deliver and take up mails on their journey at such place or places as shall from time to time be appointed by the Postmaster-general for the time being." The defenders and the drivers employed by them were also taken bound to obey the rules and regulations relating to the carriage of postmen, letters, &c., as should be signified to them by the post-office authorities.

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On 23d December 1892 a load of post-office hampers was put on a lorry belonging to the defenders, to be taken from the post-office to the Central Railway Station. On the lorry, besides the driver, there was a post-office official in charge of the hampers, who directed the driver to go to the covered way outside the station and draw up there.* At the covered way the railway officials told the men who brought the bags to go inside the station to the platform. As they were driving in round a sharp corner one of the wheels ran on to the curb, and several of the hampers were thrown off, one of which injured the pursuer.

There was some evidence that the driver was driving his horses at too great a rate, considering the angle he had to turn.

After the presiding Judge (Lord Low) had charged the jury, the defenders asked him to give the following direction to the jury:—"That if the jury are of opinion, on the evidence, that at the time of the accident William Brannan, the driver of the lorry in question, was under the orders of and subject to the control of the post-office department, and that the accident happened while the said driver was driving the lorry in

* Simmie, the post-office official, deponed,—“I take mails to station. I see to the hampers being put on the right lorries and properly placed. On the 23d December, when I came back from dinner, I found the lorry loaded. Seventeen hampers. There were two rows and a single hamper above that. There were nine on floor of lorry, then two rows of three each, and then two on top. The load was not roped in any way. I was to go to Central Station, and directed driver to go to front entrance. . . . We went to covered entrance to get unloaded there. We drew up at third door from the entrance by which we came into the covered way. . . . The porter told me to drive inside to the platform, and I told driver to go in. He was under my orders. . . .”

Brannan, the driver of the lorry, deponed,—“I was the driver of the lorry when the accident happened. It was loaded with post-office hampers. There were two horses. A post-office official was in charge of the hampers. They were three rows high. They are 4½ feet long. The postmen put on the hampers. I have nothing to do with that. The post-office people do all that. I was told by a postman to drive to Central Station, and to stop outside in the covered way. I am under his orders. I went to covered way, and stopped opposite booking office. The railway people would not take hampers off there, but said that we must go on into station. I had come to a dead stop. We were only about 3 yards from entrance to carriage entrance. That was from horses' heads. I then drove on and saw a lady coming along pavement by Station Hotel, and I shouted to her to stop several times. She stopped when we shouted, and went up the same way as the lorry at the side of the walk. The horses were walking. We could not get on to the trot. Three hampers tumbled off. Can't say about wheels being on curb. I could not see and did not feel it. . . .”

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question in furtherance of a special order and direction given to him by a post-office official, the defenders are not liable in law for the fault of the said William Brannan in consequence of his complying with such special order and direction."

Lord Low refused to give the required direction, and the jury thereupon returned a verdict for the pursuer, assessing the damages at £500.

The defenders thereupon presented a bill of exceptions in respect of Lord Low's refusal to give the above direction, and further, moved for a rule on the ground that the verdict was contrary to evidence.

The rule having been granted, argued for the pursuer;—The evidence justified a verdict for the pursuer on the ground that the driver was driving too fast. Apart from the special terms of the contract, there could be no doubt that Brannan was the servant of the defenders, and that they were responsible for his fault, and nothing in the contract took the case out of the rule that a person hiring a vehicle and driver was not responsible for the fault of the latter.¹ The driver here was not entirely under the control of the hirer as in *Rourke's* case,² the vehicle only being let out for the special purpose of taking the hampers to the railway station.

Argued for the defenders;—The evidence of reckless driving was not sufficient to justify the verdict. On the contract the defenders were not liable, as the post-office authorities had the control of the drivers. Both the post-office official who was on the van and the driver himself stated that that was their view of their relative positions. The post-office had almost unbounded control over the drivers, as they could insist on their dismissal if they did not do their duty properly, and the appointment of drivers was subject to their approval.³

At advising,—

LORD PRESIDENT.—If it had been clear on the evidence that the post-office official on this lorry had the control of all its movements I should have thought the verdict wrong. The evidence, however, does not come up to this. *Prima facie*, the horse and lorry being the property of the defenders, and the driver their servant, it is for the defenders to make out that at the time of the accident he was *pro hac vice* the servant of the post-office. Now, the written contract with the post-office does not necessarily imply this, and although the statement of the post-office official, "He was under my orders" points to it, yet that statement is not sufficiently precise to conclude the question. In a sense the driver of a hired carriage is under the orders of the hirer, for the driver is bound to drive where the hirer bids him; and yet it is quite settled that this relation between the hirer and the driver does not impose liability on the former. Now, I do not think that the evidence is inconsistent with this, and no more, being the true state of the facts in the present case, and this being a question of fact, it was within the province of the jury. The attention of his Lordship and of the jury was drawn to the point, as appears from the direction asked, and this part of the evidence duly considered.

The direction asked seems to me to have been too vague and ambiguous to

¹ *Laugher v. Pointer*, 1826, 5 Barn. and Cress. 547; *Quarman v. Burnett*, 1840, 6 Meas. and Well. 499; *Jones v. Corporation of Liverpool*, 1885, L. R., 14 Q. B. D. 890; *Reedie v. London and North-Western Railway Co.*, 1849, L. R., 4 Exch. 244; *Shiells v. Edinburgh and Glasgow Railway Co.*, July 4, 1856, 18 D. 1199, 28 Scot. Jur. 539.

² *Rourke v. White Moss Colliery Co.*, 1877, L. R., 2 C. P. Div. 205.

³ *Donovan v. Laing, &c.*, L. R., [1893] 1 Q. B. 629.

have been else than a misleading direction. Applied as it was to a driving case, it might have led the jury into the error of finding for the defenders on the sole ground that the post-office official had the right to name the destination to which he desired the lorry to be driven.

I am therefore for refusing the rule and the bill of exceptions.

LORD ADAM.—The jury in this case returned a verdict for the pursuer, with £500 damages, and from the evidence there can be no doubt that they were of opinion that the accident happened through the fault of Brannan, the driver. Now, Brannan was undoubtedly the servant of the defenders, and *prima facie* they are responsible for their servant's action. But it is said that at the time Brannan was under the special control and orders of the post-office. Now, in one sense it is true that he was under the orders of the post-office, but I think the evidence shews only in this sense, that the person in charge of the mails or parcels ordered him to drive from the point of entrance to the railway station where he was, round to the platform. But as far as I can see from the evidence, he gave him no orders whatever interfering with or affecting the manner in which he was to go to his destination. We have the contract between the post-office and the defenders, and it is clear from that contract that the position of matters was this, that the contractors agreed to carry the mails and the officials in charge of them, and to provide suitable vehicles for transporting parcels to and from the post-office and stations, and various other places in Glasgow and the neighbourhood. Now, of course, the driver of vehicles so supplied was under the orders of the post-office as to where he was to go. That is clear from the contract, but it is also clear from the contract, so far as I can see, that he was under the orders of the post-office in no other way or degree. Now, it appears to me that, if this accident happened, as I think the evidence shews it did, from the fault of Brannan in carrying out the contract or doing his work for his master—namely in transporting the letters and parcels from one spot to another—it is impossible to shift the responsibility on to the post-office. Therefore, it appears to me that there is no shifting of the *onus*.

It appears to me that in a case of this kind, where a person hires a horse and van, it is a well-known rule that the hirer will not be involved in responsibility for accidents caused by the hired. I do not see that it makes any difference to the principle whether the hire is for a day or a month, or whether it is or is not in writing. I concur with your Lordship that we should not disturb this verdict.

For the same reasons I think it would have been entirely wrong for the Judge to have charged the jury in the terms in which his Lordship was asked to direct them.

LORD KINNEAR.—I am of the same opinion. The parties are agreed that the accident was caused by the wheel of the defenders' lorry taking the curb as it went into the station. That being so, the first question of fact which arose for the consideration of the jury was whether the accident was due to want of skill or care on the part of the driver Brannan, or whether it was the inevitable consequence of his attempt to enter the station under the direction of the post-office messenger who was in charge of the parcels with which the lorry was loaded. Now, there certainly was evidence before the jury in support of the affirmative of the first of these questions, and perhaps the evidence of Brannan was as strong as any other proof could be. That at all events was a question for the jury.

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No. 59. If, however, the accident was caused by Brannan's error in driving, then the question came to be whether Brannan was or was not the servant of the defenders, so as to make them liable for his fault, and that depends upon the meaning of their contract with the post-office, for, if they had not only hired out their lorry to the post-office, but had also transferred the entire control of their drivers and other servants to the post-office authorities, then the driver must be held to have become a servant of the post-office, which would in that case be liable for his acts in the course of his employment. But I concur with your Lordships that that is not the true effect and meaning of the contract between the Tramway Company and the post-office. In so far as it depends upon the written contract it seems to be clear enough that what the defenders undertook to do was simply to convey or cause to be conveyed these mails, and to provide the post-office with a sufficient number of good and substantial vans, brakes, and mail-carts under the charge of steady and sober drivers, not being under eighteen years of age, subject to the approval of the post-office authorities. Their obligation in the first place was to supply the conveyances and drivers, and the contract goes on to provide that the company shall maintain due discipline among the said drivers, and shall be responsible for their clothing and for the horses and harness. That shews that the company were the direct masters of the drivers in charge of the conveyances in question. There is a further stipulation in favour of the post-office authorities, that, if they disapprove of any of the conveyances, horses, or drivers, they shall be entitled to require the same to be removed or changed, and that the company shall on due cause shewn, and after due notice, dismiss any such driver. That is not a condition that the post-office should have control of the drivers at all, but that, if any driver acted wrongly, or if they were dissatisfied with any driver, they should complain of him to the company, who upon cause shewn that the complaint was justified should dismiss him. It appears to me, therefore, that there is no ground for saying that the control of the Tramway Company's servant was transferred from them to the post-office. Nor was there any evidence before the jury to enable them to come to that conclusion. I think there is only one passage in the evidence upon which an argument to that effect might be founded. But it was for the jury under the direction of the Judge to consider what was the true meaning of that evidence. It appears to me, that upon the evidence before them they were justified in holding that at the time of the accident Brannan was the servant of the tramway company, and that the error, whatever it may have been, was committed in the course of his employment by them. I entirely concur with your Lordships that, if that is so, the direction which the learned Judge was asked to give was not proper. But apart altogether from the question of fact, I think the direction itself would have been altogether misleading. The language in which it is expressed would not have been sufficient explanation to the jury of what was the true legal formula upon which the Judge refused to give that direction.

LORD LOW.—I concur in the view stated by Lord Adam.

LORD M'LAREN was absent.

THE COURT disallowed the exception, discharged the rule, and refused to grant a new trial.

GILL & PRINGLE, W.S.—JOHN RHIND, S.S.C.—Agents.

THOMAS MAIN, Pursuer (Respondent).—*R. V. Campbell—W. Thomson.*
LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY, Defenders
(Appellants).—*Dickson—Ure.*

No. 60.

Dec. 19, 1893.
Main v.

Process—Sheriff—Appeal—Competency—Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sections 60, 61, and 150.—The Railway Clauses Consolidation Act, 1845, section 61, provides that “if any difference arise respecting the kind” or number of the accommodation works which a railway company is bound to make, or respecting their maintenance, “the same shall be determined by the Sheriff or two Justices. . . .”

Held that no appeal lies to the Court of Session against a determination of a Sheriff-substitute under this section.

THOMAS MAIN, market gardener, Milton, near Bowling, and the Lanark-shire and Dumbartonshire Railway Company, having differed as to the accommodation works to be provided for Main's flower and fruit garden under the Railways Clauses Consolidation (Scotland) Act, 1845, Main presented a petition under the statute * in the Sheriff Court at Dumbarton, praying the Sheriff to determine the matter in dispute.

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Stirling, Dum-
barton, and
Clackmannan.

The Railway Company lodged answers, but no record was made up.

The Sheriff-substitute (Gebbie), accompanied by Mr William Robertson, civil engineer, Glasgow, visited the ground, and having met the parties on the ground, heard their explanations.

On 9th August 1893, the Sheriff-substitute pronounced an interlocutor determining the accommodation works which the Railway Company were to make, and ordained the works to be commenced within thirty days, and to be executed with nine months.

The Railway Company appealed to the Court of Session.

At the hearing, the respondent objected to the competency of the appeal, and it was argued for him;—The Sheriff-substitute here was acting in his administrative and not in his judicial capacity, and the Court of Session could not review his determination.¹

Argued for the appellants;—The Sheriff-substitute had not been called upon, as in *Strain's* case,¹ to exercise his administrative function. He was acting judicially. It was competent then to come to the Supreme Court in the ordinary way to have his judgment reviewed. Where, as here, a new civil jurisdiction was conferred upon the Sheriff by statute with a power to judge in special matters, it was conferred subject to all the usual rights of appeal to the Supreme Court unless the contrary was expressly provided.² No stronger examples could be found of the soundness of this proposition than the undernoted cases on the Bankruptcy Statutes.³ Even where a statute contained the expression

* The Railway Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 33), sec. 61, enacts,—“If any difference arise respecting the kind or number of any such accommodation works” (as the railway company are bound under section 60 to make for the accommodation of the owners and occupiers of land adjoining the railway), “or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by the Sheriff or two Justices. . . .”

¹ *Glasgow District Subway Co. v. Corporation of Glasgow*, Nov. 8, 1893, 31 S. L. R. 70; *Strain v. Strain*, June 26, 1886, 13 R. 1029; *Deas on Railways*, Appendix, p. cx.; *Browne and Theobald on Railways* (2d ed.), p. 278; *Hood v. North-Eastern Railway Co.*, 1870, L. R., 11 Eq. 116, and 40 L. J. Ch. 17.

² *Erskine's Institutes*, i. 2, 7, and i. 3, 20; *Brown v. Edinburgh and Glasgow Railway Co.*, March 15, 1864, 2 Macph. 875, 36 Scot. Jur. 438.

³ *Tennant v. Crawford*, Jan. 12, 1878, 5 R. 433; *Marr & Sons v. Lindsay*, June 4, 1881, 8 R. 784.

No. 60. “finally determined” by the Justices, the Supreme Court was not prevented from considering and reversing the decision of the Justices.¹

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tonshire Rail-
way Co.

LORD ADAM.—The question is whether this appeal is competent. I may point out, in the first place, that the proceedings in question are entirely statutory, with regard to which the Court of Session has no original jurisdiction at all. The parties could not possibly have come to us in the first instance to have the matter of these accommodation works determined between them, and that fact at once distinguishes this case from the case of *Marr*, 8 R. 874, and the other bankruptcy cases to which we were referred. The Lord President, in the case of *Marr*, clearly points out the distinction. “The general rule,” he says, “is that the right of appeal from an inferior to a superior Court cannot be taken away except by express words. But that is a rule which may be said to be subject to some qualification, because if the jurisdiction exercised by the Sheriff is a jurisdiction specially given to him by statute, and in which the Court has not previously had jurisdiction, it may be much more easily implied that the Sheriff’s jurisdiction is not only privative but final, and not subject to review”; and that must be so, because it appears to me that in such a case the primary question is not whether an existing jurisdiction of the Court is to be taken away but whether a new jurisdiction is impliedly conferred on this Court. As I understand it, the principle is that this is implied on the ground that the Court of Session has jurisdiction over all inferior Courts in all civil matters, and therefore that when jurisdiction in a civil matter is conferred by statute on an inferior Court it is presumed to be conferred subject to the usual powers of review and otherwise of the superior Court. The principle is thus stated by the Lord Justice-Clerk in the case of the *Magistrates of Portobello*, 10 R. 131, —“Where,” he says, “a well-known and recognised jurisdiction is invoked by the Legislature for the purpose of carrying out a series of provisions which are important for the public without any specific form of process being prescribed, the presumption is that the ordinary forms of that Court are to be observed in carrying out the provisions, and indeed generally that the Court has been adopted and chosen and selected, because it is seen to be advisable that the ordinary rules of such Court and the forms of its procedure shall be applied to give effect to the provisions of the Legislature Act.”

The question therefore in this case is whether, when the Legislature provided that if any difference should arise concerning the kind or number of accommodation works it should be determined by the Sheriff or two Justices, it was intended to invoke the jurisdiction of the Sheriff Court or the Justice of Peace Court with all their ordinary methods of procedure, and including the right of review by the Court of Session.

Now, although it was not brought under our notice by the parties, the Railway Clauses Act contains provisions regulating the matter of appeal in cases like the present. Sec. 150 enacts,—“In all cases which may come before any Sheriff-substitute under this or the special Act, or any Act incorporated therewith, in which written pleadings shall have been allowed, and a written record shall have been made up, and where the evidence which has been led by the parties shall have been reduced to writing, but in no other case whatever, it

¹ *Buchanan v. Towart*, March 10, 1754, M. 7347; *Guthrie and Others v. Cowan*, Dec. 10, 1807, F. C.; *Anderson & Co. v. Campbell and Others*, Feb. 28, 1811, F. C.

shall be competent for any of the parties thereto, within seven days after a final judgment shall have been pronounced by such Sheriff-substitute, to appeal against the same to the Sheriff of the county by lodging a minute of appeal with the Sheriff-clerk of such county or his depute; and the said Sheriff shall thereupon review the proceedings of the said Sheriff-substitute, and whole process, and, if he think proper, hear the parties *viva voce* thereon, and pronounce judgment; and such judgment shall in no case be subject to review by suspension or advocacy, or to reduction on any ground whatever." No. 60.
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The 151st and 152d sections of the Act provide in like manner for appeals in the case of matters brought before the Justices.

Now, it will be observed that in this there was no written record made up; there was no proof led by the parties, and therefore that there could have been no appeal even to the Sheriff. That being so, it appears to me to be difficult to come to the conclusion that, nevertheless, a right of appeal to the Court of Session was intended to be conferred. I think the clear intention of the statute was that there should be a limited appeal within the Sheriff Court itself in a certain definite class of cases, and presumably the more important, but no other appeal whatever.

It is impossible to say that the Sheriff Court is here invoked by the Legislature with its well-known and recognised jurisdiction and its ordinary rules and forms of procedure.

I think the proceedings in question are entirely statutory, and that no appeal lies to the Court of Session. I think, therefore, the appeal should be dismissed as incompetent.

LORD M'LAREN and the LORD PRESIDENT concurred.

LORD KINNEAR was absent.

THE COURT dismissed the appeal as incompetent.

W. & J. BURNES, W.S.—CLARK & MACDONALD, S.S.C.—Agents.

JAMES GLEN EDGAR, Petitioner.—*Dickson—Christie.*

JOHN M'KILLOP AND OTHERS (Fisher's Trustees), Respondents.—*Lees.*

Tutor—Factor loco tutoris—Removal.—Under a trust-deed an aunt was sole tutor and curator to a pupil niece, *quoad* the trust-estate. The aunt and the child were the sole beneficiaries under the trust. The aunt removed the child out of the jurisdiction of the Court, and having failed to comply with an order of Court to restore the child, her estates were sequestrated and a judicial factor appointed thereon. No. 61.
Dec. 20, 1893.
Edgar v.
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tees.

In a petition at the instance of the father of the child to have the aunt removed from the office of testamentary tutor and curator and a factor *loco tutoris* appointed on the child's share in the trust-estate, or to have the care of the child's interest in the said estate committed to his care as her tutor, curator, and administrator-in-law, the Court, without removing the aunt from her office, appointed a factor *loco tutoris* to the child.

(*Edgar v. Fisher's Trustees*, Nov. 10, 1893, *supra*, p. 59.)

UNDER the mutual trust-disposition and settlement of Mr and Mrs Fisher, Glasgow, Miss Margaret Brown Fisher and two others, trustees under the deed, were appointed tutors and curators to such of the beneficiaries under the settlement as might be in pupillarity or minority when it came into force. The other original trustees having died, Miss Margaret B. Fisher came to be sole tutor of Everina Burns Edgar, pupil daughter of James Glen Edgar, *quoad* her interest in the trust-estate. Miss Fisher and Miss Edgar were the only beneficiaries under the deed. 1ST DIVISION.

No. 61.

Dec. 20, 1893.
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On 5th September 1893 Miss Fisher removed Everina Edgar from the custody of her father, and took her outwith the jurisdiction of the Court. On 21st September in a petition at the instance of James Glen Edgar, the Court ordained Miss Fisher to restore the child to her father. This she failed to do, and the Court ordained her to appear personally at the bar. She did not, however, appear, and on 10th November the Court sequestrated her estates, and appointed Mr John M. MacLeod, C.A., Glasgow, to be judicial factor thereon.

On 28th November 1893 James G. Edgar presented a petition stating the above circumstances, and praying the Court "to remove the said Margaret Brown Fisher from the office conferred upon her by the said mutual trust-disposition and settlement of the said George Fisher and Mrs Everina Burns or Fisher, dated and recorded as aforesaid, of testamentary tutor and curator to the said Everina Burns Edgar, and, in the discretion of your Lordships either to appoint such fit person as your Lordships may select to be factor *loco tutoris* of the said Everina Burns Edgar, with the usual powers, but only in so far as concerns her share and interest in the said trust-estate, he always finding caution before extract; or otherwise to abstain from making such appointment, and to commit the care of the said child's share and interest in said estate to the guardianship of the petitioner, her father, as her tutor, curator, and administrator-in-law."

Miss Fisher and John M'Killop and another who had been assumed as trustees into the trust were called. Miss Fisher did not appear, but the other respondents lodged answers, in which they submitted that the petition was unnecessary, but urged that, if the Court thought any appointment necessary, it should be conferred on Mr MacLeod.

On 20th December 1893 (Lord M'Laren absent) the Court, without delivering any opinions, pronounced this interlocutor:—"Appoint Mr John M. MacLeod, chartered accountant in Glasgow, to be factor *loco tutoris* to Everina Burns Edgar mentioned in the petition, with the usual powers, including power to uplift and discharge all sums and estate due or to become due to her, he always finding caution before extract; and decern."

SIMPSON & MARWICK, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 62.

Dec. 22, 1893.
Waugh v.
Ayrshire Post, Limited.

SAMUEL WAUGH, Pursuer (Reclaimer).—*Salvesen—Younger.*
AYRSHIRE POST, LIMITED, Defenders (Respondents).—*Shaw—Hunter.*

Reparation—Slander—Innuendo—Issues.—In an action of damages for slander the pursuer averred that the defenders, the publishers of a newspaper, had published an anonymous letter "intending to convey to members of the public that it was written by the pursuer," and had commented thereon. He stated that the letter was not written by him, and averred that the letter falsely and calumniously represented the pursuer as "longing for an opportunity of committing murder on his Roman Catholic fellow-citizens, or at all events of shedding their blood in civil commotion." Terms of the letter on which it was held (1) that the words could be innuendoed as an incitement to riot and bloodshed, and (2) that it was slanderous to attribute to the pursuer the authorship of the letter.

Terms of the issue *adjusted* to try the cause.

1st Division.
Ld. Kyllachy.

On 23d October 1893, Samuel Waugh, shoemaker, Maybole, brought an action against the Ayrshire Post, Limited, proprietors and publishers of the *Ayrshire Post* newspaper, concluding for £500 damages for slander.

The pursuer averred that he resided at 2 Belmont Terrace, Maybole, No. 62, and that he was secretary of the County Grand Orange Lodge of Ayrshire.

He further averred;—(Cond. 2) “In the *Ayrshire Post* of Friday, 28th July 1893, and in the ‘Oculeus’ column of the said newspaper, there appeared the following paragraph:—

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“‘Halt! Who goes there? An Orangeman.

“‘Belmont Terrace, Maybole, July 17th, 1893.—Mr Oculeus (or whatever they may call you), I don’t often lower myself with buying your *Ayrshire Post*, as I am more of a gentleman than read such rubbish of news as what is gathered up from your low scums of reporters, as your staff is made up of nothing but midden-rakers and chimney-sweeps. . . . Mr Oculeus, you must be a mean coward—like all the rest of your bloodthirsty crew—when you did not come to Irvine last Saturday and tell us about our long tile hats there. I know your reason. Mr Wallace of Cloncaird would have put his Orange sword down your throat, same as we done at Boyne Water. I only wish we may have the chance of meet you and your Radical crew. We will give you what we gave some of your Radical friends at Girvan in 1831; as we Maybole heroes is just thinking long for the time to come when we will have the chance of letting out the Papish blood once more. Mr Oculeus, I did not intend to lower my name with such trash as chimney-sweeps and midden-rakers, but if you don’t appologise for speaking about God-fearing, law-abiding people like what belongs to our Orange Order, as nothing but a good Protestant would be admitted into our ranks. . . . I will speak to Mr Wallace of Cloncaird, and see what can be done, as you are no gentleman, when you cannot give us your name.’”

The comment on the letter was as follows:—“I am a coward, are you? Because I do not give my name. Yet, while accusing me of that, you do not give your own name. . . .

“H. R. Wallace is president of a lodge of these fire-eating blitherers. Really I feel ashamed of my kinsman. . . . I would like to give my readers a little more information, but space forbids me this week.”

(Cond. 3) “The letter, or pretended letter, quoted in the above column, bears to be written from the pursuer’s address by an Orangeman, and is intended to convey the belief to members of the public that it was written by the pursuer. The said letter was not written by the pursuer, but is really a covert and malicious attack upon him and his opinions, which are opposed to those professed by the *Ayrshire Post*. The defenders knew that the pursuer was not the author of the said pretended letter, but they nevertheless published it as emanating from him. At all events the defenders had reason to suspect the genuineness of the said letter, and they did in fact suspect it, but they published the same without having communicated with the pursuer, although a reference was made to the pursuer in the unpublished portion of said letter referred to in the answer, and his correct address was given, and also without having obtained any knowledge of its author. In so doing they acted negligently and recklessly, and in breach of the rules in regard to publication of unsigned or anonymous letters which they print and publish in their newspaper. The defenders ought in no case to have published such a scurrilous production as the letter in question, and they would not have done so except to gratify their private malice.”

The pursuer innuendoed this letter and paragraph as follows:—“The said letter is wholly false and calumnious, and, *inter alia*, attributes to the pursuer sentiments of the most odious and criminal kind. In particular, the said pretended letter falsely and calumniously represented

No. 62. the pursuer as longing for an opportunity of committing murder on his Roman Catholic fellow-citizens, or at all events of shedding their blood in civil commotion. The said letter is calculated to hold up the pursuer to the contempt and hatred of the community with which he is connected, and of inciting the hatred against him of many of his fellow-citizens."

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 Limited.

The defenders admitted the publication, but averred that the letter was received by them by post from Maybole, and that the conclusion of the letter, which was not published, was,—“If you want any further communication with me you can address as above (Belmont Terrace), or to my father, Samuel Waugh, Orange Buildings, Maybole.” They stated that they had made inquiries, and that the letter was published in the *bona fide* belief that it came from the pursuer, and that he wished it to be published.

On 9th December 1893 the Lord Ordinary (Kyllachy) adjusted the following issue for the trial of the cause:—“It being admitted that the defenders, in the issue of 28th July 1893 of the *Ayrshire Post* newspaper, printed and published the paragraph, including the pretended letter contained in the schedule hereto annexed: Whether the said letter and paragraph are of and concerning the pursuer, and falsely impute to him that he is, and avows himself to be, a person of fanatical and odious sentiments, who desires an opportunity of shedding the blood of his Roman Catholic fellow-citizens in civil commotion; and whether the said letter and paragraph were written and published with the design and with the result of holding up the pursuer to public hatred and contempt, to his loss, injury, and damage?”*

The pursuer reclaimed, and maintained that he was entitled to an issue of slander.¹ The imputation of having written such a letter as that put in issue was slanderous, as the terms of the letter amounted to an incitement to violence and bloodshed. The form of issue allowed by the Lord Ordinary, which followed that allowed in *Paterson v. Welch*, only applied to cases where the statement alleged by the defender to have been made

* “OPINION.—In this case the pursuer proposes two alternative issues,—the one an ordinary issue of slander, and the other an issue in a special form similar to the issues allowed by the Court in *Sheriff v. Wilson*, 17 D. 52; *Cunningham v. Phillips*, 6 Macph. 926; *Maclaren v. Ritchie* (not reported); *Paterson v. Welch*, 20 R. 744.

“I have come to the conclusion that the second of those issues, somewhat altered in its terms, is the proper issue to try the case. I am not satisfied that the imputations on the pursuer amount to slander,—that is to say, to a charge against his character. To say of a man that he is a fanatic, or that he holds or avows sentiments which are even wildly fanatical, may be very offensive and very injurious, but I am not satisfied that such a statement is in any proper sense defamatory so as to be actionable *per se*, and without an express averment of intention to injure. I am not therefore prepared to send the first issue to the jury, more especially as no precedent can be found for an issue of slander in such circumstances.

“The second, I propose, should run thus:—(Quoted *supra*).

“It will be observed that as intention to injure is of the essence of the charge under this issue, I have put the question whether the letter and paragraph in question were written and published with that design. It will be for the jury to say at the trial, if the facts raise the question, whether an intention to injure on the part of the defender is consistent with what the defender alleges, viz., that he made all due inquiries, and had a *bona fide* belief in the authenticity of the letter.”

¹ *Paterson v. Welch*, May 31, 1893, 20 R. 744.

by a pursuer was not in itself of such a character as to make it slanderous to accuse a man of having said or written it.¹ No. 62.

The defenders maintained that the letter and paragraph would not bear the innuendo sought to be put upon them, and asked that the Lord Ordinary's issue (if any) should be allowed.

Dec. 22, 1893.
Waugh v.
Ayrshire Post,
Limited.

LORD PRESIDENT.—The first question to be considered is whether an issue of slander should be granted. Now, the way in which the case strikes me is this. The pursuer complains that the newspaper held out to the public that he had written and sent for publication the letter printed by them. If it would be immoral, or a piece of grievous misconduct, to offer for publication the letter attributed to him, then it is plain that an assertion that he wrote it and offered it for publication is plainly actionable. This leads me to examine the letter. It contains much trash, but it seems to me that the lines founded on by the pursuer can hardly be read otherwise than as inciting to violence and bloodshed, or I should rather say, may quite rationally be read as having that meaning. There are allusions all through the letter to acts of violence to Roman Catholics, the meaning of which is difficult to mistake. Now, Mr Shaw admits that it is actionable to accuse a man of inciting to violence, and if this letter may fairly be read as inciting to violence, then the pursuer seems entitled to have an issue of slander. I therefore propose that we should allow the following issue:—(His Lordship quoted the issue printed *infra*).

My opinion proceeds on the ground that to write a letter inciting to violence and bloodshed is so grave an act of misconduct that to ascribe such a letter to a man is slanderous. Under the issue which I propose that we should grant it would be quite open to the defenders to acquaint the jury with any extenuating circumstances which may have led them to publish the letter, and which might be pleaded in mitigation of damages. Thinking as I do that the pursuer is entitled to an issue of slander, that issue supersedes the necessity of resorting to the form adopted by the Lord Ordinary.

LORD ADAM.—I have no doubt that to publish of anyone that he is a person who has incited to bloodshed and violence is *per se* actionable, and the question comes to be whether the letter and paragraph do impute such sentiments to the pursuer. The question of libel or no libel is one for the jury, and we are not entitled to withhold the letter and paragraph from a jury unless we are satisfied that the innuendo placed upon the letter by the pursuer is unreasonable. To that extent we may construe an alleged libel. We are in short just now in the same position as if a jury had returned a verdict for the pursuer on an issue of slander, and we were being asked to upset their verdict on the ground that it was unreasonable. But I am of opinion that the innuendo here is a reasonable one. That being so, I think the issue proposed by your Lordship is the right one. Had the letter and paragraph not been *per se* slanderous, or capable of being innuendoeed as slanderous, then it would have been necessary to shew that the publication had been made with a view to do the pursuer injury, and had done him injury. In such a case the issue adjusted by the Lord Ordinary would have been the right one, but I do not think that that is the case we have here, and I therefore concur in the issue now proposed.

¹ Mackay v. Campbell, July 25, 1833, 11 S. 1031; Russell v. Shereffs, March 16, 1837, 15 S. 881; Graham v. Roy, Feb. 11, 1851, 13 D. 634, 23 Scot. Jur. 124; Ersk. Inst. iv. 4, 80.

No. 62. LORD KINNEAR concurred.

Dec. 22, 1893. LORD M'LAREN was absent.
 Waugh v.
 Ayrshire Post,
 Limited.

THE COURT recalled the interlocutor of the Lord Ordinary, and allowed the following issue:—"It being admitted that the defenders, in the issue of 28th July 1893 of the *Ayrshire Post* newspaper, printed and published the paragraph, including the pretended letter contained in the schedule hereto annexed: Whether the statements contained in said paragraph and letter are of and concerning the pursuer, and falsely and calumniously represent that the pursuer had written a letter for publication in a newspaper, in which letter he incited to riot and bloodshed, to the loss, injury, and damage of the pursuer?"

STURROCK & GRAHAM, W.S.—R. AINSLIE BROWN, S.S.C.—Agents.

No. 63. WILLIAM SPENCE SMITH, Pursuer (Respondent).—*Murray—Galloway.*
 JAMES HUTCHEON (Harrison & Company's Trustee), Defender (Appellant).
 —*Dickson—A. J. Morison.*

Dec. 22, 1893.
 Smith v. Har-
 rison & Co.'s
 Trustee.

Lease—Tenant's right to remove buildings erected by him.—Where a tenant is entitled at the expiration of his lease to remove buildings erected by him, he cannot enforce this right when he has not implemented his obligations under the lease.

Lease—Trust-deed for creditors—Compensation—Loss by abandonment of lease—Value of buildings erected by tenant.—A tenant, several years before the termination of his lease, granted a trust-deed for behoof of his creditors. The lease having been abandoned by the trustee, it was arranged between the trustee and the landlord that buildings which the tenant would have been entitled to remove at the natural expiration of the lease should be taken over by the landlord at their value. *Held* that the landlord's agreement to pay the value of the buildings was to be construed as subject to his antecedent right to retain them till the tenant had implemented his obligations under the lease, and that the landlord was entitled to set off against the trustee's claim for the value of the buildings his loss by the tenant's abandonment of the lease.

1ST DIVISION.
 Sheriff of
 Caithness,
 Orkney, and
 Shetland.

WILLIAM S. SMITH, as factor for P. L. Smith, proprietor of the lands of the North Ness of Lerwick, let four different subjects to A. H. Harrison & Company, fishcurers, Shetland. On one of the subjects buildings were erected by the tenants.

On 30th November 1889 Harrison & Company granted a trust-deed for behoof of their creditors in favour of James Hutcheon. At this date the leases had still several years to run.

On 13th January 1890, Hutcheon, who had been arranging with Smith for the surrender of the leases, wrote to him as follows:—"Referring to our conversation of Saturday, what I have to propose is that,—(1) The loss to the end of the respective leases on the three stations I intend to give up be estimated by two valuers mutually chosen, and if no agreement can be arrived at, let the matter be referred to an oversman. (2) That the erections and improvements on the fourth station be taken over by you at mutual valuation, with reference to oversman, if need be. . . ." Smith replied on 23d January,—*"In accordance with my promise made to you on 16th inst., I now beg to reply formally to your favour of 13th current. Agreeable to your suggestion to appoint valuers to value the loss I sustain to the end of the leases, and to value the erections on the £16 station, same to be taken over by me at the valuation. . . . Of course, my taking over the erections on the £16*

station infers that the loss or gain on that station should also be determined by the valuator. . . .” No. 69.

On 1st November 1890 the valutors under this agreement issued an award or report which proceeded on the narrative that they had been called upon “to value the buildings erected by the said Messrs A. H. Harrison & Company, and to estimate the rents probably obtainable for these stations during what remains of the various leases.” They valued the buildings at £175. The loss to the landlord by taking over the leases was put down at £406 17 6 X
and the report proceeded,—

“Deduct value of buildings, 175 0 0

“Amount for which proprietor will rank, . . . £231 17 6”

Smith thereafter raised an action against Hutcheon in the Sheriff Court at Lerwick concluding, *inter alia*, for decree ordaining the defender to pay him £231, 17s. 6d., or otherwise to rank him for that amount on the estate of Harrison & Company.

He averred, *inter alia*;—(Cond. 5) “The sum of £406, 17s. 6d. is the amount of loss sustained by the pursuer under said agreement in taking over said leases, and the sum of £175 is the value of the erections and buildings taken over by the pursuer, and the sum of £231, 17s. 6d. is the sum due by the defender to the pursuer under said agreement.”

The defender stated that the buildings formed a valuable asset of the trust-estate. “The defender, as trustee foresaid, was entitled, subject to any right of hypothec competent to the landlord, to sell and dispose of the buildings and rank the landlord as an ordinary creditor for the present value of the loss of future rents under the leases to be sustained subsequent to the date of abandonment of the leases taking effect. The agreement between the parties was that, in place of his (the defender) selling and removing the buildings, the landlord should take them over and pay for them the sum which might be fixed as their value under the informal arbitration. It was also agreed that the arbiters should estimate the amount of loss which the landlord would sustain by the leases being terminated in respect of loss of future rents payable under the leases. The only matters referred to the arbiters were to value the loss to the proprietor by the leases being terminated, and to fix the price to be paid by the proprietor for the buildings.”

The defender offered to give the pursuer a ranking for £406, 17s. 6d. on the trust-estate, but averred that the arbiters had gone *ultra fines compromissi* in deducting the value of the buildings from the pursuer's counter claim of damages, and ranking the pursuer for the balance, and stated pleas to that effect. He also pleaded;—(2) The pursuer's statements being irrelevant and insufficient to support the conclusions of the petition, the action should be dismissed, with expenses.

The Sheriff-substitute (Shennan), on 4th October 1893, allowed parties a proof.

The defender appealed, and argued;—The action was laid entirely on the agreement, and that being so, ought to be dismissed, for there was nothing in the agreement to warrant the plea of compensation. The only matters referred by the agreement to the arbiters were (1) the value of the buildings; and (2) the loss of rent sustained by the landlord; and they had clearly gone *extra fines compromissi* in setting off the one claim against the other. But assuming the question of compensation to be validly raised it failed on the merits. The landlord's claim arose out of the lease. The agreement to make over the buildings to the landlord, out of which the trustee's claim for their value arose, was a totally

Dec. 22, 1893.
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Trustee.

No. 63. different contract, subsequent in date to the bankruptcy, and but for it the landlord would have had no claim to the buildings. There was therefore no *concursum debiti et crediti*.¹

Dec. 22, 1893.
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rison & Co.'s
Trustee.

The pursuer argued;—But for the words “under said agreement” in cond. 5 the action was admittedly relevant. These were not, however, sufficient to make it irrelevant, for the real question,—that, namely, of compensation,—was clearly enough raised apart from the agreement. It fell to be determined according to the rights of parties prior to the agreement, which merely ascertained the pecuniary values of these rights, and did not affect their nature. In the circumstances, then, the landlord had a right to retain the buildings, for assuming that they might have been removed by the tenant at the expiration of the lease, they had none the less become *partes solæ*,² and the tenant's right to remove them was entirely dependent on his implementing his obligations to the landlord under the lease. But the landlord's admitted counter claim here arose from the tenant's inability and failure to pay the stipulated rents. The landlord was therefore entitled to retain the buildings, or what was the same thing, to set off their value against the debt due to him by the tenant.

At advising,—

LORD PRESIDENT.—The whole question turns on the agreement contained in the two letters of 13th and 23d January 1890. As regards the report and award of the men of skill, it is perfectly plain that the men of skill had nothing to do but to value the buildings under article 2, and the loss under article 1 of the first letter. The other part of their award, in which they purport to fix the sum ultimately due has no legal effect on the question which we have now to determine.

That question is whether the pursuer is entitled to set off the ascertained value of certain buildings erected by his tenant on his land against the loss sustained by him through the tenant having gone bankrupt and failed to pay rent for the unexpired term of his lease, the pursuer's claim being to rank for the balance.

The agreement in question was entered into between the landlord and the trustee for the creditors of the bankrupt. It is elliptically expressed, but its import, so far, is sufficiently clear, especially read in connection with the defender's record. It was arranged that instead of being removed by the tenant certain buildings are to remain on the ground and be kept by the landlord, he giving value for them at a figure to be fixed by valuers; while, on the other hand, the amount of the admitted liability of the estate for the bankrupt's failing to pay the rents is to be determined by the same valuers.

As to the mode in which those values were to be made good, the letters are silent. Their silence leaves this to be determined, as I consider, according to the nature of the rights, the pecuniary amounts of which are thus ascertained.

I agree with Mr Murray, therefore, that it is necessary to consider what were the antecedent rights of the parties; and I may add that I think the account he gave of them was perfectly accurate.

¹ Taylor's Trustee v. Paul, January 24, 1888, 15 R. 313; Davidson's Trustee v. Urquhart, May 26, 1892, 19 R. 808, Lord Young, p. 812.

² Brand's Trustees v. Brand's Trustees, March 16, 1876, 3 R. (H. L.) 16, L. R., 1 App. Ca. 762, at p. 766.

To begin with, the landlord had right to damages for the tenant's confessed default in fulfilling his obligations for the years of the current lease which were yet to run. This may now be taken as amounting to between £400 and £500.

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On the other hand, it is to be assumed that this tenant would have had right, at the expiry of his lease, to take away certain buildings. This right, however, was not absolute. We do not know exactly what those erections are, but it is enough for the argument that they are described by the defender as "buildings." Of all buildings it is certain that they are *partes soli*; of some buildings erected by the tenants, it is true that they may be removed by the tenant on his leaving at the expiry of his lease. But then this is the right of the tenant, as tenant, and can only be asserted on his fulfilling his obligations to the landlord. Until the tenant fulfils those obligations the landlord has a right of retention of those *partes soli* which the tenant may claim to remove.

Well, then, when this tenant declared his inability to meet his obligations, what was the right of his trustee regarding those buildings? He could only remove them upon paying the landlord what was still due. He could not remove and sell them to anyone unless and until the landlord's claims were satisfied. Practically, therefore, as the landlord's claims were upwards of £400, and the value of the buildings some £175, the value of the buildings to the bankrupt estate was dormant, the landlord being master of the situation.

On the other hand, the landlord might very well say,—“I am losing £400 by this man going bankrupt; on the other hand I am gaining £175 worth of buildings which, but for his bankruptcy, he would have taken away. I am willing to reduce the stated amount of my loss by the amount of my gain, and rank for the balance.” This is, to say the least, a reasonable view for the landlord to take of his own interests, and points to a sensible solution of the difficulty for both parties. It is, in my opinion, the proper construction to place upon the agreement. To suppose that the landlord went beyond this and agreed to pay for the buildings exactly as if he had no right over them seems to me a most unnatural and unsupported conjecture. We are, as I have said, by the silence of the agreement, thrown back upon the antecedent rights of the parties, it being natural to hold that no further inversion of the rights of parties was intended than what is stated.

This being my view of the case, it is hardly necessary to say that the decision which I propose in no way conflicts with the principle of such cases as *Taylor's Trustees v. Paul*. This case is not one in which the trustee was free to sell articles forming part of the bankrupt estate on his own terms and to whom he chose.

My opinion is that we ought to recall all the interlocutors in the case subsequent to the original interlocutor closing the record on 22d March 1893, when the case was perfectly ripe for judgment, on the grounds which I have now stated, and to ordain the defender to rank the pursuer as a creditor on the estate of A. H. Harrison & Company for the sum of £231, 17s. 6d., with legal interest from 1st November 1890, the date of the valuation.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

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Dec. 22, 1893.
Smith v. Harrison & Co.'s
Trustee.

THE COURT pronounced the following interlocutor:—"Recall the whole interlocutors in the cause subsequent to the interlocutor of the Sheriff-substitute dated 22d March 1893, closing the record: Ordain the defender to rank the pursuer as a creditor on the estate of A. H. Harrison & Company for the sum of £231, 17s. 6d. sterling, with legal interest from 1st November 1890, the date of the valuation of the buildings by the arbiters, and decern," &c.

CARMICHAEL & MILLER, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 64.

Jan. 10, 1894.
Cox v. "Gosford" Ship Co.

ROBERT COX, Petitioner.—*Jameson—W. C. Smith—Macaulay Smith.*
THE "GOSFORD" SHIP COMPANY, Respondents.—*Murray—Salvesen.*

Company—Winding-up by the Court—Failure of object of the company—Just and equitable cause—The Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 79, subsec. 5, sec. 129, subsec. 1.—On 13th December 1893 a shareholder, holding 10 out of 215 shares of a limited company, incorporated to own and work a particular ship, presented a petition to have the company wound up by the Court, on the ground that the ship had become a total loss off the coast of North America on 25th November 1893. Answers were lodged by the company, in which they stated that no good reason had been given or existed for a winding-up, and that it would not be just that the company should be wound up by the Court. It appeared that notice of abandonment had not yet been formally accepted by the underwriters who had insured the vessel, and that no meeting of shareholders had been held to consider the question of a voluntary winding-up. The Court *refused* the petition.

1ST DIVISION.

THE "GOSFORD" SHIP COMPANY, LIMITED, was registered and incorporated under the Companies Acts, 1862-1890, on 18th December 1891.

By the memorandum of association the objects for which the company was established were defined to be "the purchase, owning, and working of a steel sailing ship intended to be called the 'Gosford,' . . . and of no other ship," and power was conferred upon the company "to carry on the business of a shipowner in all its branches with respect to the said ship only. . . ."

The management of the company was vested in Briggs, Harvie, & Company, shipowners, Glasgow.

On 13th December 1893 Robert Cox, who held ten shares of the company, presented a petition under the Companies Acts* to have the company wound up by the Court.

He averred,—*"The said company, which, in terms of the memorandum and articles of association, existed solely for the purpose of working the said sailing ship 'Gosford,' carried on business from the date of incorporation till November 1893, when the said ship 'Gosford' was totally destroyed by fire off the Pacific Coast of North America, near San Francisco. The said ship is a total loss. At the date of the said disaster she was insured with various underwriters and underwriting associations and clubs to the extent of £21,500 on hull, £3000 on disbursements, and £1400 representing balance of freight. The petitioner is a holder of ten*

* The Companies Act, 1862 (25 and 26 Vict. cap. 89), provides, sec. 79,—*"A company under this Act may be wound up by the Court. . . . (5) Whenever the Court is of opinion that it is just and equitable that the company should be wound up."*

Sec. 82,—*"Any application to the Court for the winding-up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more . . . contributory or contributories of the company. . . ."*

fully paid shares of £100 each in the said company. By the 79th section of the Companies Act, 1862 (25 and 26 Vict. cap. 89), it is provided, *inter alia*, that 'a company under this Act may be wound up by the Court, as hereinafter defined, under the following circumstances (that is to say)—
 (5) Whenever the Court is of opinion that it is just and equitable that the company should be wound up.' Although Briggs, Harvie, & Company "were appointed managers of the said ship, and for the purposes of such management were empowered to do all the usual acts necessary for carrying on the business of a shipowner with respect to the said ship, they were not empowered either to wind up the company or to receive, on account of the shareholders, from the underwriters the moneys payable under the policies of said ship in respect of her total loss. In particular, the petitioner, as a contributory of the company, objects to the said managers intromitting with the moneys payable to the company by the said underwriters, in respect that they have no mandate from the company to intromit with said moneys, and for other good and sufficient reasons."

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Answers were lodged by the company, in which they stated,—“On 25th November 1893, while the said ship ‘Gosford’ was on a voyage from Birkenhead to San Francisco with a cargo of coal, the managers received a cable from the captain from Santa Barbara, California, intimating that the ship had been destroyed by fire, and had been scuttled, and lay in 5½ fathoms of water, and that notice of abandonment should be given. . . . The managers accordingly gave notice of abandonment to the underwriters, but the underwriters have refused to accept notice of abandonment, and efforts are being made on their behalf to raise the said ship, with the view of repairing her and restoring her to the company. In these circumstances, the company is not in a position to be wound up. The petitioner is a holder of ten shares of the company, and there are other thirty-eight shareholders who hold among them 205 shares. There has not since the disaster to the ship been any meeting of the shareholders to consider what may have to be done, and it is premature to consider any proposition for winding up the company, unless and until the underwriters accept an abandonment of the said ship; but in any event, the managers have ample powers to attend to the interests of the company, and to receive and discharge all sums due to the company, including the amounts insured, if they should become payable. The managers are the proprietors of ninety-five shares of the company. No good reason has been given or exists for winding up the company, and it would not be just and equitable that the company should be wound up by the Court.”

It appeared that notice of abandonment had not yet been formally accepted by the underwriters who had insured the vessel, and that no meeting of shareholders had been held to consider the question of a voluntary winding-up.

Argued for the petitioner;—When the Court was satisfied that the subject-matter of the business of a company had ceased to exist it would make an order for a compulsory winding-up although the majority of the shareholders desired to continue the company.¹ That was the position of matters here, for it was not seriously disputed that the “Gosford” had been abandoned as a total loss, and it would be *ultra vires* of the company to build or substitute another vessel in her place. To refuse the petition would be to postpone the date of winding-up, even assuming that a resolution for a voluntary winding-up would be carried. The

¹ *In re Haven Gold Mining Co.*, 1881, L. R., 20 Ch. D. 151; *In re German Date Coffee Company*, 1881, L. R., 20 Ch. D. 169.

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ford" Ship Co.

delay might be injurious to the petitioner. Besides, his application being perfectly competent, it was for the respondents to shew that they would be prejudiced by its being granted, and they had failed to do so. There were *dicta* to the effect that such an application would be granted where, liquidation being unavoidable, a shareholder presented his petition prior to a voluntary winding-up being resolved on by the company.¹ The cases cited by the respondents dealt with a totally different question from the present, viz., whether there should be a winding-up at all.

Argued for the respondents;—The negotiations with the underwriters had not been concluded, but assuming that the company must be wound up, it was for the shareholders to determine whether the winding-up should be voluntary. That was clearly contemplated by the Act* in circumstances like the present when the object of the company's incorporation no longer existed. But the shareholders had had no time or opportunity hitherto for doing so. Then it was not suggested that the company was insolvent, and where all the shareholders except one were opposed to a compulsory winding-up the Court would not act on the "just and equitable" section† unless there were very strong grounds for doing so,² and no relevant ground whatever had been stated by the petitioner. His interests would be just as well protected in a voluntary as in a compulsory winding-up, and there was no question of imprudence or impropriety on the part of the managers.

LORD PRESIDENT.—It appears that this ship, called the "Gosford," was the subject of a casualty of fire at some point off the Pacific Coast of North America so lately as November 1893. *Prima facie* there seems strong reason to think that the ship is a total loss; but it is not unnatural, considering the recentness of the event, that the matter has not been brought to a final and admitted conclusion as between the owners of the ship and the underwriters.

From the terms of the memorandum and articles of association it is clear that if the ship is a total loss and cannot be made the subject of further trading, then the work of the company has come to an end, and it must be wound up. But, in the meantime, it cannot be affirmed positively and definitely that the rights of the shareholders have been resolved into claims for their shares of the money payable by the underwriters. It seems to me that the petitioner has been quite premature, if not precipitate, in his action. The negotiations are not yet completed between the executive of the company and the underwriters; but assuming that they had been, it will then be for the shareholders to consider whether they should proceed to a voluntary winding-up of the company. The question arising on sec. 129, subsec. 1, will naturally come on as soon as the chapter of winding-up is opened, and the shareholders will say whether or not the natural course, viz., for the company to be wound up by voluntary

¹ *In re Gold Company*, 1879, L. R., 11 Ch. D. 701, Baggallay, L. J. 717.

* The Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 129,—“A company under this Act may be wound up voluntarily (1) whenever . . . the event, if any, occurs upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.”

† 25 and 26 Vict. c. 89, sec. 79, subsec. 5, *supra*, p. 334.

² *In re Professional, &c. Building Society*, 1871, L. R., 6 Ch. Ap. 856, Mellish, L. J., p. 863; *In re Langham, &c. Co.*, 1877, L. R., 5 Ch. D. 669, Jessel, M. R., 684; *In re Middlesborough, &c. Co.*, 1880, L. R., 14 Ch. D. 104.

liquidation, shall not be followed. This petitioner, however, asks us to affirm **No. 64.** that it is just and equitable now for the Court to pronounce a winding-up order. **Jan. 10, 1894.** But we have no information whatever as to the wishes of the shareholders, and **Cox v. "Gosford" Ship Co.** the time has scarcely come for their being convened and asked to come to a conclusion on the point. Accordingly I think that the grounds of the petition are entirely insufficient, and that the prayer should be refused.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT refused the petition.

BOYD, JAMESON, & KELLY, W.S.—GILL & PRINGLE, W.S.—Agents.

HUGH GRAHAM LANG, Pursuer (Respondent).—*D. Dundas—P. J. Blair.* **No. 65.**
ALEXANDER CAMERON, Defender (Appellant).—*W. Campbell—Salvesen.*

Sale—Pactum Illicitum—Weights and Measures Act, 1878 (41 and 42 Vict. c. 49), secs. 14, 19.—*Held* that a bargain to deliver 600 stones of hay each stone to weigh 24 imperial pounds was not void under the provisions of the Weights and Measures Act, the transaction being a sale by an imperial weight, namely, the pound. **Jan. 10, 1894. Lang v. Cameron.**

THIS was an action at the instance of Major Hugh Graham Lang, 1ST DIVISION. adjutant of volunteers in the county of Sutherland, against Alexander Sheriff of Ross, Cameron, farmer there, to have the defender ordained to deliver to him Cromarty, and Sutherland. "600 stones of hay, each stone to consist of 24 imperial standard pounds avoirdupois," or otherwise to pay £32, 10s.

The pursuer averred that on the 18th October 1892 the defender sold and agreed to deliver to him 600 stones of hay, each stone to consist of 24 imperial standard pounds, and 2½ quarters of oats, that in exchange the pursuer sold and delivered to the defender a pony, and that the defender had delivered the oats but refused to deliver the hay.

The defender stated that he was prepared to deliver 600 stones of hay, imperial standard weight.

The defender pleaded, *inter alia*;—(2) The defender being ready and willing to deliver to pursuer 600 stones of hay, imperial standard weight, this action ought to be dismissed, with expenses. (4) The bargain, as stated by the pursuer, being contrary to law, could not, even if admitted by defender, be enforced, and this action ought to be dismissed as irrelevant, with expenses.*

On 21st March 1893, the Sheriff-substitute (Mackenzie), repelled the fourth plea in law for the defender and allowed a proof.†

* The Weights and Measures Act, 1878 (41 and 42 Vict. c. 49), enacts, sec. 14,—". . . a stone shall consist of fourteen imperial standard pounds. . . ."

Sec. 19.—"Every contract, bargain, sale, . . . made . . . in the United Kingdom for any . . . goods . . . or other thing which has been or is to be . . . sold, delivered . . . or agreed for by weight or measure, shall be deemed to be made . . . according to one of the imperial weights or measures ascertained by this Act, or to some multiple or part thereof, and if not so made . . . shall be void . . . No local or customary measures . . . shall be lawful."

† The pursuer deponed,—"The bargain as to the hay in question was made between me and the defender within the office in Dornoch of the Town and County Bank. Mr John Mackintosh, the joint agent of the bank, was present during the whole time. . . . While we were bargaining about the quantity of hay I was to get, Mr Mackintosh remarked,—'Gentlemen, you know the

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On 9th May the Sheriff-substitute found that the pursuer had failed to instruct that each stone of said hay was "to consist of 24 imperial standard pounds avoirdupois," or (2) that the defender ever undertook to deliver 600 stones of hay of any other than the imperial standard weight, and that the offer of the defender to deliver 600 stones of imperial weight was in due implement of his bargain, and ordained him to give, and the pursuer to take, delivery of that amount.

The pursuer appealed, and on 5th June 1893 the Sheriff (Johnston) pronounced this interlocutor:—"Finds that, on 18th October 1892, the pursuer and defender entered into a verbal bargain of exchange or barter, whereby the pursuer undertook to give his horse, and the defender undertook to deliver in exchange $2\frac{1}{2}$ quarters of oats, and 600 stones, each stone to weigh 24 imperial lbs. of hay from a stack on his farm of Drummie, Golspie: Finds that the defender thereby undertook to deliver 600 times 24 imperial lbs., or 14,400 imperial lbs. of hay, and that said bargain *quoad* the defender's part was therefore for a multiple of an imperial weight as ascertained by the Weights and Measures Act, 1878: Finds that the pursuer has implemented his part of the bargain by delivery of his horse, but that the defender has failed to implement his part of the bargain by delivering said quantity of hay: Therefore repels the second and fourth pleas in law for the defender; ordains him to deliver to the pursuer, within fourteen days from intimation hereof, 600 times 24 or 14,400 imperial lbs. of hay from his stack situated . . . and in the event of his failure to do so within the period stated, remits to the Sheriff-substitute to decern in favour of the pursuer for the sum of £30 sterling, as the value of said hay, with interest at five per cent from the date of citation," &c.

The defender appealed, and argued;—The sale was by the stone, not by the pound, but the Sheriff was wrong in holding that the pursuer had proved that the "stone" was to be one of 24 lbs. If, however, that were held to be established, then the contract was void under the Weights and Measures Act, for it was a sale by the "Sutherland" stone, which was a local, and not an imperial weight or measure.¹

number of pounds to the stone for which you are dealing?' My reply was,— 'Of course I do, 24 pounds to the stone.' The defender made no objection, so I understood him to acquiesce. . . . I addressed myself to the defender in reference to Mackintosh's remark, 'Gentlemen, you know the number of pounds to the stone for which you are dealing?' I answered, 'Of course I do, 24 pounds to the stone.' This was the mode in which I pointed out to the defender my understanding of the bargain."

Mr Mackintosh deponed,— "Before the parties fixed upon the number of stones of hay to be given, I intervened and said, 'I suppose, gentlemen, you know what a stone of hay in Sutherland implies,—24 lbs. go to the stone of hay.' The pursuer then remarked, 'Certainly, 24 lbs.' . . . Cross-examined.— When the pursuer used the expression, 'Certainly, 24 lbs.' he addressed himself to the defender and me, but for the defender's benefit, as I thought, so that there might be no misunderstanding. I am not aware that the defender said anything to this."

The defender deponed,— "Cross-examined.—When Mackintosh intervened with his remark, 'You know, gentlemen, what sort of bargain you are making?' I don't think he mentioned the Sutherland stones of 24 lbs., but he did mention Caithness, Ross, and Inverness stones, and their weight in lbs. Mackintosh never mentioned the Sutherland stone as of 24 lbs. during the bargaining, though he mentioned those of the other counties. The pursuer's remark, '24 lbs. to the stone,' must have referred to the bargain for the hay between us. I made no remark in reply to this statement of the pursuer."

¹ Robertson v. Gow, June 25, 1858, 20 D. 1170, 30 Scot. Jur. 701.

The pursuer's counsel were not called upon.

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LORD PRESIDENT.—I think the Sheriff is right. He proceeds on findings in fact which give rise to no difficulty as regards the Weights and Measures Act, 1878. He holds that the bargain was that the defender should deliver 600 stones of hay, each stone to weigh 24 imperial lbs. In my opinion, that view is well founded in the evidence. The defender himself says that in the course of the negotiations the witness John Mackintosh said,—“You know, gentlemen, what sort of bargain you are making?” to which the pursuer replied,—“Decidedly I do, 24 lbs. to the stone.” It is true those words were uttered not by the parties, but by an intermediary; but it is shewn conclusively that the statement was assented to by both the parties, and formed not only an integral part of the bargain, but the bargain itself. Was the bargain illegal? Nothing was said at all about a local stone forming the basis or standard of the transaction, and, in my opinion, it was nothing but a sale by an imperial measure, namely the pound.

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LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—“Find in terms of the findings in fact and in law contained in the interlocutor of the Sheriff dated 5th June 1893: Affirm said interlocutor, and decern and ordain in terms thereof: Of new repel the second and fourth pleas in law for the defender, and ordain him to deliver to the pursuer, within fourteen days from intimation hereof, 600 times 24 or 14,400 imperial lbs. of hay from his stack situated . . . and in the event of his failure to do so within the period stated, of new remit to the Sheriff-substitute to decern in favour of the pursuer for the sum of £30 sterling as the value of the said hay, with interest at five per cent from the date of citation,” &c.

ANDREW URQUHART, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

COOKE'S CIRCUS BUILDINGS COMPANY, LIMITED, Pursuers (Respondents).

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—*Shaw—Abel.*

EDWARD WELDING, Defender (Appellant).—*Johnston—Watt.*

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Lease—Partnership—Power of one partner to bind firm.—On 11th September 1891 Zeigler and Welding, who had on that day been introduced to each other, went to Aberdeen, where they met Sellar, the manager of the Royal Circus there, and with him visited the circus. Zeigler entered into negotiations with Sellar for a lease of the circus, to be used as a music hall. Welding, who had been introduced to Sellar as Zeigler's partner, took no part in these negotiations. Zeigler and Welding then left Aberdeen, without concluding any agreement for a lease. Next day they entered into a contract of joint adventure as music hall proprietors, one of the places at which the business was to be carried on being the Royal Circus at Aberdeen.

On 13th October Zeigler returned to Aberdeen, and there entered into a lease as for the firm of the circus for three successive winter seasons. This lease was signed by Zeigler as an individual, and with the firm's name, but was not signed by Welding. Music performances were thereafter carried on in the circus for about three months, the bills announcing that Zeigler and Welding were proprietors of the circus. The partnership between Zeigler and Welding then terminated, after which there were no performances. The rent of the circus had been paid up to that date—in part by cheques granted by Welding in favour of Sellar, and he also paid the cost of certain alterations in the circus.

In an action by the Circus Company against Welding for payment of the

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remainder of the rent for the first winter season, Welding pleaded that he was not a party to the lease and so was not liable. It was proved that such premises as the circus were not usually let for less than an entire winter season. *Held*, in the circumstances, that Welding was liable in the sum sued for. *Question*, whether he was liable as tenant under the lease.

IN January 1892 Cooke's Circus Buildings Company, Limited, having their registered office in Aberdeen, brought an action in the Sheriff Court there, against "Baron Zeigler and Company, Theatrical Entrepreneurs, carrying on business at Aberdeen and elsewhere in the United Kingdom," and against Burlington Brumell, otherwise Baron Zeigler, and Edward Welding, the individual partners of the said firm, as such partners and as individuals, praying the Court to sequester, and grant warrant to sell, the furniture and other effects subject to the pursuer's hypothec, within the premises in Aberdeen known as Cooke's Royal Circus, occupied by the said firm as tenants under the pursuers since 23d November 1891, in security and for payment of certain specified sums, amounting in all to £188, 6s. 8d., as being the rent due and to become due by the defenders for the period from 23d December 1891 to 12th April 1892; and for decree against the defenders for payment of any balance of the said rent remaining due after the sequestration and sale.

The pursuers averred,—(Cond. 2) "By lease dated 13th October 1891, entered into between the pursuers and defenders, the pursuers let to the defenders the said premises mentioned in the foregoing article for the space of three years for the following periods in each year—viz., from the 23d day of November 1891 to the second Saturday in May 1892; from the first Monday in September 1892 to the first Saturday in May 1893; and from the first Monday in September 1893 to the first Saturday in May 1894, and that at a rent of £50 per calendar month, payable weekly in advance on Tuesday in each week, except the rent for the first fortnight of the defenders' tenancy, which was declared to be payable in advance on the 24th day of November 1891. . . . The defenders are, by the terms of the said lease, entitled to sit rent free for the last month of the said first period of their tenancy. . . . The defender Welding's averments in answer, except in so far as coinciding herewith, are denied. . . . The said defender was not ignorant of the existence or terms of the said lease. . . . The defender Welding took part in the negotiations for the said lease, and, along with his partner, the said Burlington Brumell, visited and inspected the premises in question prior to the conclusion of the said negotiations, and authorised and empowered the said Burlington Brumell to sign the said lease on behalf of their said firm of Zeigler & Company, so as to bind the said firm and the partners thereof."

Welding alone lodged defences, but stated no objection to the sequestration and sale being proceeded with. He averred,—(Ans. 2) that he or his firm of "Baron Zeigler & Welding" were not parties to any lease of the said premises. "The lease produced does not bear to be signed by him or by his said firm, nor was he ever communicated with regarding it, and did not know of its existence until he received the service copy summons herein. . . . Explained and averred that the defender Welding understood that the tenancy of the said premises by his said firm of Baron Zeigler & Welding was weekly."

He pleaded;—(4) The said lease being invalid so far as the said Edward Welding is concerned, he is not bound by its terms, and should be assolized, with expenses.

A proof was allowed. Welding, who was a retired military officer, became acquainted with Brumell or Zeigler in September 1891, in consequence of having answered an advertisement by Zeigler for someone

to join him in purchasing a music hall. They met for the first time on 11th September in Glasgow, where they went to the office of Mr Alexander Wright Grant, writer, by whom a draft contract of joint adventure between Welding and Zeigler was prepared, its terms being the same as those of the contract ultimately executed (see *infra**). Welding deponed that he understood the business was to be that of music hall proprietors in Bradford, and that when he came to the reference to the circus in Aberdeen he said he would have nothing to do with that, and read no further. Grant deponed that the clause bearing that Welding was not to be responsible for any loss in Aberdeen was that inserted to meet Welding's objection. Zeigler and Grant arranged to go to Aberdeen the same day, and Welding agreed to accompany them, but (as he deponed) "it was purely as a pleasure visit."

In Aberdeen they met Mr W. M. Sellar, the secretary of the pursuers' company. Welding gave this evidence;—"In Aberdeen I was in Cooke's Circus. . . . I did not go to Cooke's Circus on purpose. I had missed Grant and Baron Zeigler, and after spending some time at my hotel, I walked up as far as Bridge Street. When there, Baron Zeigler, who was at Cooke's Circus, waved his hand to me. Mr Sellar was with him. He said he wanted to introduce me to him. I went and was introduced to Mr Sellar, and we all went together into the circus. . . . Zeigler and Mr Sellar were in deep conversation at the time. I don't know what went on between them." Sellar deponed,—“Zeigler introduced Major Welding as ‘my partner.’ He took no exception. He heard the introduction. After some general conversation Welding said that he was only a sleeping partner, that the Baron was the managing partner, and that he did everything, as he, Welding, did not understand business himself.” Witness then deponed that he and Zeigler entered into negotiations for a lease of the circus. “During the time I was conversing with Zeigler the defender Welding was moving about the circus and not taking any serious part in the conversation.” Zeigler was not examined as a witness.

No lease was agreed to on the occasion of this visit to Aberdeen, and Welding, Zeigler, and Grant returned to Glasgow, where next day the agreement quoted below * was entered into between Zeigler and Welding.

* “This contract of copartnery entered into between Burlington Brumell, professionally known as Baron Zeigler, theatrical, concert hall, and general manager, late lessee and manager Zeigler's Royal Circus of Varieties and Equestrian Hippodrome, Dundee, hereinafter called the first party, and Edward Welding, gentleman, residing at Chester Lodge, 55 Haverstock Hill, London, N.W., hereinafter called the second party.

“Witnesseth that the parties hereto have agreed and do hereby agree as follows:—

“First, That said parties, in consideration of the second party paying to the first party the sum of £500 on the signing of this agreement, do hereby contract to be copartners in carrying on a business or joint adventure as concert hall and circus proprietors and managers under the firm or style of Baron Zeigler & Welding, the business at present to include the Royal Circus in Canal Street, Bradford, and the Royal Circus in Aberdeen, and afterwards such other place or places as may hereafter be acquired and mutually agreed upon by both parties.

“Second, The partnership shall be held to have commenced at this date, and shall subsist till mutually dissolved, declaring that said partnership may be dissolved by either party giving to his copartner three months' notice in writing of his intention to terminate same.

“Third, The first party shall act as the managing partner of the firm and their respective duties consistently therewith shall be mutually arranged as the

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No. 66. On 13th October Zeigler returned to Aberdeen, accompanied by Grant, but not by Welding, and entered into a lease of the circus. The provisions of the lease sufficiently appear from the pursuers' averments quoted above. It bore to be "between Cooke's Circus Buildings Company, Limited, incorporated under the Companies Acts, 1862 to 1886, having their registered office in Aberdeen, of the first part; and Burlington Brumell, otherwise Baron Zeigler, at present residing at Garrick House, 44 St Alban Street, Leeds, and Major Edward Welding, residing at Chester Lodge, 55 Haverstock Hill, London, trading under the firm of Baron Zeigler & Company, theatrical entrepreneurs, Aberdeen and Bradford, of the second part." It was signed (on behalf of the second parties) "Baron Zeigler" and "Baron Zeigler & Company" (both signatures being written by Zeigler), but not by Welding, and Welding deponed that he knew nothing of its terms until after the commencement of the present proceedings.*

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The joint adventure between Zeigler and Welding was terminated on 15th December 1891. The *Gazette* notice of dissolution bore that they carried on business "at the Royal Circus in Canal Street, Bradford, in the county of York, and at the Royal Circus in Aberdeen, as concert hall and circus proprietors and managers, under the firm or style of Baron Zeigler & Welding."

All the rents for the Aberdeen circus due prior to the dissolution were paid—partly by cheques granted at Bradford by Welding in favour of the pursuers' secretary. Welding deponed that these cheques were written by his clerk to Zeigler's dictation, and were handed to Zeigler. The pursuers incurred a sum of about £96 in alterations on the circus, and Welding in addition paid £9 to the contractor for extras. The circus posters announced Welding as proprietor of the circus along with Zeigler, and he admitted that when this came to his knowledge he did nothing to repudiate it.

Music hall proprietors were adduced, who deponed that it would be absurd to take a circus by the week for the purpose of using it as a music hall, as the better class of music hall performers required to be engaged at least six months before their appearance; and it appeared

requirements of the business may necessitate. No bills, notes, or cautionary obligations of any kind relating to the firm's business shall be binding on the firm unless the signatures of both parties in addition to the firm's are adhibited.

"Fourth, Each partner shall draw ten pounds sterling weekly as salary, and the net profits remaining shall be equally divided after the working expenses shall have been provided for, it being understood that each partner shall contribute equally towards these expenses, and that the first party shall relieve the second party of all loss and responsibility that may result from the management of the Royal Circus, Aberdeen. . . ."

* With reference to the absence of Welding's signature, Grant deponed,—“It was the subject of a very stormy debate. Mr Sellar insisted upon getting it. Zeigler refused to take the lease if Mr Sellar insisted on Mr Welding's signature as a necessity. He did not explain to me his reason. . . . He only wanted my legal advice, if need be. . . . Mr Sellar asked me would I give him a letter. . . . I thought for a moment, and not having the deed with me, my recollection was not quite distinct, and from what I remembered of the deed I felt that I could honestly and justly give him the letter he wanted.”

The letter which Grant gave to Sellar was in the following terms:—“With reference to the lease of Cooke's Circus executed to-day between The Cooke's Circus Buildings Company, Limited, and Baron Zeigler & Company, it is within my knowledge that Baron Zeigler has power on behalf of his firm to enter into said lease and bind his firm.”

that a year—*i.e.* a season, from November till May—was the minimum period for which such premises would be let.* No. 66.

On 18th March 1893 the Sheriff-substitute (Brown) pronounced this interlocutor (after findings in fact):—"Finds in law that Baron Zeigler had no implied authority, either at common law or under said contract, to enter into said lease on behalf of the said Edward Welding; and that he not having authorised the same, it is not binding on him: Finds, further, that the pursuers have failed to prove facts and circumstances shewing that the said Edward Welding adopted, or homologated, or acquiesced in said lease: Therefore assoilzies the said Edward Welding from the conclusions of the action."

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On appeal the Sheriff (Guthrie Smith), on 12th July, pronounced this interlocutor:—"Recalls the said interlocutor: Finds it proved that the defender was in partnership with Burlington Brumell *alias* Baron Zeigler as concert hall and circus proprietors, under the firm or style of Baron Zeigler & Welding, and for some time carried on business as such at the Royal Circus, Aberdeen, until the 15th December 1891, when said firm was dissolved by mutual consent: Finds that by lease dated 13th October 1891 the pursuer let to the said firm the premises mentioned on record at the rents specified, and that the said lease was signed by the said Brumell, as managing partner of the firm, for and on behalf of the firm, but not by the defender: Finds that said lease was entered into by the pursuer in the belief, induced by the defender, that the said Brumell had authority to take the premises on behalf of the firm, and that the same is binding on the defender: Therefore repels the defences: Finds the defender liable in payment of the rents due and unpaid, namely, from 23d December 1891 to 3d January 1892, £19, 7s. 2d.; from 5th January 1892 to 12th April 1892, £168, 19s. 6d., making in all £188, 6s. 8d., under deduction of the sums paid or recovered to account thereof: Remits to the Sheriff-substitute to fix the sum due after hearing parties."†

* Welding deponed,—“The Baron and I attended to the business in Bradford for the first two weeks, and then I attended to it afterwards. . . . The business in Bradford was somewhat similar to what the Baron was carrying on in Aberdeen. If you require artistes of any extraordinary talent for a business of that kind you require to engage them beforehand. Ordinary talent you get in hundreds.”

† “NOTE.— . . . I do not think it necessary to decide whether a lease, to be binding on a firm, should be signed by both partners; probably the prudent course is to have it so executed; and I am not surprised that Mr Sellar, the pursuers' adviser, should have taken this view. Nor am I surprised that, when on his insisting on Welding's signature as well as Zeigler's, and this was refused, he asked and obtained an assurance from Mr Grant, the Glasgow solicitor whom Zeigler had brought with him to assist in the adjustment of the lease, that the latter had authority to bind the firm in that particular matter. The defender is obliged to repudiate that act, also on the ground that Grant was Zeigler's agent, not his. But Mr Sellar evidently dealt with him as representing the firm. Grant himself says he saw he was under this impression and did nothing to remove it, and I think it is hardly open to the defender to dispute that a managing partner, whatever may be his powers in other respects, has, at least, authority to employ a solicitor to attend to the interests of the firm in the negotiation of a lease. In this view the case comes within a well-settled principle of partnership law. Whatever may be a partner's authority in a particular matter, by force of law it is always open to the other members of the firm to limit or enlarge his powers, and just as an innocent partner may defend himself by proving that the third party claiming fulfilment of the obligation had notice of the limitation, he may be barred from impeaching an act outwith the usual scope of administration by leading the stranger to believe that

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The defender appealed, and argued;—(1) The lease founded on by the pursuers was signed neither by the defender nor by his firm of Zeigler & Welding; it was signed by Zeigler and by a firm of "Zeigler & Company," of which the defender knew nothing. He therefore was not bound. But (2) assuming that the signature "Zeigler & Company" might be sufficient to bind the defender, that would only be where the deed to which the signature was adhibited was an act of ordinary administration, or was one specially authorised by the defender. A lease of heritage was an act of extraordinary administration, by which only those partners who had signed the lease would be bound, even where the subjects let were the premises in which the business of the firm was to be carried on, if there was no special authority to bind the remaining partners.¹ At least it was an act of extraordinary administration, where the period of the lease might, and, as here, in the event did, extend beyond the period of the partnership. Then this contract of joint adventure did not give Zeigler special authority to bind the defender under this lease; and the defender had done nothing from which the pursuers were entitled to infer that Zeigler had such authority. Sellar, the pursuers' secretary, plainly thought so when he insisted on having the defender's signature, and if, in face of Zeigler's intimation that he would not go on with the lease if the defender's signature was required, Sellar chose to be satisfied with Grant's letter, the pursuers must take the risk of that. Nor (3) had the defender done anything to adopt or homologate the lease. He had granted cheques in favour of the pursuers' secretary, but they were granted at Bradford, where, undoubtedly, he and Zeigler had business relations, and if the defender owed Zeigler money, and Zeigler wished the money to be paid to the pursuers instead of himself, that was his act, not the defender's. Nor could payment to the con-

his copartner had his authority for acting on behalf of the firm. The belief, of course, that the partner was endowed with the requisite authority must be a reasonable belief, for if he is mistaken he cannot fall back on the other partner and say he is bound merely because of his belief, unless (in the words of Lord Blackburn) 'he can shew that the other party has so conducted himself as to authorise that belief'—(*Kendal v. Wood*, L. R., 6 Ex. 243). Reviewing all the facts in the case, I think the pursuers have shewn enough to satisfy this principle. The inspection of the premises by both partners on the 11th September, when Zeigler introduced Welding as 'his partner,' and when it was arranged that Zeigler should come back and arrange the terms of the lease, and Zeigler's return a month later, with that object, accompanied by a Glasgow writer, who being appealed to as agent of the firm, gave the explicit written assurance contained in No. 14, are facts of themselves sufficient. If the defender was, as he says, ignorant of the terms of the lease, his ignorance was inexcusable, for, on the 21st October, the firm took possession of the building, and he was bound to inquire as to the nature of their title. Instead, however, of doing anything to repudiate the transaction, it appears that with his knowledge the walls were placarded with posters announcing that Welding was associated with Zeigler in the proprietorship of this place of amusement; that payments of rent were made by cheques bearing Welding's own signature; that the pursuers were permitted to incur a considerable expenditure on the building to make it suitable for the firm's occupation; and that Welding himself paid for the alterations executed on behalf of the firm. Nor can the *Gazette* notice of 15th December 1891, publishing the dissolution of the partnership, be thrown out of view. . . . These facts constitute a ratification of the lease on the part of the defender, from which there is no escape. The result is that, differing from the Sheriff-substitute, I must hold the defender liable in the rents sued for."

¹ Sharp v. Milligan, 1856, 22 Beav. 606; Lindley on Partnership, p. 139.

tractor for the Aberdeen alterations for extras be regarded as adoption of the lease. It was a payment of a trifling sum to avoid an action, not a voluntary payment. But (4) it was now said that the defender, even if he were not liable as tenant under the lease, was at all events liable for the rent during the period for which he must be held to have been in occupation of the circus, as his contract with Zeigler and his conduct shewed that he must have known that his firm were in occupation of it. That argument came to no more than this, that the defender was liable for the rent falling due while the joint adventure lasted. It was true that the contract of joint adventure bore that the business was to be carried on in the Aberdeen circus, but the business of a partnership might be carried on in premises of which one of the partners only was tenant, and there was nothing in the defender's conduct inconsistent with the view that Zeigler was sole tenant of the circus. As, therefore, the whole rent falling due up to the dissolution of the partnership had admittedly been paid, the defender ought to be assolvied.

Argued for the pursuers;—Each partner of a firm had implied authority to bind his copartners to every act done by him in the firm name, provided that the act was done to carry on in the usual way the business of the firm. Whether a given act was or was not done for the purpose of carrying on the business of the firm in the usual way depended on the nature of the business.¹ Here taking a lease of the circus in Aberdeen was necessary for carrying on the business of the defender's firm, since it was constituted for the purpose of carrying on business in that circus. A lease could be validly granted to a partnership, *socio nomine*.² Zeigler's signature, therefore, and that of the firm, bound Welding. It might be that a lease for three years was *ultra vires* of Zeigler, but that question was not raised in this action. The pursuers sued merely for the balance of the first year or season's rent. And taking a lease for that period was certainly within Zeigler's implied authority, the evidence being to the effect that no one would think of taking a circus for the purpose of using it as a music hall for a shorter term. In any case Welding was bound as having held himself out as Zeigler's partner. He had gone with him to Aberdeen, and had been introduced as his sleeping partner to the pursuers' secretary. The pursuers therefore were entitled to conclude that Zeigler had authority to bind Welding. Welding's subsequent conduct confirmed this. He had granted cheques in favour of the pursuers; he had paid for part of the alterations on the circus; and had allowed his name to appear along with Zeigler's as a proprietor of the circus. It was not necessary, however, to the pursuers' case to maintain that Welding was liable as tenant under the lease. On the evidence he must certainly be held to have known that his firm had the right to occupy, and were occupying, the circus in Aberdeen, down at anyrate to the dissolution of the firm; he knew the nature of the business, for that at Bradford of which he was the manager was similar; he could not therefore reasonably have supposed that his firm held the Aberdeen circus upon a weekly tenancy, but must have known that their right of occupation was at least for the minimum period for which a music hall would be let.

LORD JUSTICE-CLERK.—In 1891 the defender, Welding, and a person calling himself Baron Zeigler or Brumell, entered into an engagement to carry on a theatrical business in certain places, one of which was Aberdeen. It appears

¹ Lindley on Partnership, 6th ed. p. 135; Partnership Act, 1890 (53 and 54 Vict. cap. 39), sec. 5.

² Dennistoun, M'Nayr, & Co. v. Macfarlane, 1808, M., Tack, App. No. 15; Hunter on Landlord and Tenant, i. 215.

No. 66. from the evidence that both Welding and Zeigler went to Aberdeen immediately before the signing of the contract to look at this circus, which belonged to a limited company. They had a meeting with the secretary of the company, and then and there Welding was introduced as a partner, and he announced to the secretary, Mr Sellar, that he was the sleeping partner in the firm, and that Baron Zeigler was the managing partner. There is nothing more certain than this, that the contract provides that one of the places in which the business of the copartnery was to be carried on was a circus building in Aberdeen, and I think it proved that Welding knew that it was to be taken for the business in which he was a coadventurer.

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It is possible, as was suggested in the course of the discussion, that in such a contract as this it might be intended that one of the partners should have the lease of one of the places of amusement at one place and the other at the other, but there is nothing of that sort in this case, as I think it is clearly proved that Welding knew that the building was taken for the business of the copartnery.

The lease was made out in the name of Baron Zeigler & Company, and Zeigler signed it as Baron Zeigler & Company, and then added his own name, if it may be so called, "Baron Zeigler," and it was contended that Welding was not a member of any such copartnery, and that he was not bound by the lease in any way.

I have come to the same conclusion as the Sheriff, although not upon quite the same grounds. I think that these premises were occupied by the parties to the copartnery for carrying on the business of the copartnery, that the business was carried on there on that footing as long as it lasted, and that although the copartnery was dissolved when it became unsuccessful, I hold that the partners are liable for the rent of the term for which they had begun to use them. The occupation was the occupation of Welding as well as Zeigler. It is not contended that what is asked is an unreasonable sum to pay for the occupation. I therefore do not think it necessary to decide any question as to the written lease. In my opinion Welding is liable for the occupation, which was his as well as Zeigler's, and I think that the judgment of the Sheriff gives the right decision of the case, although I cannot agree with the grounds given in his note.

LORD YOUNG.—There have been raised here some questions of law which are of more importance than I should have wished them to be in such a case. The case arises out of an agreement between two gentlemen, one of whom calls himself "theatrical, concert hall, and general manager," and the other describes himself as "gentleman, residing at Chester Lodge, Haverstock Hill, London," and the purpose of the agreement is to carry on "a business or joint adventure as concert hall and circus proprietors and managers" at Bradford and Aberdeen. Now, I am not surprised, I must confess, that a gentleman from Haverstock Hill, who gave £500 to Baron Zeigler, "theatrical, concert hall, and general manager," in order to carry on such a business, should come to grief. He lost his £500 apparently, and he has further become involved in the questions which are raised in the present action, and relate to his liability for the rent of a circus in Aberdeen belonging to the pursuers, of which Zeigler obtained a lease for three years.

If the question had been whether the defender was liable for the rent as

tenant under this lease, I think that the case of the pursuers would have been attended with very considerable difficulty. It appears to me to be doubtful whether the defender, by the terms of his association with Zeigler, authorised him to enter into a lease of this circus for three years, or indeed for any period, binding him, the defender, as tenant. But the case of the pursuers, as it was presented to us, is limited to this,—that the defender should be found liable for the rent, not as a tenant under the lease, but only as an occupier of the premises for the period of occupation during the subsistence of the joint adventure, and for such a period beyond that as it may be shewn to be customary and reasonable to let such premises for the uses to which the joint adventurers intended to put them. Accordingly, the action is limited to asking for decree for the first year's rent. The pursuers' position is this,—“We do not say that you are tenant for three years, but as you have occupied the premises for a period of three months you must pay rent for that occupation, and that at the rate specified in the lease, there being no allegation that it is an unfair rent; and you must also pay rent for the remainder of the year, it being according to the evidence that no owner of such premises would have given leave to occupy them for any shorter period.”

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I think that that position, assuming it to be well founded, is a sufficient ground for our judgment. No doubt it avoids the question, and I am desirous to avoid deciding the question, whether one of several joint adventurers has implied authority to enter into a lease of heritable subjects for three years, or for any period, so as to bind his coadventurers. I am inclined to think that he has not. I rather incline to the view that persons who let property to joint adventurers, if they wish all the joint adventurers to be bound as tenants, should get the signatures of all to the lease, if it is for a period for which by our law writing is necessary, or get their verbal consent, if verbal consent is all that is required. In this case there was no communication whatever between the pursuers and Welding in regard to the terms of the lease, and apart altogether from the question of right, I think that the proper course for a proprietor to take in letting heritable subjects is to communicate with the persons whom he desires to have bound as tenants under a contract of lease. I confess, however, that when the pursuers sue not upon the contract of lease, but on the ground of occupation, there is a good deal to be said for them, and I do not quite see the answer to their demand. That being so, the question is reduced to this, whether the defender's liability for rent on the ground of occupation may not be extended to the two or three months beyond the period of actual occupation, so as to complete the shortest period for which, according to the evidence, such buildings as these are in use to be let. If that is the question, I think that we may take into consideration the whole circumstances of the case; and looking to the fact that Welding went to Aberdeen with Zeigler—that he told Sellar, the secretary of the circus company, that he was the sleeping partner of the firm—that his name was used in the advertisements of the business, and so on, I am not prepared to dissent from the judgment proposed.

LORD RUTHERFURD CLARK.—I do not think that this case raises any general question. For my part I decide it entirely upon the special circumstances of the case. It is proved satisfactorily to my mind that the parties to the contract of copartnery intended that a lease of these premises should be taken,

No. 66. and that the appellant Welding knew that the lease was taken for the use of the firm and for carrying on its business. The firm entered into possession, and I think that the rent of the premises for the term during which the firm were in possession must be paid by Welding as one of the partners.

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LORD TRAYNER.—The defender Welding entered into a contract with a person calling himself Zeigler to carry on a business or joint adventure as concert hall and circus proprietors and managers in Aberdeen. It was necessary that premises should be taken in which to carry on the joint adventure, and either of the joint adventurers taking a lease of such premises, in prosecution and in the interests of the joint adventure, would, in my opinion (in the general case), be acting within his implied mandate, and would bind the whole of the joint adventurers for the tenant's obligation. I have said in the general case, because a question might be raised whether what had been done by the one joint adventurer was a thing which was in the prosecution of the coadventure or appropriate to it.

It is not necessary, however, for the decision of this case to determine any general question as to the power of one joint adventurer to bind his coadventurers, because I am of opinion, with Lord Rutherford Clark, that the case may be decided on its special circumstances. In my opinion Welding knew and approved of the premises in question being taken for the purposes of the joint adventure, and entered into possession of the premises. He must therefore pay the rent which is now demanded.

THE COURT pronounced this interlocutor:—"Find in fact and in law in terms of the findings in fact and in law of the interlocutor of the Sheriff dated 12th July 1893; dismiss the appeal, and affirm the interlocutor appealed against"; and of new decerned against the defender for the rents in question in so far as unpaid.

R. C. GRAY, S.S.C.—ANDREW URQUHART, S.S.C.—Agents.

No. 67. **LORD ADVOCATE, Pursuer (Reclaimers).—Sol.-Gen. Asher—Comrie Thomson—A. J. Young.**

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GRAHAM MACFARLANE AND OTHERS (Dunlop's Trustees), Defenders (Respondents).—D.-F. Pearson—Johnston—Pitman.

Revenue—Legacy-duty—Moveable estate directed to be invested in purchase of land—Lands purchased before vested right acquired by beneficiary—Act 36 Geo. III. cap. 52, sec. 19.—Sec. 19 of 36 Geo. III. cap. 52, enacts,—"That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued, but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate for so much thereof as shall have been so applied."

A testator directed his trustees, during the period of six years next after his death, to realise the whole residue of his moveable estate, and therewith to purchase land to be entailed at the expiry of the six years upon D and a series of heirs. The residue amounted to £350,000, and during the six years the trustees invested £21,000 in the purchase of land. At the expiry of the six years D presented a petition for disentail under the Entail Acts, and obtained a decree

ordinating the trustees to convey to him in fee-simple the residuary estate. Thereafter a claim by the Crown for legacy-duty on this estate was sustained, and the trustees were ordained to lodge an account of that estate. In the account lodged by them they deducted the sum of £21,000. The Crown objected to the deduction. *Held* (aff. judgment of Lord Wellwood) that the sum was exempt from legacy-duty, in respect that when it was applied in the purchase of land it was subject to a trust for the benefit of a series of heirs in succession, and because it had been so laid out before any duty accrued, and therefore fell within exception and subexception in sec. 19.

Revenue—Legacy-duty—Money directed to be applied in erection of mansion-house—Stamp-Duties, &c., Act, 1845 (8 and 9 Vict. cap. 76), sec. 4.—By sec. 4 of the Stamp-Duties, &c., Act, 1845, it is enacted that “every gift by any will . . . of any person, which by virtue of any such will . . . shall be payable . . . or be satisfied out of the personal or moveable estate . . . of such person . . . shall be deemed a legacy,” and shall be liable to legacy-duties accordingly. *Held* that a sum of money directed to be expended on the erection of a mansion-house is a legacy within the meaning of the statute.

(ANTE, vol. 19, 461.)

Alexander Dunlop, of Carnduff and Doonside, died on 30th September 1883, leaving a trust-disposition and settlement, dated 28th July 1875.

By the 5th purpose Mr Dunlop directed his trustees to retain and accumulate for six years after his death the whole rents, interests, and profits of the residue of his estate, and out of the accumulations or capital, if necessary, to apply a sum not exceeding £12,000 in the erection of a mansion-house at Doonside, and to pay an annuity of £800 a-year during the said period of six years to W. H. Dunlop, the institute of the entails thereafter mentioned, whom failing, to the heir of entail for the time being, who should be entitled to succeed under the destination thereafter expressed to the lands and others to be entailed as directed.

The 6th purpose was as follows:—“During the said period of six years my said trustees shall sell and realise the whole of the residue and reversion of my moveable estate of every kind, and of the whole of my heritable bonds, feu-duties, and ground-annuals, and my house and other heritable property in Glasgow and out of the United Kingdom” (with certain specified exceptions), “and my said trustees shall look out for and purchase with the proceeds of said residue and reversion such lands or landed estate or estates in Scotland as they may consider proper, and shall entail the same and my other landed estates as after mentioned. . . . Declaring, however, that although it is my wish and desire that my said trustees should realise the residue and reversion of my said estates, and purchase the said lands or estates during the said period of six years, I hereby declare that they shall be entitled to use their own discretion as to this, and if they consider it necessary they shall be entitled . . . to delay the said realisation, and also the said purchase or purchases till such time or times as may seem to them most convenient and suitable for such realisation and purchases: Declaring, however, that after the said period of six years have expired, the institute or the heir of entail in possession, or entitled at the time to possess the lands and estates to be purchased as aforesaid under the destination hereinafter written, shall be entitled to demand and receive the interest and proceeds of the entire residue and reversion of my said estates, heritable and moveable, hereby conveyed, but under deduction always of such expenses and charges as may be incurred by my said trustees in the management and execution of the trust until the said lands or estates are purchased and entailed, and the whole purposes of the trust fulfilled.”

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By the 7th purpose the trustees were directed, as soon as convenient after the said period, to execute a deed or deeds of strict entail of the lands and estates to be purchased in terms of the 6th purpose, and of any other properties which might belong to the truster at his death, to and in favour of William Hamilton Dunlop and the heirs-male of his body, whom failing, to other substitutes in succession.

At the truster's death he was possessed of heritable property in Scotland and abroad, and also of personal property of the value of about £350,000.

The trustees accepted office, and out of the residue vested in them they purchased the estate of Sauchrie for the price of £21,000, but made no further purchases.

They also expended £12,000 in the erection of a mansion-house at Doonside, in terms of the 5th purpose of the settlement.

The period of six years expired on 30th September 1889.

In January 1890 William Hamilton Dunlop, who would have been the heir in possession had the truster's directions as to the investment of the residue been carried into effect, presented a petition to the Court under the Entail Acts, and on 22d November 1890 the trustees were ordained to convey to him in fee-simple the whole estate vested in them.

Thereafter the Lord Advocate, as representing the Crown, in an action at his instance against Alexander Dunlop's trustees, was found entitled to legacy-duty on the clear residue of the personal estate of the truster, to which Mr Dunlop had thus become entitled, and the trustees were appointed to lodge an account of that estate—(see 19 R. 461.)

To the account of the trustees the pursuer stated two objections, (1) "to the deduction of £12,000 made on account of 'sum directed by the deceased's settlement to be expended in erection of mansion-house at Doonside.' . . . The sum of £12,000, in so far as it was derived from income of the testator's personal estate, is liable to legacy-duty, and ought not to form a deduction from residue.* . . . (2) To the deduction of £21,015 on account of 'price of estate of Sauchrie.' . . . The said sum was part of the personalty of the testator directed to be applied in the purchase of real estate, and was not so given as to be enjoyed by different persons in succession.† . . . The real estate bought by the trustees has been conveyed absolutely to" Mr Dunlop.

* The Stamp-Duties, &c. Act, 1845 (8 and 9 Vict. c. 86), sec. 4, enacts,—
 "That every gift by any will . . . of any person which by virtue of any such will . . . shall be payable . . . or be satisfied out of the personal or moveable estate or effects of such person . . . shall be deemed a legacy within the true intent and meaning of the Legacy-Duties Acts, and shall be liable to these duties accordingly. . . ."

† The Act 36 Geo. III. cap. 52, section 19, enacts "that any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided, nevertheless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate

It appeared that the heritable subjects at Sauchrie and Doonside had been included in a succession-duty account passed in July 1890, before the decree in the entail proceedings was granted.

On 13th June 1893 the Lord Ordinary repelled the objections.*

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by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

* "OPINION.—The previous judgment of the Court in this case related to personal estate of the late Alexander Dunlop, which the testator directed his trustees to invest in the purchase of land to be settled by deed of strict entail upon a series of heirs. Before this purpose had been carried into effect, and while the bulk of the personal estate remained uninvested in land and no entail had been executed, the person named as institute in the trust-deed, Mr W. H. Dunlop, carried through a disentail, and thereby became entitled absolutely to the clear residue of the heritable and personal estate of the deceased Alexander Dunlop. According to the view which I took, and which was affirmed by the Inner-House, the concluding proviso of section 19 of 36 Geo. III., c. 52, applied in terms to the only question then considered; and it was decided that legacy-duty was chargeable on the capital of the clear residue of the personal estate of Alexander Dunlop at the rate of 5 per cent.

"It then became necessary to ascertain the amount of the personal estate, and I accordingly ordered the defenders to lodge a residuary account, which they have done. The pursuer has lodged two objections. He objects to the deduction of (1) a sum of £12,000, being a sum directed by the deceased's settlement to be expended in erection of mansion-house at Doonside; and (2) a sum of £21,015, being the price of the estate of Sauchrie purchased by trustees on 11th November 1885, in virtue of the directions in the deceased's settlement. The pursuer maintains that both these sums are liable in legacy-duty as personal estate. I may mention at this point that it is admitted that the heritable subjects at Doonside and Sauchrie, on the improvement and purchase of which those sums were expended, were included in a succession-duty account delivered in June 1890, and passed in July 1890.

"These objections raise a question which was not directly involved or decided in the former discussion—one of those puzzles which the 19th section of 36 Geo. III. c. 52, is so prolific in producing. The leading object of that section was, for revenue purposes, to invert the rule of law that, *quoad* succession, money directed to be invested in the purchase of land is regarded as heritage or real estate. Otherwise, at the date of the Act 1796, money so bequeathed would have escaped duty. The leading provision of the 19th section is,—'That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate.' Then follows the exception,—'Unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate for so much thereof as shall have been so applied.'

"Before considering the application of that exception to the present question it is necessary to refer to Mr Alexander Dunlop's settlement in order to ascertain the precise nature of Mr W. H. Dunlop's rights when the succession opened to him. Mr Alexander Dunlop died on 30th September 1883. By the direction in his settlement (fifth purpose) the trustees were directed to retain and accumulate the rents, interests, and profits for six years after his decease, and the only interest which Mr W. H. Dunlop took during these six years was that the truster directed his trustees to pay '£800 sterling per annum during the said period of six years to William Hamilton Dunlop, solicitor, Ayr, the institute of the entails hereinafter mentioned, whom failing to the heir of entail for the

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The pursuer reclaimed and argued;—(1) The sum of £12,000, was derived from the moveable estate of the truster—accumulations of profits

time being who shall be entitled to succeed under the destination hereinafter expressed to the lands and others to be entailed as after directed.' The provisions of the sixth purpose of the trust-deed shew, in my opinion, that the expiry of the six years from the date of the truster's death is the *punctum temporis* upon which the present question depends. At that time, and not till then, right vested in the person who was then institute or other heir called either to demand that the estates purchased should be entailed as directed, or, if the trustees were not prepared at that time to carry out those directions, to call upon them to pay over to him the interest and proceeds of the residue, heritable and moveable. After stating that the trustees shall be entitled in their discretion to delay realisation and purchase, there is this declaration:—'Declaring, however, that although it is my wish and desire that my said trustees should realise the residue and reversion of my said estates, and purchase the said lands or estates during the said period of six years, I hereby declare that they shall be entitled to use their own discretion as to this, and if they consider it necessary they shall be entitled and are hereby empowered to delay the said realisation and also the said purchase or purchases till such time or times as may seem to them most convenient and suitable for such realisation and purchases: Declaring, however, that after the said period of six years have expired the institute or the heir of entail in possession, or entitled at the time to possess the lands and estates to be purchased as aforesaid under the destination hereinafter written, shall be entitled to demand and receive the interest and proceeds of the entire residue and reversion of my said estates, heritable and moveable, hereby conveyed, but under deduction always of such expenses and charges as may be incurred by my said trustees in the management and execution of the trust until the said lands or estates are purchased and entailed, and the whole purposes of the trust fulfilled.'

"The six years from the death of Alexander Dunlop ran out on 30th September 1889. Till then no right vested in any of the heirs called, and the rate of duty could not be fixed or the amount calculated. By that time the two sums in question had been expended in the improvement and purchase of land to be entailed under the truster's directions. The person entitled at that date was the institute named in the settlement, Mr W. H. Dunlop; but his right was not an absolute right to the *corpus* of the estate, it was merely a right as first of a series of heirs to enjoy the real estate, if purchased, as heir of entail in possession, or, pending the purchase of lands and execution of a deed of entail, to demand from the trustees the interest and proceeds of the entire residue and reversion of the truster's estates, heritable and moveable, under deduction of expenses and charges of management and execution of the trust.

"Mr W. H. Dunlop did not commence proceedings for the purpose of disentailing until January 1890, and the disentail was not carried through until the end of that year.

"Turning now to the 19th section of the Act 1796, I shall consider whether Mr W. H. Dunlop was in the position to which the exception, which I have quoted, applies. I think it is clear that, at the time when the right opened to him, it opened to him as the first of a series of persons by whom, according to the will, the land to be purchased was to be enjoyed in succession. If any of the money at that date was not invested in the purchase of land, duty fell to be calculated by way of annuity, and paid just as if the money had not been directed to be applied in the purchase of real estate; and if, after the right opened, but before the money had been so applied, he acquired (as he did) absolute right to it, legacy-duty, under the express terms of the section, fell to be paid just as if from the first he had an absolute right to it. But it seems to me that the statute makes a marked distinction where money, directed to be applied in the purchase of real estate to be enjoyed by different per-

or interest being equally liable for duty with capital¹—and was within the definition of “legacy” given by sec. 4 of the 1845 Act,² which covered nearly every species of gift from the dead to the living. The erection of a mansion-house was not a purchase of real estate,³ and the provisions of sec. 19 of the Act 36 Geo. III. c. 52,⁴ had no application.

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The sum of £21,000 was moveable estate expended on the purchase of real estate, and it had not been so left by the trustor as to be enjoyed by different persons in succession, for Mr Dunlop had been found absolutely entitled to it. The 19th section was meant to be read in two parts, the

sons in succession, has actually been so applied before right of succession opens to any of the series of heirs; or even, perhaps, when it is so applied when the heir entitled to be in possession for the time has not yet acquired an absolute right to the estate. This distinction runs through the whole section. Each person entitled in succession is to pay duty on the personal estate so destined ‘unless the same shall have been actually applied in the purchase of real estate before such duty accrued,’—that is, before that person’s right emerged. The Act then proceeds to provide,—‘But no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied.’ The meaning of these provisions seems to be that if, during the lifetime of any of the persons entitled for the time to enjoy the estate in succession, land is purchased under the directions of the will, legacy-duty will not fall to be paid on the succession of the next heir. Further, though it is, perhaps, not necessary to decide this, it would seem that if the money is applied in the purchase of land before all the instalments due by the heir in possession or entitled to be in possession are paid, liability for future instalments of legacy-duty ceases. Again, while it is directed that if any person becomes entitled to an estate of inheritance in possession, he shall pay as if he had been originally absolutely entitled, that provision is expressly confined to the case of his acquiring an absolute right before the money has been actually applied in the purchase of land; and legacy-duty is only payable in respect of so much of the money as has not been then applied in the purchase of land. I, therefore, think that, looking to the language used in the statute, it must be held that Mr W. H. Dunlop’s case *quoad* the two sums in question falls within the exception or qualification in the 19th section. I do not think that any solid distinction can be taken between the case of the institute or first person called and subsequent heirs. The statute says,—‘Each person entitled thereto in succession shall pay duty,’ &c.

“The question is one of some subtlety, because it may be suggested that, from the expiry of the six years from the death of Mr Alexander Dunlop, Mr W. H. Dunlop had a potentiality of acquiring the estate in fee-simple, and actually did acquire it before it was conveyed to him; and that thus from the first the trustees held for him absolutely. But the money having been actually applied in the purchase of land before the succession opened to Mr W. H. Dunlop, I think the direct words of the 19th section are too strong to admit of this refinement, and that it would not be safe to rely on the analogy of other statutory enactments dealing with other cases, such as section 21 of 16 and 17 Vict. c. 51, on which the case of *Lord Lilford v. The Attorney-General*, L. R., 2 Eng. and Ir. (H. of L.) App. 63, was decided. My opinion therefore is that the objections must be repelled; and even if the matter were more doubtful than I hold it to be, I should feel bound to give the defenders the benefit of the doubt.

“As I have already mentioned, succession-duty has already been paid, and I think that is all that the Crown is entitled to claim. The difference is stated to be about £1200.”

¹ Advocate-General v. Oswald, May 20, 1848, 10 D. 969; Attorney-General v. Cavendish, 1810, Wightwick, 82.

² *Supra*, p. 350, note.

³ In *re Parker*, 1859, 4 H. and N., 666, 29 L. J. Exch. 66.

⁴ *Supra*, p. 350, note.

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first—which covered the present case—being wholly unqualified by the later exception. That applied only to the second part, that, namely, introduced by the first “unless,” and dealing with the case of successive owners. That was the view of the Court in the former judgment.¹ It did not matter, therefore, whether the money had been actually applied in the purchase of land before Mr Dunlop's right emerged. It was not disputed that when he took he did so absolutely and not as first of a series of owners. It might be that he required the aid of the Entail Acts to work out his right, but with that the Crown was not concerned.

Argued for the defender ;—Both sums fell within the provisions of sec. 19 of the Act of Geo. III., and sec. 4 of the 1845 Act had no application. The direction to expend £12,000 in the erection of a mansion-house should not be separated from the larger direction to purchase land. It was merely an incident of the latter, and although the form of expression was different the practical result was the same, viz., the acquisition of heritable estate. *Sprot's case*² was therefore, strictly analogous. Accordingly the exception in the latter part of section 19 applied in terms to both sums. In any event, it applied to the sum of £21,000, for it was moveable estate applied in the purchase of real estate, and it had been actually expended in the purchase of land before the expiry of the six years, and before any person had acquired a right thereto, whether limited or absolute, and before therefore any duty had accrued, and when Mr Dunlop's right was ascertained the estate was exactly in the position described in the last exception. There was no warrant for breaking up the section into two parts as the pursuer proposed, so as to limit the last exception to the case of money so gifted as to be enjoyed by different persons in succession.

At advising,—

LORD M'LAREN.—This case relates to the liability of money directed to be invested in the purchase of land to payment of legacy-duty. The late Alexander Dunlop, having conveyed his personal estate to testamentary trustees, directed that the rents, interest, and profits of the residue of his estate should be accumulated for six years after his death, and that the residue increased by such accumulations should be applied in the purchase of lands to be entailed on a series of heirs. It may be here noticed that under the powers of the deed of trust the trustees might have purchased land for the purpose of being entailed within the period of six years following the truster's death, but it is only after the expiration of this period of six years that the heirs of the destination have a right to demand and receive the full income of the residue, which is thenceforth treated as entailed money, waiting investment. During this period of six years the right of the institute or heir is restricted to an annuity of £800 per annum.

Mr William Hamilton Dunlop, the institute of entail, in the exercise of his statutory powers, elected to disentail the estate ; and, under a previous reclaiming note, we held, affirming Lord Wellwood's judgment, that as Mr William Hamilton Dunlop had, by arrangement between him and his three minor children and their curators, become entitled absolutely to the clear residue of the personal estate of the deceased Alexander Dunlop, legacy-duty was chargeable on the capital thereof at the rate of five per cent.

It then became necessary to ascertain the amount of the personal estate. An

¹ 19 R. 461, Lord Kinnear, p. 473.

² *Sprot's Trustees v. Sprot*, March 11, 1830, 8 S. 712, 2 Scot. Jur. 331.

account was given in for the Lord Ordinary's consideration. To this account **No. 67.**
 two objections were stated by the Lord Advocate as representing the Inland Revenue Department, which objections have been repelled by the Lord Ordinary in the interlocutor which is under review. I shall consider these objections in their order. Jan. 12, 1894.
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1. In the residue account given in the defender proposes to make a deduction of the sum of £12,000 under the head,—“Sum directed by deceased's settlement to be expended in erection of mansion-house at Doonside.” The Lord Advocate objects to the deduction in so far as the sum expended is derived from the personal estate. The Lord Ordinary has allowed the deduction, but I am not quite sure on what ground. Apparently, in the argument in the Outer-House, this expenditure had been treated as equivalent to the expenditure of residue in the purchase of land, and therefore as raising a question under the 19th section of the Act 36 George III. cap. 52, which I shall have to consider with reference to the second objection.

Now, in a question of private right depending on the constructive conversion of money into land under the operation of a power, there is evidently a strong analogy between the cases of a power or direction to purchase land, and a power or direction to add to the value of the land by building on it. But I believe your Lordships are all of opinion that the operation of a taxing statute cannot be extended analogically, and that the expenditure of £12,000, or whatever may be the sum derived from personalty in the erection of a mansion-house at Doonside is not a case within the contemplation of the 19th section, which deals only with the case of a “purchase of real estate.”

I am free to say that I do not see any good reason why this sum of £12,000, or so much of it as was personalty, should not be treated as a part of the clear residue, and subject as such to legacy-duty under the general provisions of the Act 36 Geo. III. But any doubt that might be raised on this subject is removed by the 4th section of the Act 8 and 9 of the Queen. The terms of that section appear to me to be sufficiently comprehensive to include within the category of things which are subject to legacy-duty, a sum of money which is directed to be applied to the erection of a house or building, and the case of *Parker*, 4 H. & Nor. 666, is an authority in point.

2. I pass to the second objection, under which the Lord Advocate objects to the deduction of £21,015 on account of “Price of estate of Sauchrie, purchased by the trustees on 11th November 1885, from Alexander Mitchell in virtue of directions in deceased's settlement.” Now, the truster, Alexander Dunlop, died on 30th September 1883; this purchase was made about two years later; the six years of accumulation expired on 30th September 1889, and the proceedings for the purpose of disentailing the succession were only commenced in January 1890, and were carried through during that year. In these circumstances the defender says that this purchase falls within the general scope of the 19th section of 36 Geo. III. cap. 52, but that in this particular case no duty attaches.

The purpose of the 19th section is to regulate the payment of duty in respect of money to be applied in the purchase of real estate. It begins with general words imposing duty; then follows an exception or qualification, and to this again there is a subexception. 1st, It is enacted,—“That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate.” The qualification is,—“Unless

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the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate,"—that is, I presume, according to the provisions of the 12th section. I pause here to inquire what would have been the right of the Inland Revenue in relation to this sum of £21,000, supposing the lands of Sauchrie had not been purchased, and the capital sum was still unexpended but entailed. It was common ground that until the expiration of the six years ending 30th September 1889 no duty accrued. Until that date the institute of entail was not ascertained, no right to the enjoyment of the entailed money vested in anyone, and, as the Lord Ordinary points out, the rate of duty could not be fixed or the amount calculated. Immediately thereafter, the institute, Mr William Hamilton Dunlop, would, in the case supposed, be liable to pay duty on the value of his life interest according to the tables appended to the Act of Parliament, and if he died before a purchase was made (the money being still entailed) the next heir would pay legacy-duty on his life interest, and so on. I pass to the subexception of the 19th section which (like the chief exception) is introduced by the word "unless," i.e. "unless the same shall have been actually applied in the purchase of real estate before such duty accrued, but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied."

Keeping in view that at this time, and for many years thereafter, land was altogether exempted from succession-duty, or death-duty of any kind, I think the meaning of this subexception is very plain. So soon as the money shall be *de facto* converted into land, it is to be exempt from future taxation. Until an investment is found the heirs in succession must pay duty as for a pecuniary legacy, but after an estate is purchased and the trust so far executed the legacy account closes, future heirs are heirs to landed property, and it is not intended that the estate in their hands should be subject to duty.

The peculiarity of the present case is that the estate was purchased before a right to its value vested in anyone. Before the purchase was made, it was not possible to find a person liable in duty as having a limited interest, and after the purchase was made then by the express words of the last exception no duty accrues.

It is certainly a curious result of the statutory provisions that this capital sum, although left by the testator in the form of money, escapes taxation altogether under the Legacy-Duty Act. But it can hardly be said that it escapes liability contrary to the policy of the Act, when it is observed that this is the result of the money being converted into land soon after the testator's death, and before the acquisition of a vested interest by an institute. We were informed that succession-duty under the Act of the present reign has been paid on this sum.

I ought not to conclude without taking notice of the argument founded on the proviso to the 19th section, which was the subject of consideration under the previous reclaiming note, under which any person who shall become entitled to an estate of inheritance in possession is to pay duty as if absolutely entitled. Now, this proviso begins with these words,—“In case before the same, or some part thereof” (that is, of the money) “shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession,” &c.

Now, in the present case, the defender did not disentail before this money was applied in the purchase of land, and so did not in the language of the statute become entitled to an estate of inheritance before the money was so applied. Accordingly, I agree with the Lord Ordinary that this proviso has no application to the subject of the second objection.

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If your Lordships agree with me, the Lord Ordinary's interlocutor will be altered as regards the first objection, and the first objection to the account will be allowed in so far as the sum of £12,000 proposed to be deducted is derived from personal estate of the deceased Alexander Dunlop. As regards the second objection, I propose that we should adhere to the Lord Ordinary's interlocutor, which repels this objection.

LORD KINNEAR.—I am of the same opinion, and I should not have thought it necessary to add anything were it not that observations I am reported to have made in the previous case were referred to in argument as supporting the view that Mr Dunlop's right from the moment it vested in him was an absolute right to the residue of this estate. The argument is that nothing following the words "unless the same shall be so given as to be enjoyed by different persons in succession," is applicable to a legatee having from the first an absolute right. It is inaccurate to say that Mr Dunlop's right was absolute from the first. But he had from the first—that is from the time when his interest vested—a capacity to acquire such a right, and he did, in fact, acquire it, before any question of duty arose. What I said was intended to apply only to the circumstances of the case which we were then considering. The condition of the argument was that while the money was still unpaid and unapplied in the hands of the trustees, the institute had acquired right but in fee-simple. It appeared to me that liability for legacy-duty must be determined by reference to the interest which the legatee actually takes under a will, rather than by what the will *ex figura verborum* may purport to bequeath; and therefore that Mr Dunlop could not at the same moment claim immediate payment of the whole residue in his own right, and also maintain that the residue so to be paid to him absolutely had been given to be enjoyed by a series of heirs in succession so as to exempt him from legacy-duty. Whether that was right or wrong, it has no application to the present question.

The facts on which that question depends are clearly stated by the Lord Ordinary. The testator directed the residue of his estate to be applied in the purchase of land to be entailed on a series of heirs. Before any right had vested in the institute, the trustees, in the execution of their trust, had laid out £21,000 in the purchase of the lands of Sauchrie, to be entailed according to the directions of the testator. The institute, Mr Hamilton Dunlop, cannot demand payment of that portion of the residue in money, because no interest in the money had vested in him until after it had been converted into land in due performance of the trust. But when the right vested it was, as the Lord Ordinary points out, not an absolute right to the estate of Sauchrie, but only a right to demand a conveyance under the fetters of an entail, although by disentailing he has now right to demand a conveyance in fee-simple. The meaning of the enactment appears to me to be, first, that money left by will to be laid out in the purchase of land is to be chargeable with legacy-duty as personal estate, except when it is so given as to be enjoyed by different persons in succession; secondly, that in this excepted case each successive owner is to pay

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I entirely concur with Lord McLaren both upon that point and also upon the second point as to the money expended in building upon the estate of Doonside. I find it unnecessary to add anything.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT recalled the interlocutor of the Lord Ordinary so far as it repelled the first objection to the residuary account given in by the defenders, and in place thereof sustained said objection, and *quoad ultra* adhered to said interlocutor.

PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—J. & F. ANDERSON, W.S.—Agents.

No. 68. MRS MARJORY A. K. GRANT, Pursuer (Respondent).—*Dickson—Cooper.*
JOHN HENRY, Defender (Reclaimer).—*Murray—Crabb Watt.*

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Fishings—Trout-fishing—River navigable but non-tidal.—In a question between a riparian proprietor and a member of the public held (1) that a right in the public of being at or on the non-tidal portion of a river for the purposes of navigation does not entitle them to fish for trout therein, and (2) that such a right of fishing cannot be acquired by prescriptive use.

1ST DIVISION. MRS KINLOCH GRANT was proprietrix of the lands of Arndilly and Ld. Kyllachy. Aikenway in the counties of Banff and Elgin. The lands were bounded on the west by the River Spey, which at that part was not a tidal river.

In October 1892 Mrs Grant raised an action against John Henry, exciseman, Craigellachie, concluding for declarator (*first*) that she was entitled to prevent the defender entering on or passing along the bed or *alveus* of the Spey lying between the bank in her lands and the *medium filum fluminis ex adverso* of Arndilly and Aikenway, and from entering on or passing along the banks within her lands; (*second*) that she had the sole and exclusive right to fish for trout and all other kinds of fish from that part of the bed or *alveus*, and from the bank *ex adverso* of Arndilly, and similarly to fish for trout and all other kinds of fish, not being salmon, *ex adverso* of Aikenway; and (*third*) that the defender had no right to fish for trout or any other kind of fish from the *alveus* or bank on Mrs Grant's side of the river, and for interdict against him accordingly.

The pursuer stated that the defender had asserted a right to fish for trout in the river *ex adverso* of her lands, that he had no right in himself, and had not received authority from anyone entitled to give it to do so.

The defender stated;—"That the Spey is a public navigable river, and that any part of its *alveus* is inalienable by or from the Crown as trustees for the public. The members of the public have enjoyed its use as a public navigable river since beyond the memory of man. As such they have used it for centuries in the transport of the produce of the country, and for the passage of the inhabitants to the low country. For these and

kindred purposes it has been navigated by rafts, boats, currachs, and other native craft from time immemorial. The public have exercised and enjoyed the right of fishing for trout and other fish not of the salmon kind in and use otherwise of the *alveus* of the said river *ex adverso* of the pursuer's said lands from time immemorial. They have also exercised and enjoyed the right of walking on its bed and along its banks. They have in particular enjoyed and exercised from time immemorial a right of way on the south bank of the said river *ex adverso* of the pursuer's lands, and from the said right of way they have, and the defender as a member of the public has, constantly obtained access to the *alveus* of the said river." No. 68.
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The defender pleaded;—(4) The public having from time immemorial enjoyed the right of fishing for trout and other fish not of the salmon kind in the *alveus* of the said river *ex adverso* of the said lands, the defender as a member of the public is entitled to exercise said right. (5) The Spey being a public navigable river, the pursuer has no exclusive rights therein, except the right of fishing for fish of the salmon kind.

On 16th February 1893 the Lord Ordinary (Kyllachy) declared and interdicted in terms of the conclusions of the summons.*

* "OPINION.—The defender in this case claims right, as one of the public, to fish for trout in the River Spey *ex adverso* of the pursuer's lands of Arndilly; and the present action has been brought to have it declared that he has no such right, and to have the defender interdicted from continuing to fish on the pursuer's water.

"The defender's claim is rested upon two grounds—(1) That the River Spey is at the place in question navigable,—that is to say, navigable for boats and rafts; and that being navigable, although not tidal, it is a public river, in which the public have the same rights as they have in the sea; (2) that assuming the river to be private in point of property, the right of trout-fishing may yet be acquired by the public by prescriptive use, in the same manner as a right of way.

"I have had a very full and careful argument on the important questions thus raised, and have been very willing to consider how far the law of Scotland leaves these questions open. In result, however, I cannot say that I have found room for any serious doubt on that subject.

"As to the first ground, it is probably true—at all events (what is enough at present) it is averred—that the River Spey, from about Kingussie downwards, is navigable, and has been long navigated by boats, currachs, rafts, and other native craft. On the other hand, it is admitted, and is notorious, that at the place in question the river is not tidal. In point of fact, as mentioned at the debate, the tide only flows for a very short distance above the mouth of the Spey at Garmouth.

"In these circumstances, it is necessary for the defender to contend, as he does contend, that mere navigability makes a river public—at least, that it does so when there has been in fact a usage of navigation for the prescriptive period. In other words, the defender contends, as he requires to contend, that it is immaterial whether the river is tidal or non-tidal at the part in question.

"It appears to me to be hopeless to maintain this contention in face of the authorities. It is settled in England, and has been so since the days of Sir Matthew Hale,¹ that fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent. Both in England and in Ireland there have been repeated decisions to that effect,² decisions distinguishing between tidal and non-tidal waters, and negating the right of the public to fish in the latter. There have been similar decisions in America, where, looking to the

¹ Hale, *de Jure Maris*, ch. 1.

² *Pearce v. Scotcher*, L. R., 9 Q. B. D. 162; *Murphy*, 2 Ir. Rep., C. L. 143; *Angell on Watercourses*, p. 552 *et seq.*

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The defender reclaimed, and argued;—The Spey at the part in question was a public navigable river, and the proprietor of the adjacent lands had therefore no right to exclude the public from the *alveus*. He might have had a right to prevent them from trespassing on his lands in order to get to the *alveus*, but that point did not arise here, for the right of navigation carried with it a right of access, and once at the *alveus* the public had a right to fish for trout, for these were *res nullius*. In *Fergusson's* case¹ the water was a private stream, and besides the public, in fishing from the road or right of way, had to cast their lines over private property. But a river if navigable, though not tidal, was a public river.² It had been expressly so decided in the case of the Spey.³

character of American rivers, a different doctrine might perhaps have been looked for. And although in Scotland there may have been until lately an absence of direct authority, it cannot, I think, be said that the point has ever been regarded as doubtful. In any case, the opinions of the Judges in the recent case of *Colquhoun's Trustees v. Orr Ewing*, and particularly the opinions of the Judges in the House of Lords (which cannot in any view be regarded as *obiter*), settled I think conclusively, that by the law of Scotland a right on the part of the public to navigate a fresh water river does not imply that the river is public. They settle, on the contrary, that the only public rivers are those which, being both navigable and tidal, are truly parts of the sea, and in which accordingly, as in the sea, the property of the *solum* is in the Crown and the right to fish in the public.

"As to the second ground of defence, viz., the alleged prescriptive use, it is also, I think, clear that the defence is foreclosed. It is not disputed that in an ordinary private stream it is impossible by any amount of possession to acquire the right of trout-fishing. Certain rights over private property may no doubt be so acquired. Known servitudes, including rights of way, may certainly be so; but, as Lord Cockburn puts it in the case of *Fergusson v. Shirreff*, 6 D. 1363—"It is certainly not true that by the law of Scotland anybody may do anything not criminal which he has been accustomed to do for forty years." The question always is, whether the right claimed falls within the category of known servitude. Accordingly, in the case of *Fergusson v. Shirreff*, which I have just quoted, it was expressly held that a right of trout-fishing in a private stream could not be acquired by forty years' possession, and the same thing was again decided in the case of *Montgomery v. Watson*, 23 D. 635, where the question was as to an alleged right of fishing in a fresh-water loch.

"But the defender argued that when once a stream is found to be subject to a right of navigation, it is no longer a private stream in the sense of those authorities. Such a stream is already, it is said, *quodammodo* public; and being so, there is no legal objection to the extension by usage of a public right, so as to add the right of fishing to the right of navigation. As to this, I can only say that I can find no authority and can see no principle for such a distinction. A right of way through an estate does not carry with it, or make it possible to acquire by usage, a *jus spatiandi* over the estate; and the principle is the same whether the subject is dry land or land covered by water. The question really is whether this river is public or private property. It must be one or the other. If it is public, there is of course an end to the question; but if it is private, as I hold it to be, the existence of one burden in the shape of a right of passage for rafts and boats, cannot, in my opinion, be a ground for admitting another burden—a burden unknown to the law as affecting private property.

"On the whole matter I see no ground for allowing a proof. I propose to find that the defender's statements are irrelevant, and to repel the defences, with expenses."

¹ *Fergusson v. Shirreff*, July 18, 1844, 6 D. 1363, 16 Scot. Jur. 580.

² Digest, xlii. 12, 1; Ersk. Inst. ii. 1, 5; Bell's Prin. 648.

³ *Grant v. Duke of Gordon*, 1778, M. 14,297, 1781, M. 12,820.

It was admitted that the public had an unrestricted right to fish in tidal rivers. That was because these were indisputably public rivers. It did not follow that because a river was non-tidal it was not public. The use had of it was the best proof of the rights in and to it, and the defender offered to establish that for the prescriptive period trout-fishing had been enjoyed by the public in the part of the Spey in question. The fallacy of the pursuer's argument was in the assumption that because the proprietor of the adjacent banks had a right of property in the *alveus* he must also necessarily have a co-extensive right of trout-fishing. But (1) trout-fishing was not limited *ad medium filum*, as the right of property was, but extended from bank to bank; and (2) the right of trout-fishing was not a prædial servitude requiring a dominant tenement,¹ but was a pertinent of the land which was capable of transmission or reservation as a separate estate.² The Crown might, therefore, in the case of a navigable river, reserve the right of trout-fishing, if not absolutely, at any rate jointly with the adjacent proprietors; and here if the defender proved that from time immemorial the public had enjoyed the right, that would establish that the Crown had made no grant of the trout-fishing to the adjacent proprietors. It was important to notice in this connection that the pursuer had not averred exclusive possession. Navigation might be the primary use had by the public, but that did not prevent the acquisition by them of subsidiary or other uses.

Argued for the pursuer;—The owner of lands on the banks of a river which was navigable, but not tidal, had a right of property in the *alveus ad medium filum*.³ The right of navigation gave the public no right of property of any kind, but was merely a right of way or passage over the water. It did not constitute the river a public river, and did not carry with it the right of trout-fishing.⁴ That was a privilege inherent in the right of property of the owner of the adjacent lands.⁵ In *Carmichael's case*⁶ no general question was raised as here with the public; and the *dictum* of Lord Braxfield in that case, that "the heritor *ex adverso* has the right of trout-fishing, and no one can do anything to interrupt it," was quoted with approval in *Fergusson's case*.⁷ That the mere right of access to a stream gave no right of trout-fishing therein, and that no such right could be acquired by prescriptive use, had been expressly decided.⁸

At advising,—

LORD KINNEAR.—The pursuer brings this action to establish an exclusive right to fish for trout in the Spey *ex adverso* of her lands of Arndilly, and to have the defender interdicted from encroaching upon that right. The defence is that the public, or at all events the inhabitants of the neighbourhood, have

¹ Patrick v. Napier, March 28, 1867, 5 Macph. 683, 39 Scot. Jur. 346.

² Carmichael v. Colquhoun, 1787, Hailes' Dec. 1033, M. 9645.

³ Patrick v. Napier, *supra*, note 1; Colquhoun's Trustees v. Orr Ewing, Jan. 26, 1877, 4 R. 344, July 30, 1877, 4 R. (H. L.) 116.

⁴ Colquhoun's case, *supra*, note 3; Hargreaves v. Diddams, 1875, L. R., 10 Q. B. Ca. 582; Pearce v. Scotcher, 1882, L. R., 9 Q. B. D. 162; Harrison v. Duke of Rutland, L. R. [1893], 1 Q. B. 142.

⁵ Mackenzie v. Rose, May 26, 1830, 8 S. 816.

⁶ *Supra*, note 2.

⁷ Fergusson v. Shirreff, July 18, 1844, 6 D. 1363, at p. 1373.

⁸ Fergusson v. Shirreff, *supra*, note 7, and authorities there cited; Montgomery v. Watson, Feb. 28, 1861, 23 D. 635, 33 Scot. Jur. 312; Maxwell v. Copland, Nov. 20, 1868, 7 Macph. 142, 41 Scot. Jur. 79, Feb. 28, 1871, 9 Macph. (H. L.) 1, 43 Scot. Jur. 246.

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right to fish for trout in the water in question, because they have free and unrestricted access to the water without trespassing on the pursuer's lands. The averments of fact on which this contention is based are that the Spey is a navigable river, that there is a public right of way along the bank of the river opposite to the pursuer's lands, and that the right to fish for trout has been exercised by the public for time immemorial. The argument upon these averments may be stated in the following propositions:—First, That inasmuch as trout in a river are not property, they may be lawfully captured by anyone having access to the water; secondly, that even if access will not of itself infer the right to fish, such a right may be acquired by continuous use and enjoyment for the period of prescription; and thirdly, that whatever may be the law with reference to private streams, there can be no exclusive right to fish for trout in navigable rivers.

The first and second of these propositions were rejected by the Court in *Fergusson v. Shirreff*, 6 D. 1363.

It was decided in that case, first, that the right of angling for trout in private streams is an accessory to the right of property in the adjoining lands; secondly, that there is no common right of fishing for trout residing in the public at large, or in such members of the community as may have access to the water by virtue of a right of passage along the banks; and thirdly, that the continuous use and practice of fishing in such a stream for forty years or more will not establish a right in the public or in the inhabitants of the neighbourhood, but must be ascribed to toleration by the proprietors. All the earlier authorities on which the defender relied were brought before the Court in that case, and are fully discussed in the opinions of the four very eminent Judges who agreed in the decision. It does not detract from the authority of the judgment that in some of these opinions the question whether a public right of trout-fishing might not be acquired by use was treated as a question of difficulty. The Lord Justice-Clerk says,—“I believe there has been a common belief of right where there has been possession. I have wished much to find that this right of amusement or enjoyment is a legal title on which prescription can be founded so as to protect the use. I must confess I have struggled so to find it.” And Lord Medwyn said that he had framed his opinion with a good deal of hesitation, and perhaps with some reluctance. But, notwithstanding these difficulties, both of these learned Judges, after deliberate consideration, became satisfied that there was no ground in law on which a right of fishing could be established by usage, either in the public at large or in a particular community. The opinions of Lord Moncreiff and Lord Cockburn were even more decided to the same effect. The authority of that decision has never since been called in question, and it is certainly binding upon this Court. The same law has been laid down in the later cases of *Montgomery v. Watson*, 23 D. 635, and *Copland v. Maxwell*, 9 Macph. (H. L.) p. 1. The former of these cases is not so directly in point, because it concerned the right of fishing in a loch, and it appeared from the titles produced that the complainer was proprietor of the whole loch and its *solum*. The Court, however, held that access to the loch conferred no right to fish, that the decision in *Fergusson v. Shirreff* was applicable, and that the doctrine there laid down could not be impugned. In *Copland v. Maxwell* the question was whether an agricultural tenant had a right to fish for trout in a pond on his farm, to which he had access as a necessary result of his tenancy. It was held, on the authority of *Fergusson*, that the mere right of access inferred no right of

fishing, and therefore that an agricultural tenant could have no such right, since it was wholly independent of the agricultural enjoyment of the land, unless it had been communicated to him by the proprietor. The Lord Justice-Clerk said,—“The right of trout-fishing in private streams or lochs must be conceded to be one accessory to the right of property in the lands which surround them. If the right be incident to the property of the lands, as it is universally said to be, the tenant can only claim to exercise it on the assumption that it has been communicated to him by the landlord.” Lord Neaves, concurring generally with the Lord Justice-Clerk, says,—“A right of trout-fishing is an incident to the right of property. It is not a right open to the public, and exercisable by all who have access to the water. There is no property in trout in the burn, any more than in the running water.” Lord Westbury, quoting this *dictum* in the House of Lords, observes,—“This is for the purpose of distinguishing this case from the case of an ordinary fish-pond enclosed all round, where the fish may be said to be no longer feeding in a state of nature, and where the owner has unquestionably a property in them.” Lord Neaves goes on to say,—“But the right to fish is a privilege of the proprietor of the soil, and no stranger is entitled to take the trout, any more than he is entitled to ladle out the water.” The judgment was affirmed, and the opinions I have quoted were approved in the House of Lords.

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The only question, therefore, which appears to me to be open for consideration is, whether the doctrine which has been established with reference to private rivers and lochs is or is not applicable to the River Spey above the point where the tide ebbs and flows. It is said to be inapplicable because the Spey is a public navigable river. It is not pretended that the Spey is in fact navigable by vessels of burthen, but it must be assumed, for the purposes of this discussion, that it is navigable, and has in fact been navigated by “rafts, boats, currachs, and other native craft” from Kingussie to the sea. I do not see that if the river has been used by the public as a navigable river, it can make any difference to the question now under discussion whether it is navigable by one class of vessels or another. But assuming the right of navigation to be as extensive as the physical character of the river will permit, no tenable ground has been suggested for holding as matter of law that the right to use a fresh water river for purposes of navigation must necessarily carry with it the right to use it for any other purpose, and particularly for the purpose of fishing. The right to use a river of this kind for the purpose of navigation is assimilated by the Lord President in *Orr Ewing v. Colquhoun's Trustees* (4 R. 344) to a public right of way, and it is obvious that a right of way by means of a river where it is fitted for navigation is just as definite and specific a right as a right of way by land, and does not by its definition imply any other or more extensive uses than are necessary for purposes of passage. It necessarily implies a right of access to the river, but it is settled by the authorities already mentioned that a right of access does not infer a right to fish for trout. It is a right of access for one specific purpose only, which has nothing whatever to do with the use and enjoyment of the river for fishing. But it is said that the ultimate ground of judgment in *Fergusson v. Shirreff* was that the banks, the *alveus*, and even the water of a private stream are the private property of the riparian heritors, subject only in the case of each to the rights and interests of the others, and that there is no such right in the *alveus* or stream of a navigable river. To make good this argument the counsel for the reclaimer maintained that the law

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of Scotland recognises no distinction between inland and fresh water rivers and the estuary of a river where the tide ebbs and flows. No authority was cited for this proposition, and there is very high authority to the contrary. I agree with the Lord Ordinary that it is unnecessary to go farther back than the case of *Colquhoun's Trustees v. Orr Ewing*. In that case the doctrine of the law of Scotland is laid down with the greatest clearness and precision by the Lord President and Lord Deas. The Lord President says,—“The distinction between a navigable river where the tide ebbs and flows, and a proper fresh water river is very important as regards legal principle, because where the tide ebbs and flows the *alveus* of the river is the property of the Crown for public purposes as well as the banks of the river. . . . Not so with a fresh water river. The *alveus* of a fresh water river is the property of the proprietors upon the banks, just as the *alveus* of a stream which is not navigable is the property of the proprietors upon the banks. But, notwithstanding of that distinction, which is a very clear one, there may be a public use of a fresh water river for the purposes of navigation.” His Lordship goes on to argue the legal character of the public use by the analogy I have already mentioned. His view therefore is that in such streams there is a right of property in the *alveus*, subject to the public right to navigate, just as there is a right of property in land over which the public has a right of way, subject to the public right of passage. Lord Deas states the same distinction between the two classes of public navigable rivers, and explains that operations which would be illegal in the tidal part of the river may be lawful in the non-tidal part, the difference being that “the Crown holds the *solum* of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum*, and the right of navigation on the part of others requires use to found and support it.” The law so laid down is approved and confirmed by the opinions delivered in the House of Lords (4 R. (H. L.) 116), and especially by the opinion of Lord Blackburn, and indeed it formed the basis of the judgment by which the decision of this Court was reversed. In that case riparian proprietors on the River Leven had erected the piers of a bridge in the bed of the river. The Court held that although they were proprietors of the *alveus* they were not entitled so to build within the bed of the river, because the public having rights of navigation had an interest in the running water, and although the new bridge might not cause any present injury, it was impossible to foresee what effect the operations in such a river as the Leven, where there is no great abundance of water and the deep part of the channel is but narrow, might ultimately produce in times of flood or in various states of the river. The Court therefore held that the right of navigation gave the public using the river the same title and interest to interfere with the operations of a riparian proprietor as lower or opposite heritors might have in respect of their right of property according to the doctrine established in *Bicket v. Morris*. But the House of Lords held that the right of navigation inferred no proprietary right or interest, and that *Bicket v. Morris* was inapplicable; and Lord Blackburn in explaining his reasons for that conclusion lays down the law as to the property of the *alveus* just as clearly as it had been stated in this Court. His Lordship says, in the first place, that “the River Leven is an inland stream, and the tide does not flow up to the point where the piers are erected. And as is pointed out by the Lord President, the rights of the Crown as regard the soil of the *alveus*, and of the public to navigate, are not the same

in such a river as they are in the sea, or in a tidal estuary"; and in defining the public right to navigate, he says that "the public who have acquired by user a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully and freely and as safely as they have been wont to do." The question to be considered therefore, as his Lordship treated it, was whether the erections complained of, being erections on the defender's own land, although *in alveo* of a running stream, were a present interference with the public right of passage, or if not, whether it could be shewn that they would necessarily produce effects which would in future interfere with that right. The judgment appears to me to import that a riparian proprietor has just the same property in the *alveus* of a navigable river as if it had been a private stream, subject only to the public right of passage. It was suggested in argument that whatever might be the law as to *alveus*, there could be no such right of property in the water as if the stream were private. I think there is no substantial distinction in this respect between the river and the *alveus*. The only question in *Colquhoun's* case was whether the riparian owner's right of property enabled him to interfere with the running water. The law laid down, as I understand the decision, is that no difference in the legal character of the landowner's right is created by the public right of navigation. He has therefore a right not only to the ordinary uses of the water as it flows past him, but to any extraordinary uses he may be able to enjoy without interfering with the rights of other heritors above or below him, and without obstructing the navigation. He has therefore a right of use, which, although not unlimited, is indefinite, and is available against all the world; and whether that is in law a right of property or not, it is exactly the same right as a riparian owner has in the water of a running stream which is not navigable. It appears to me, then, that all the grounds on which *Fergusson v. Shirreff* was decided are directly applicable to the present case. The pursuers, as an accessory of their right of property, have a right to fish for trout *ex adverso* of their lands, and in respect of that right they are entitled to exclude others from fishing, notwithstanding that there may reside in such other persons a right to use the river for some other definite and specific purpose.

The same considerations appear to me to be conclusive against the defender's claim to establish a public right by proof of a prescriptive use and enjoyment. If this were an open question, I should have thought it one of difficulty. We know that there are rivers which are practically open, where not only the inhabitants of the neighbourhood, but persons coming from a distance, have been accustomed to fish for trout without let or hindrance from time immemorial; and one would have expected to find that a use and enjoyment so extensive and so continuous rested rather on public right than on the goodwill and good sense of private landowners. But that is just the difficulty which the Lord Justice-Clerk considered and overcame in *Fergusson v. Shirreff*. If the right to fish for trout is not an incident of the right of navigation, the navigable character of the river can afford no special title independent of possession to which the use can be ascribed. The relevancy of the averments of possession must therefore be determined on the same grounds as in *Fergusson v. Shirreff*. All the arguments which were addressed to us in support of the relevancy, including even those which were founded on what is said to be a public understanding and belief—topics which Lord Cockburn described as scarcely judicial—were fully

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No. 68. considered and rejected in that case. I think that decision is binding upon us, and that we cannot allow the questions then settled to be reopened.

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LORD M'LAREN.—I concur in the judgment proposed and in Lord Kinnear's opinion. If the question had not been settled by decisions I should have felt difficulty in affirming that a right of fishing for trout or fresh water fish is a right which the law would protect. Trout-fishing is not, like salmon-fishing, a species of property distinct from the property in the channel of the stream in which the fish are taken; it is a right inseparable from the property of the *alveus*, and is, as I think, more correctly described as an incident of the estate of a riparian proprietor than as a separate right.

In the ordinary case it would be impossible for a stranger to fish for trout against the will of the riparian proprietor without committing a trespass, and so the estate of the riparian proprietor in the channel of the stream and the adjacent banks carries with it a virtually exclusive right to the fishing. I need hardly say that there is no right of property in the trout which are found in a running stream, and which are free to migrate from one estate to another. It may be otherwise in the case of ponds and enclosed waters artificially stocked with fish. Now, in the not infrequent case of a road or right of way following the course of a stream I should not, apart from the decisions, be able to come to the conclusion that a member of the public using the public way and casting his rod across the stream for trout was committing a trespass or invading a right. But the cases cited by the Lord Ordinary certainly establish the proposition that trout-fishing is in itself a subject of legal protection, and that the right of the riparian proprietor to the exclusive privilege of fishing does not depend altogether on his right to prevent trespassers from coming upon his lands. Indeed, it is impossible to read the opinions of the learned Judges who took part in those decisions without seeing that in their view a right to be on the bank of a stream, *e.g.*, in the exercise of a public right of way, is a strictly limited right, and that the defence that the fisherman was fishing from a standpoint where he had a right to be would not be a relevant answer to an application for interdict against fishing in private waters.

Now, if the point to which I have spoken be admitted or established it appears to me that the claim of the defender Henry as one of the public must fail. His case is that the Spey is a navigable stream, that the right of navigation includes the lesser rights of fording, wading, or walking along the bank of the stream; and he contends that being lawfully on the stream or on the bank adjacent thereto he may fish for trout without invading proprietary rights. But it is not disputed that the pursuer, Mrs Grant, is proprietrix of the channel of the Spey to the *medium filum ex adverso* of her lands as well as of the bank. She sues as a riparian proprietor. The circumstance that the public have a right of navigation in the Spey does not take away the rights of the riparian proprietors in relation to the stream, but only obliges the proprietors not to use their rights in such a way as to interfere with the uses of navigation. This point is made perfectly clear by the judgment of the House of Lords in *Orr Ewing & Co. v. Colquhoun's Trustees*, 4 R. (H. L.) 116. The defender was not fishing from a boat, but supposing he were, I think that a fisherman fishing from a boat could not defend himself against an interdict by pleading that the Spey is a navigable stream, and that he was entitled to have his boat on it. In principle the fisherman in the case supposed would be in no better position than

the angler using the riverside way and fishing from it. There is no authority for holding that the servitude or use of navigation carries any such accessory rights with it as are contended for. Such expressions of judicial opinion as we have on this subject are to the effect that a right of navigation in the case of a non-tidal river is a species of public way or a right *ejusdem generis*. No. 68.
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While, therefore, I am not prepared to say that trout-fishing is a heritable estate, or anything more than an incident of the use of property, I am satisfied that we could not sustain the defences in this case without going counter to the authorities which recognise the right of a riparian proprietor to preserve his fishings.

I shall not add anything on the distinction between tidal and non-tidal rivers, because in the case of tidal rivers it is evident that the Crown alone has the right to restrain the public from fishing if such rights exist at all. It is not likely that the Crown would seek to interfere with the right claimed by the public to fish in tidal waters, but the question is not before us, and its solution obviously involves considerations which have no bearing on the right claimed in the name of the public to fish in the navigable part of the Spey.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT adhered.

JOHN C. BRODIE & SONS, W.S.—DOUGLAS & MILLER, W.S.—Agents.

ALEXANDER MITCHELL AND CHARLES D. LAURENSEN, Pursuers
(Respondents).—*D. Dundas—W. Thomson.*

JAMES CULLEN GRIERSON, Defender (Appellant).—*Ure—Peddie.*

No. 69.

Jan. 13, 1894.
Mitchell v.
Grierson.

Process—Summons—Competency—Two pursuers claiming separate damages in one action—Reparation—Slander—Issue.—Held (1) that it is competent for two persons alleging injury by one calumnious statement to claim damages in one action provided the damages due to each are separately concluded for; and (2) that in such an action each pursuer must take a separate issue.

ALEXANDER MITCHELL, agent of the Union Bank at Lerwick, and Charles D. Laurenson, agent of the Commercial Bank there, raised an action in the Sheriff Court at Lerwick against James Cullen Grierson, solicitor in that town, praying the Court "to ordain the defender to pay to the pursuer the said Alexander Mitchell the sum of £500 sterling, and to pay to the pursuer the said Charles Duncan Laurenson the like sum of £500 sterling, with expenses." 1ST DIVISION.
Sheriff of
Caithness,
Orkney, and
Zetland.

After stating that they were Justices of the Peace, they averred that at a public meeting in the town hall of Lerwick, on 21st June 1893, in the presence of several persons, whom they named, the defender used the following words:—(Cond. 3) " . . . The Licensing Court had always been very amusing to him. He had appeared before that Court both for and against licences; and they used to size up the bench and say, 'Oh yes! This will be a day for licences, or it will be a day when none will be granted'; or they would say, 'Oh! you are right enough, you are a customer at Mr So-and-so's bank, and he's on the bench,' or 'So-and-so has two clients on the bench, his licence is quite sure.'" "The words quoted are of and concerning the pursuer Alexander Mitchell, and falsely, calumniously, and maliciously represent him as a person of unjust and dishonourable character, who had been unfaithful to the public trust reposed in him as a Justice of the Peace for the county of Zetland, and

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who had, in his official capacity, acted corruptly, for his personal benefit and that of his customers, by granting licences to persons who were his customers, with the object of securing their business to his bank; and they are also of and concerning the pursuer Charles Duncan Laurenson . . . " (then followed a repetition of the same innuendo as in the case of Mitchell).

The defender admitted that the statement of his remarks was substantially correct, but denied that they were directed against the pursuers, or either of them.

The defender pleaded;—(1) The pursuers' averments are irrelevant.

On 6th November 1893 the Sheriff-substitute (Shennan) allowed a proof.

The defender appealed for jury trial.

At the hearing the defender was allowed to add a plea that the action was incompetent.

A separate issue, in identical terms, was proposed by each pursuer, viz.:—"Whether, on or about 21st June 1893, in the town-hall, Lerwick, and in presence and hearing of [certain specified persons], or one or more of them, the defender uttered the following words, or words of like import and effect [here followed the statement quoted *supra* from cond. 3]; and whether the said statement is, in whole or in part, of and concerning the pursuer, and falsely and calumniously represents the pursuer as a person of unjust and dishonourable character, who had been unfaithful to the public trust reposed in him as a Justice of the Peace, and had in his official position acted corruptly for his personal benefit, to the pursuer's loss, injury, and damage? Damages laid at £500."

The defender argued;—There must be community of interest between different pursuers to entitle them to combine their claims in one action.¹ There was no such community here, for the expression alleged to be slanderous had reference only to a single person. Indeed, there was a possible conflict of interest, for one pursuer might fail and the other succeed, and the success of the one might injure the chances of the other. In *Harkes' case*² the words complained of were plural words, and might have hit both the pursuers in that action. That decision however was regarded as having gone as far as it was possible to go in sustaining the competency of such an action,³ and should not be followed unless the circumstances were identical.

Argued for the pursuers;—The case was ruled by *Harkes*,⁴ which was not distinguishable. It was evident that though in form of expression the slander here was directed against one person it might be meant to apply to several, and the pursuers averred that it did. The defect in *Gibson's case*¹ was that only one lump sum of damages was concluded for.

LORD PRESIDENT.—At the previous hearing of this case the opinion was indicated that the plea to relevancy could not be sustained.

We pass now to the consideration of the new point of the incompetency, and no doubt, if matters were open, there is a good deal to be said as to the proper shape, and the most convenient shape, in which claims for injuries arising to two persons out of the same wrong may be tried, but I do not see how we could get over *Harkes v. Mowat*. In that case the words alleged to be slanderous

¹ *Gibson v. Macqueen*, Dec. 5, 1866, 5 Macph. 113, 39 Scot. Jur. 56.

² *Harkes v. Mowat*, March 4, 1862, 24 D. 701, 34 Scot. Jur. 348.

³ *Gibson v. Macqueen*, *supra*, note 1, at p. 114.

⁴ *Harkes v. Mowat*, *supra*, note 2; *Revey v. Murdoch*, March 11, 1841, 3 D. 888; *Smyth v. Muir*, Nov. 13, 1891, 19 R. 81.

were plural words. Two persons came forward together who said, "These words apply to us, or, at all events, to one or other of us," and the Court allowed an issue affirming either that both were hit by the slander or one only. Turning to the present case, we find that the alleged slander purports to be a reflection on one person, but it is a common figure of speech to use the singular instead of the plural when the intention really is to hold a plurality of persons up to censure, just as it is not uncommon to have words used in the plural which are intended to be interpreted in the singular, where the speaker is willing to wound but afraid to strike. Accordingly I think the course taken by the pursuers is competent, and we shall follow the decision in *Harkes v. Mowat* by giving each pursuer an issue applying the slander to himself. They come here affirming that the slander is common to both, but also that it applies to each.

As to the issue, I must say that I think the pursuers are ill-advised to put in the issues that the words complained of represent them to be "persons of unjust and dishonourable character," for that is an innuendo not reasonably involved in what is said of them, and it would put upon them an unnecessary *onus*. As regards the remaining words, it is proposed that they should be as follows,— "Whether the said statement is in whole or in part of and concerning the pursuer," and "falsely and calumniously represents the pursuer as a person who had been unfaithful to the trust reposed in him as a Justice of the Peace."

Now, I think that a charge of infidelity on the part of a Justice of the Peace to the public trust is slanderous. But, then, these are very vague and general words, and the pursuer has very properly stated on record the kind of infidelity with which he supposes himself to be charged. He says he is accused of having preferred the interests of the customers of his bank to those of the public. The words of the issue as now proposed are so wide that if they stood alone there might be a danger of the jury returning a verdict on too general grounds. We are bound to put to them, or at anyrate it is highly convenient that there should be kept before them, the question whether the speech ascribes to the pursuers the conduct specified on the record, viz., whether it represents that the pursuers when on the bench kept before them the interests of their customers, and served them rather than the public. Accordingly, I think the issues should run as follows:—"Whether on or about 21st June 1893, in the Town-Hall, Lerwick, and in the presence and hearing of . . . or one or more of them, the defender uttered the following words, or words of like import and effect,— 'The Licensing Court had always been very amusing to him. He had appeared before that Court both for and against licences; and they used to size up the bench and say,— "Oh yes; this will be a day for licences—or it will be a day when none will be granted"; or they would say,— "Oh; you are right enough. You are a customer at Mr So-and-So's bank, and he's on the bench"; or "So-and-So has two clients on the bench, his licence is quite sure"; and whether the said statement is, in whole or in part, of and concerning the pursuer, . . . and falsely and calumniously represents the pursuer as a person who had been unfaithful to the public trust reposed in him as a Justice of the Peace, and had in his official position acted corruptly for the personal benefit of the customers of his bank, to the pursuer's loss, injury, and damage? Damages laid at £500."

LORD ADAM.—As regards the competency, I cannot distinguish this case from that of *Harkes v. Mowat*, and I agree with your Lordship as regards the issue.

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LORD M'LAREN.—I think the question of competency was a very fair one for argument, for undoubtedly in actions founded on delict delicate questions may arise as to the competency of different pursuers who claim each for his own interest combining their claims in one action. If it had been shewn that the defender could sustain any prejudice by the combination that would probably have been a reason for dismissing the action unless one of the pursuers should agree to withdraw his instance.

But I agree that the defender will be put to no disadvantage in this case, and that *Harkes v. Mowat* is a direct authority in favour of the competency.

In that case certain limitations were laid down which I think are very accurately expressed by Lord Kinnear, who says in *Smyth v. Muir*,—"It has been held in *Harkes v. Mowat*, 24 D. 701, that where two persons have sustained injuries by one and the same wrong they may insist for damages in the same action, provided the summons contains conclusions applicable separately to each pursuer, and that each takes a separate issue."

I also agree that the issue ought to be altered, so as to make the innuendo agree with the statement on record.

LORD KINNEAR.—I am of the same opinion. I think that we could not without serious consideration go further than *Harkes v. Mowat* in sustaining an action at the instance of two pursuers combining together to recover damages for injuries arising out of the same wrong, but I think that case is an authority which we are bound to follow, and I think it undistinguishable from the present.

THE COURT repelled the objection to the competency and approved a separate issue for each pursuer, in the terms set forth in the Lord President's opinion.

R. C. BELL & J. SCOTT, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

No. 70.

Jan. 13, 1894.
Bunten v.
Muir.

JAMES CLARK BUNTEN AND ANOTHER, Petitioners.—*Ure—Wilson*.
SIR JOHN MUIR, BART., AND OTHERS, Respondents.—*Dickson—Aitken*.
WILLIAM J. DUNDAS (Curator ad Litem to Muriel Evelyn Muir and others), Minuter.—*Blackburn*.

Trust—Resignation of trustees—Implied power to resign in trust-deed—Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97).—A trust-disposition and settlement, which conferred no express power on the trustees to resign, contained a clause, declaring that upon any of the trustees resigning office and accounting for their intromissions, the remaining trustees should be bound to discharge them of their office. *Held* that the trustees had power to resign under the deed, and a petition for authority to resign refused as unnecessary.

1ST DIVISION.

MATTHEW ANDREW MUIR, ironfounder, Glasgow, died on 13th January 1880, leaving a trust-disposition and settlement dated 26th April 1876, and relative codicils, under which J. C. Bunten and others were nominated trustees. The deed contained a clause in the following terms:—"Declaring that upon any of the trustees, executors, tutors, and curators herein named, or to be nominated or assumed as aforesaid, resigning the said offices of trustee, executor, tutor, or curator, and accounting for his or their intromissions with my trust-estate, my remaining trustees or trustee, or if there be no remaining trustee, then the beneficiaries under the trust hereby created, are hereby empowered and shall be bound to discharge the persons or persons so resigning of his or their office or offices."

The truster also directed a sum of £200 to be paid to each of his accept- No. 70.
ing and acting trustees and executors.

In 1893 James Clark Bunten and Thomas Robertson, two of the trustees, Jan. 13, 1894.
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presented a petition praying, *inter alia*, for authority to themselves to Muir.
resign the office of trustees.

LORD PRESIDENT.—I am satisfied that there is a power to resign here. The clause in question plainly implies that resignation is an act which may be done by any one of the trustees, for it declares that, upon any trustee resigning, the remaining trustees shall be bound to discharge him of his office.

In these circumstances, we are not called upon to exercise the jurisdiction given us by the Trusts Act, and accordingly I think we should refuse the latter part of the prayer of the petition on that express ground.

LORD ADAM.—It is not—on the construction of this deed—of the slightest consequence whether the trustees are to receive legacies or not. I think it is a necessary implication from the clause in the trust-deed and settlement which was read to us that the truster contemplated and intended that the trustees nominated by him should have power to resign.

LORD M'LAREN.—There is here a power or direction to the remaining trustees, or the beneficiaries if there be no remaining trustee, to discharge any trustee who shall resign his office. Now, the hypothesis of the power is that any trustee may resign, and therefore he is to be discharged. But as the truster could enable any trustee to resign, the clause is equivalent to a power to resign with a right on the part of the trustee to be discharged of his actings. It is not necessary, therefore, to invoke the aid of the special statutory provisions with reference to the resignation of trustees.

LORD KINNAR.—The testator has given the trustees an absolute and unqualified power to demand a discharge in respect of their having resigned office. It is difficult to imagine a clearer expression of power to resign than that, and it is therefore unnecessary for us to grant the power which is prayed for under the statute.

THE COURT refused the petition as unnecessary, having regard to the terms of the trust-disposition and settlement.

DAVIDSON & SYME, W.S.—FORRESTER & DAVIDSON, W.S.—DUNDAS & WILSON, C.S.—
Agents.

ROBERT SYMINGTON (Symington's Executor), Pursuer (Reclaiming).—
A. S. D. Thomson—M'Lennan.

No. 71.

GALASHIELS CO-OPERATIVE STORE COMPANY, LIMITED, Defenders
(Respondents).—*C. J. Guthrie—Cook.*

Jan. 13, 1894.
Symington's
Executor v.
Galashiels
Co-operative
Store Co.,
Limited.

Jurisdiction—Provident Society—Dispute between society and member—Reference clause—Industrial and Provident Societies Act, 1876 (39 and 40 Vict. cap. 45), sec. 14.—The rules of a provident society provided that in the event of any dispute between a member of the society, or any person claiming through a member, and the society, it must be referred to a committee of the society.

In an action against the society at the instance of the executor-dative of a member to recover a sum alleged to be due by the society to the deceased, the defenders averred that in consequence of an arrangement made by the next of kin of the deceased, the pursuer was not entitled to claim the sum in question as his representative. They founded on the rule above mentioned, and pleaded

No. 71. that the Court had no jurisdiction. *Held* (rev. judgment of Lord Kyllachy) that, as the defenders denied the pursuer's right to represent the deceased member, the question raised was not a dispute within the meaning of the rule, and that the jurisdiction of the Court was not ousted.

Jan. 18, 1894.
Symington's
Executor v.
Galashiels
Co-operative
Store Co.,
Limited.

Ultra vires—Industrial and Provident Societies Act, 1876 (39 and 40 Vict. c. 45), sec. 11 (6).—By sec. 11 (6) of the Industrial and Provident Societies Act, 1876, it is provided that "if any member of a society entitled to an interest in the society . . . dies intestate and without having made any nomination . . . such interest shall be . . . payable, without letters of administration, to or among the persons who appear to a majority of the committee, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same . . ." A member of a society having died without having made any nomination, the society, on the representation of certain of the deceased's next of kin that one of their number had a better claim to the deceased's interest than the others, and that they were all agreeable that he should receive payment of the whole, made payment accordingly. Thereafter a next of kin, who denied that he had been a party to the alleged arrangement, having been appointed executor-dative, sued the society in that capacity for the amount of the deceased's interest. *Held* that the society had acted *ultra vires* in paying to one only of the next of kin, he not being the person "entitled by law" to receive payment, and that the pursuer was entitled to decree.

1st DIVISION.
Ld. Kyllachy.

MRS MARGARET SYMINGTON died intestate on 24th June 1892, predeceased by her husband and survived by several children, all of whom were in majority. Part of her estate consisted of a sum standing at her credit in the books of the Galashiels Co-operative Store Company, Limited.

In May 1893 her son, Robert Symington, who had been confirmed executor-dative, raised an action against the society for £53, 10s. (including £1, 3s. of dividend), which he averred was the amount of her interest in the society.

The defenders admitted that a sum of £49 stood at the credit of the deceased in their books at the time of her death.

They stated that their society was a provident society, registered under the Industrial and Provident Societies Act, 1876, as amended by the Provident Nomination, &c. Act, 1883, and that the deceased had made no nomination under these statutes.*

* The Industrial and Provident Societies Act, 1876 (39 and 40 Vict. c. 45), sec. 11, enacts,—“Registered societies shall be entitled to the following privileges :— . . . (6) If any member of a society entitled to an interest in the society not exceeding £50 dies intestate, and without having made any nomination under this Act which remains unrevoked at his death, such interest shall be transferable or payable without letters of administration to or among the persons who appear to a majority of the committee, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same.

“(7) Whenever the committee, after the decease of any member, make any payment or transfer to any person who at the time appears to them to be entitled under this section, the payment or transfer shall be valid and effectual against any demand made upon the committee or the society by any other person.”

The Provident Nominations and Small Intestacies Act, 1883 (46 and 47 Vict. c. 47), enacts, sec. 3, “. . . subsection 6 of section 11 of the Industrial and Provident Societies Act, 1876 . . . shall be read as if in the said” section of the said Act “the words £100 were substituted for the words £50.”

Sec. 9,—“All payments made by directors under the powers aforesaid shall be valid with respect to any demand of any other person as next of kin of a deceased member or as his lawful representative, or person claiming to be such representative, against the society or savings bank or the directors, but such next of kin, representative, or claimant shall have remedy for recovery of such

They further stated,—(Stat. 2) “After Mrs Symington’s funeral a meeting of her family was held, at which the pursuer was present. The whole of the other children of the deceased were also present, with the exception of two, one of whom was in New Zealand. The deceased was a widow, and having died intestate, her said children were entitled, equally among them, to her moveable estate. At said meeting it was proposed and agreed to by all the members of the family present that the whole sum standing at the credit of and belonging to the deceased in the books of the said store should be paid to her youngest son George, for his own exclusive use and behoof, he having contributed more largely than the others to the support of his mother. This arrangement was expressly sanctioned by the pursuer. Thereafter the eldest son of the deceased and the said George Symington came to the store and explained to the secretary that an agreement had been made among the next of kin of the deceased whereby the said George Symington was to receive the money standing at his mother’s credit in the books of the store, and requested that it might be paid to him accordingly. The application was submitted to the committee, and as they were satisfied, from the statements made to them, that the said George Symington was entitled to receive the money, they sanctioned payment thereof to him. The money was accordingly paid to him. . . . The foresaid agreement was communicated to the two absent children, and was approved of and homologated by them. . . . The whole of the next of kin of the deceased, with the exception of the pursuer, have now no desire to disturb the family arrangement above narrated.”

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They also stated;—“The present action was raised by the pursuer without any notice to the defenders, and he has taken no steps to refer the claim now made to the committee of the society, to a general meeting, or to arbiters as above provided.”*

The pursuer pleaded, *inter alia*;—(2) The defences being irrelevant . . . should be repelled.

The defenders pleaded;—(1) No jurisdiction. (5) The sum at the credit of the deceased in the books of the said store having been properly paid by the defenders to the person who appeared to them to be entitled to receive it, and who was in point of fact so entitled, the defenders should be assoilzied, with expenses.

On 10th November 1893 the Lord Ordinary (Kyllachy) pronounced money so paid as aforesaid against the person or persons who shall have received the same.”

* The Industrial and Provident Societies Act, 1876 (39 and 40 Vict. c. 45), enacts, sec. 14,—“With respect to disputes concerning registered societies the following provisions shall have effect:—(1) Every dispute between a member or person claiming through a member, or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society if they contain any such direction, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction, and application for the enforcement thereof may be made to the County Court.”

By rule 28 of the rules of the defenders’ society it was provided that “in the event of any dispute between a member, or person claiming through a member, and the society, or an officer thereof, it shall be referred to a committee, from whom an appeal may be taken to a general meeting of the company. In the event of the dispute not being settled by the meeting, recourse shall be had to arbitration as follows:—Three neutral individuals shall be chosen by each party, whose names shall be written on pieces of paper and placed in a box or glass, and the three first drawn out by the complaining party, or by someone appointed by him, shall be the arbitrators to decide the matter in difference.”

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the following interlocutor:—"Finds that the question at issue between the parties involves a dispute between the society and a person claiming through a member in the sense of the society's rules, and that in terms thereof the said dispute falls to be determined in manner provided by the said rules: Therefore sists process *in hoc statu* to enable the pursuer to take steps, if so advised, for the purpose of having the said dispute determined in terms of the rules, reserving to either party to move, on such determination being obtained, to have such decree pronounced as may be necessary for enforcing the same."*

The pursuer reclaimed, and argued;—*Jurisdiction*.—The dispute was not a dispute between the society and a member or a person claiming through a member, but between the society and a stranger, for the defenders expressly denied the pursuer's right to represent the deceased member. The question first to be decided was whether that contention was well founded or not. The reference clause, accordingly, did not apply,

* "OPINION.—The pursuer in this case is the executor-dative of the late Mrs Symington. The defenders are a provident society, registered under the Industrial and Provident Societies Act of 1876. The object of the action is to recover a sum of £52, 10s., said to be standing at the credit of the deceased in the books of the society, she having been a member of the society at her death. The defence is that to the extent of £3, 10s., there was a counter-debit of the deceased in the books, and that as regards the balance of £49, it was paid away to certain relatives of the deceased, in conformity with certain powers vested in the committee of the society by the Industrial and Provident Societies Statutes. In short, the defence is that the society has been well discharged of all sums due to the deceased, so that the pursuer as her representative has no claim upon the society's funds.

"Such is, on the merits, the dispute between the parties, but what I have at present to decide is, whether that dispute falls to be determined in this Court, or falls to be referred to what is called arbitration in terms of a rule of the society duly made under the Act, and which rule is in the following terms: 'In the event of any dispute between a member, or person claiming through a member, and the society, or an officer thereof, it shall be referred to the committee, from whom an appeal may be taken to a general meeting of the company. In the event of the dispute not being settled by the meeting, recourse shall be had to arbitration as follows: Three neutral individuals shall be chosen by each party, whose names shall be written on pieces of paper and placed in a box or glass, and the three first drawn out by the complaining party, or by someone appointed by him, shall be the arbitrators to decide the matter in difference.'

"The defenders say that that rule excludes the jurisdiction of this Court. The pursuer, on the other hand, contends that the dispute in question is not a dispute falling under the rule. I have not been able to find any sufficient ground for holding that the rule is inapplicable. I think that the pursuer is, undoubtedly, a person claiming through a member, and that there is here a dispute between him and the society, that dispute being, whether the society has been well discharged of the sums due to a deceased member. That being so, I think the rule is in terms applicable, and I do not feel justified in passing it by, because the mode of settlement of the dispute provided is cumbrous and scarcely appropriate. I do not say the action is, necessarily, excluded. It may remain in Court for the purpose of enforcing the decision when the decision is obtained, but, in my opinion, I have no power to decide the dispute, and all I can do is to sist process, that the pursuer may betake himself to the remedy afforded by the rule. When he has got a decision, and requires to enforce it, he may come back and obtain decree in terms of the decision. That is the procedure which has been recognised in various decisions in this Court, and I, therefore, do not dismiss the action, but simply make a finding to the effect that the dispute falls under the clause in the rules, and sist process accordingly."

and the jurisdiction of the Court was not ousted.¹ Further, the committee having already decided the question which, according to the defenders, would fall to be referred, were disqualified from acting as arbiters.² *On the merits.*—The defenders on their own statement had acted *ultra vires*, for they had knowingly paid over the money to a person who was not the person “entitled by law” to receive it. The whole next of kin were not said to have been parties to the alleged agreement, and the majority could not bind a minority of their number.

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Argued for the defenders;—*Jurisdiction.*—The pursuer's only title to sue was as executor of a deceased member, and therefore he was clearly “a person claiming through a member”; he was within the express definition of that term given in the interpretation clause of the 1876 Act.³ The jurisdiction of the Court, therefore, was ousted.⁴ Even when the aid of a Court of law had to be invoked, the Act, section 14 (5) directed that applications should be made not to the Supreme Court but to the Sheriff Court. The Lord Ordinary ought therefore to have assoilized the defenders or dismissed the action, and not merely sisted process. Though the matter might have been already before the committee, that did not disqualify them from acting as arbiters.⁵ *On the merits.*—The next of kin who had consented took upon themselves the burden of obtaining the consent of the others. The defenders were safeguarded by section 11, subsections 6 and 7. The persons on whose representation the money had been paid were all entitled in law to receive it, being next of kin, though they did not exhaust that class, and the defenders were warranted in acting as they did by the terms of section 11, which was meant to dispense with the necessity of a formal title to discharge.

At advising,—

LORD PRESIDENT.—Mrs Symington was at the date of her death a member of the Galashiels Co-operative Store Company, Limited. There is no dispute as to her having been entitled at her death to the sums mentioned on record. The pursuer is her executor; he claims the money, and has brought this action to recover it. The answer made to this claim on its merits is that the society has already paid away the money to someone else, and that they were entitled to do so under section 11, subsection 6, of the Industrial and Provident Societies Act, 1876.

The defenders first plead that the dispute between them and the pursuer is one from which the jurisdiction of Courts of law is excluded, and the soundness of this plea is what we have to determine.

Now, the Industrial and Provident Societies Act, 1876, allows each society to set up a particular mode of determining disputes between the society and its members, and the decision arrived at in this manner is to exclude the jurisdic-

¹ Prentice v. Loudon, &c., 1875, L. R., 10 C. P. 679; Willis v. Wells, L. R., [1892], 2 Q. B. D. 225.

² Mackenzie v. Clark, Dec. 19, 1828, 7 S. 215; Tennant v. Macdonald, June 16, 1836, 14 S. 976; Dickson v. Grant, &c., Feb. 17, 1870, 8 Macph. 566, 42 Scot. Jur. 264.

³ The Industrial and Provident Societies Act, 1876 (39 and 40 Vict. c. 45), sec. 3.

⁴ Hack v. London Provident Building Society, 1883, L. R., 23 Ch. D. 103; *Ex parte Payne*, 1849, 5 Dowling and Lowndes, 679.

⁵ Magistrates of Glasgow v. Caledonian Railway Co., June 17, 1892, 19 R. 874.

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tion of the Courts of law. According to the rules of this particular society the dispute would first be considered by a committee, on appeal by a general meeting of the society, and if the dispute is not settled by the meeting, then arbiters are appointed in a specified way, and they finally decide the dispute. The question, then, is whether the dispute between the pursuer and the defender is one to be settled in this way.

Now, the scheme of the statute and its words make it plain that the tribunal is a domestic tribunal for the settlement of questions within the society. Given a member (or a person claiming through a member) and the society as disputants, and they are not to go to a Court of law for the settlement of their relative rights. But then the contention of the society here is that the pursuer is not a member, and has no claim though a member; in short, they deny that they have any relation to him at all. Now, I do not see how they can, at one and the same time, assert him to be a stranger, and hale him into their domestic tribunal in order to establish this against him. The two cases of *Prentice* and *Willis*, cited for the pursuer, shew that the English Courts hold that the exclusion of the Courts does not apply where the substance of the question is whether the litigant opposed to the society has or has not the rights of a member. In my opinion this principle is sound, and applies to the present case.

Holding, then, that we are to judge of the dispute, I proceed to consider it.

Now, as I have said, there is no question as to the rights of the deceased member, and the only question is, who has now got them. The case of the defenders is rested solely on section 11, subsection 6, of the Act of 1876, and what they say they have done under it. That provision is plainly intended to save the expense of requiring strict legal evidence of propinquity or title in the case of small successions which could not well afford such expense. It in no way at all alters the legal succession, or allows the society to alter it, or authorises them to pick and choose among those known to them to be the legal successors of the deceased. If they find the legal representatives, or think they have found them, on such evidence as satisfies a majority of the committee, then they may pay to those persons without liability to pay over again in case of mistake. But, if they first find the legal representatives, and then do not pay to them, but only to some of them without authority of the rest, such a proceeding is, in my judgment, wholly unauthorised by the section.

Yet this is exactly what the defenders say that they did. They begin by saying that the committee knew that one of the next of kin of Mrs Symington was in New Zealand, and then they go on to say that those of the next of kin who were at home, save one who was absent, decided that one of themselves should get the whole, and on these *media* the committee paid over the whole to this person, four days after the death. In my opinion this cannot be brought under the section, and was quite illegal.

In the only dispute, therefore, between the parties, which we have heard of, my judgment goes for the pursuer. I do not observe any plea for the defenders which would remain standing, and apparently it may not be necessary to send the case to the Outer-House, as we could now give decree. But counsel will tell us.

LORD ADAM.—I agree with your Lordship, and upon the same grounds. But I am also disposed to think that there are reasons for arriving at the same result, even assuming that the pursuer here is to be treated as a member of the society.

Now, in order to ascertain whether the question or dispute is one which ought to be determined in the manner provided by the society's rules, it is necessary to see what that alleged question or dispute is. Now the pursuer in this case, as Mrs Symington's executor, sues for payment of a sum of £53, 10s. alleged to have been due to her by this society. As regards at least £49 the defenders do not deny that they were due that sum to her but they seek to discharge themselves by saying that they paid away that sum to her son George. And they do not say that they paid this sum to him because they were satisfied that he represented her, or was otherwise entitled by law to discharge it, but because certain members of the family present at a family meeting agreed that it should be paid to him. What they say is that, whether that payment was rightly or wrongly made, it is protected from challenge by the provisions of the 6th and 7th subsections of section 11 of the Societies Act, and also by the amending Act of 1883, which raised the privilege as to members dying entitled to an interest in a society to £100. Of course the claim here being for £53, 10s. requires the assistance of the latter Act to bring it within the provisions of the former Act. Now, I think the construction of that Act is not a question for the determination of the society. The construction of the Act is for the Court, and if it should appear that the act of the society is not protected by this clause, then I think the result is that it is a payment merely gratuitous of the society, and it must be so treated in this case. Now, I agree with your Lordship in the construction of the 6th subsection of section 11 of the Act of 1876. It is clear then that the payment referred to must be made to persons appearing entitled by law to receive it. It is clear to me that the persons entitled by law to receive it are the legal representatives of the deceased. And, as your Lordship has pointed out the object of the Act is simply this, that the society, on evidence deemed satisfactory to them, may dispense with a formal title, or as it is called in the Act "letters of administration," or a similar title which would be necessary in this country.

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That is the object of the Act, and it appears to me that it does not go beyond that. I think that becomes clearer if we look to the amending Act of 1883, which says this,—“All payments made by directors under the powers aforesaid shall be valid with respect to any demand of any other person, as next of kin of a deceased member, or as his lawful representative, or person claiming to be such representative, against the society,”—that is to say, if for such payments there has been a claim made by a person as next of kin or lawful representative, or person claiming to be such representative.

And it says if any “other” person comes forward claiming as next of kin, or as lawful representative, or as administrator-at-law, then such other person claiming the sum paid shall not be entitled to recover. The payments protected are payments made to parties entitled by law, or who the members of the society think, after satisfactory evidence has been produced to them, are persons entitled by law to receive the payment. Now, if that is the true construction of the Act, the claim of any other person claiming, not as being entitled by law, but in any other capacity, is not within the protecting clauses of the Act. Now, the payment here is not alleged to have been made to George Symington, because evidence was produced to the society that he was a person entitled by law to receive it; that is, to receive it as a representative of the deceased. What the defenders say is that they paid it to him because they were satisfied that he was entitled to it under a family agreement. But, as your Lordship has pointed

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out, it was never intended by the statute to make the society judges as to whether such an agreement was valid or invalid. The statute never contemplated making the society the judge of competing claims arising under private agreements. Now, if that be so, the question is, what is here the dispute that is proposed to be referred to settlement under the society's rules? There is no dispute as to the sum having been due to Mrs Symington. That is admitted upon record. Is it a dispute as to whether or not this is a valid claim? But, as I have pointed out, that question depends entirely on the construction of the statute, and therefore that is a matter which is to be decided not by the society but by the Court. On these grounds, I should be disposed, if necessary, to come to the conclusion that, assuming this pursuer to be a member of the society, yet nevertheless there is no dispute between him and the defenders which falls to be determined by the society.

LORD KINNEAR.—I have come to the same conclusion. The executor of a deceased member of this society claims from the society the money due to the deceased. The only answer made by the defenders is that they have already paid away the money to someone else; that their Act of Parliament entitled them to make that payment; and that according to their own rules, passed in accordance with the Act, they are the final judges of the question whether they were right or wrong in so doing. Now, before we give effect to that argument, we must be satisfied that the Legislature intended to give the defenders this arbitrary power of judging in their own cause, and determining the extent of their own liabilities. I think, with your Lordships, that the clause on which they found has no application to a controversy of this kind, but that it is intended to provide a method for regulating internal disputes between members of this society as such, and the society or governing body of the society. But before that clause can be brought into operation, it must first be shewn that the controversy, to which it is proposed to apply it, is really a dispute between a member of the society as such and the society.

Now, I agree with your Lordship in the chair that the first question in controversy in this case is, whether the pursuer has or has not the rights of a member of this society,—whether he is entitled to claim in the right of the deceased member or not. But that is not a question between the society and a member, but a question whether the person is or is not entitled to the rights of a member. I think the case of *Prentice*, to which your Lordship has referred, is directly in point; and concurring entirely, both with the reasoning of the learned Judges in that case and with the observations of your Lordship in the chair, I have no difficulty in arriving at the same conclusion.

Upon the merits of the question—on the construction of the 11th section of the Act of 1876—I also concur. I do not think that that Act was intended to give to this company a power to select among the representatives of the deceased person, and to pay to one of them to the exclusion of another. That is exactly what they say they have done, because they set out quite clearly that they knew that the deceased had died leaving various children, but that they, in consideration of the statement of certain members of the family that one of them had a better claim than the others to the money left by his mother, gave effect to that consideration, and conferred a benefit upon this favoured brother without the consent or knowledge of the pursuer. I think, in doing so, they were going entirely beyond their powers. They were bound to pay to persons

having a legal right as representatives of the deceased member. They may in certain circumstances be protected against defects of title in the persons to whom they have paid in that character, but that does not entitle them to pay to one money which they knew belonged to another.

LORD M'LAREN was absent.

LORD PRESIDENT.—Mr Cook, have you any reason to offer against our pronouncing decree on the footing of the judgment?

Cook.—No, I do not think I can offer any.

THE COURT recalled the Lord Ordinary's interlocutor, and decerned in favour of the pursuer for £50, 3s.

RICHARD LEES, Solicitor—KINMONT & MAXWELL, W.S.—Agents.

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WILLIAM BUCHAN, Pursuer (Appellant).—*T. B. Morison.*
THE NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—
Sol.-Gen. Asher—F. T. Cooper.

No. 72.
Jan. 16, 1894.
Buchan v.
North British
Railway Co.

Reparation—Slander—Bills posted up in stations by railway company setting forth convictions for offences against company.—A railway company is not liable in damages for slander by posting up in its stations bills announcing the names and addresses of persons who have been convicted of the offence of travelling without having previously paid the fare, and with intent to avoid payment thereof, or of other offences against the company's acts and bye-laws, together with the date and nature of the offence and the result of the conviction.

IN September 1893 William Buchan, traveller, agent, and collector, 21 Arthur Street, Pilrig, Leith, raised an action in the Sheriff Court at Edinburgh against the North British Railway Company for payment of £500.

The pursuer averred;—(Cond. 3) "On the 13th August 1892 the Sheriff-substitute, within the Sheriff Court of Edinburgh, on the evidence solely of the defenders' servants, convicted the pursuer of having contravened the Railway Clauses Consolidation (Scotland) Act, 1845, sec. 96, and the Regulation of Railways Act, 1889, sec. 5, subsec. 3 (a), by travelling on the North British Railway from Kirkcaldy to Haymarket without having previously paid his fare, and with intent to avoid payment thereof, and fined him 5s. 6d. and costs, with the option of twenty days' imprisonment. Said conviction was bad in point of law, and was not warranted by the evidence; but the pursuer, in order to avoid the publicity of an appeal, at once paid the fine and expenses in the belief that the proceedings against him were then at an end. This prosecution was in reality instigated by the manager or agent of the defenders, and he supplied all the evidence upon which the conviction was obtained. The pursuer defended himself, and in the course of the trial proved in open Court the illegal, unwarrantable, and violent conduct of the defenders' servants in assaulting him and rifling his pockets, as before mentioned; and in consequence of this, and of his threat to raise an action against the defenders for said illegal conduct, the defenders' said manager or agent conceived malice and ill-will towards the pursuer, which he gratified in the oppressive proceedings after mentioned." (Cond. 4) "Towards the end of February and beginning of March 1893, about six months after said conviction, the defenders' agent or manager wrongfully and maliciously set about publishing such conviction against the pursuer in order to gratify his said feelings of malice and ill-will, and to ruin pursuer's business as a traveller, agent, and collector foreshaid. To accomplish this the defenders' said manager wrongfully and maliciously printed and

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Sheriff of the
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No. 72. published a large bill, a copy of which is herewith produced. Said bill is printed in large letters and in red ink, and, *inter alia*, contains the following 'List of Convictions for Offences against the Company's Acts and Bye-Laws':—

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Name and Address.	Date and Nature of Offence.	Result of Conviction.
William Buchan, Canvasser and Collector, 21 Arthur Street, Pilrig, Edinburgh.	Travelling from Kirkcaldy Station to Haymarket Station without having previously paid the Fare, and with intent to avoid payment thereof. 31st May 1892.	Fined Five Shillings and Sixpence, with Thirty-Four Shillings and Sixpence of costs, or twenty days' imprisonment. Sheriff Court, Edinburgh, 13th August 1892.

There then follows a list of the names of several offenders against the company's bye-laws; but the pursuer's name and address were maliciously placed at the top of said bill in order the more readily to arrest the attention of the public. . . .” (Cond. 5) “Said bill was posted up in all the principal stations on the defenders' railway system, . . . and remained and in some stations remains still posted up, and was and is still read by the public. Pursuer's name and address and the conviction against him were inserted in said bill under the pretence of a caution to the public; but in point of fact this insertion was made maliciously in order to rake up said conviction against the pursuer and injure him in the eyes of the public by representing that he had defrauded the defenders. The defenders have been repeatedly requested to stop the publication of said bill, but they maliciously decline to do so.” (Cond. 6) “In consequence of the publication of said bill throughout Scotland the pursuer has suffered great loss, injury, and damage in his business as a traveller, agent, and collector. . . . He has also suffered in his feelings and reputation in consequence of the persistent and malicious publication of the said conviction. . . .”

The pursuer pleaded, *inter alia*;—(2) The pursuer having suffered loss, injury, and damage through the wrongful and malicious publication of the bill condescended on is entitled to reparation.

The defenders pleaded;—(1) The pursuer's averments are irrelevant, and the action should be dismissed.

On 23d November the Sheriff-substitute (Rutherford) pronounced this interlocutor;—“Finds that the pursuer's averments are not relevant or sufficient to support the conclusions of the libel; therefore sustains the defenders' first plea in law, dismisses the action, and decerns.”

The pursuer appealed, and argued;—No doubt the publication of proceedings in a Court of Justice was in the ordinary case privileged, if fair and accurate; but this was not the ordinary case. The object of the publication, which took place six months after the proceedings, was not to enable the public to see that justice was done, which was the ground on which such publications were held to be privileged, but, as the pursuer averred, to gratify the malice of the defenders against the pursuer, and to injure him in the eyes of the public. An accurate report of proceedings in a Court of Justice¹ was not privileged if published with malice.

The defender was not called on.

¹ Riddell v. Clydesdale Horse Society, May 27, 1885, 12 R. 976; Stevens v. Sampson, 1879, L. R., 5 Excheq. Div. 53.

LORD JUSTICE-CLERK.—The facts in this case do not seem to me to be in the slightest degree in doubt. Both parties are agreed as to them. The pursuer was accused of an offence against the Railway Acts, and he was tried and convicted of that offence. All that the railway company have done is to announce shortly in a bill, put up in certain of their stations, the fact that the pursuer was convicted and fined for the offence. It certainly is according to the usual practice for railway companies all over the country to put up such notices in their stations. Here it is said that the pursuer is entitled to take objection to the railway company publishing facts which he does not deny, and he accuses the railway company of acting maliciously in doing so. But the case appears to me not to raise a question of privilege at all. This bill is just an announcement by the railway company of facts connected with its own business, namely, that they, in pursuance of a statutory bye-law, prosecuted the pursuer for a breach of it, and that he was convicted and fined. In these circumstances, I think it is out of the question that the pursuer should be allowed an issue at all as for publication of a libel, and I am of opinion that the action is irrelevant.

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LORD YOUNG.—I agree. I think that the pursuer's contention is simply ridiculous.

LORD RUTHERFURD CLARK.—I am of opinion that the pursuer has no ground of action.

LORD TRAYNER was absent.

THE COURT adhered.

ANDREW H. HOGG, Solicitor—JAMES WATSON, S.S.C.—Agents.

THE WEST END CAFE COMPANY, LIMITED (AND REDUCED), Petitioners.—
Lorimer. No. 73.

Company—Reduction of Capital—Capital "in excess of the wants of the company"—Companies Act, 1867 (30 and 31 Vict. cap. 131), secs. 9 and 10—Companies Act, 1877 (40 and 41 Vict. cap. 26), sec. 3.—A company whose shares consisted of A preference shares, fully paid-up so far as issued, but not all issued, and B postponed shares, all issued and fully paid-up, passed a special resolution to reduce its capital, with the consent of the sole holder of the B shares "(1) by the cancellation as being unrepresented by available assets" of two-fifths of the nominal value of the B shares, and "(2) by paying off, as being in excess of the wants of the company," the remaining three-fifths of the nominal value of the B shares. The company proposed to pay off the three-fifths by borrowing on the security of its heritable property. The only creditors of the company were heritable creditors, and trade creditors, whose debts were paid monthly.

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In a petition the Court *confirmed* the reduction and authorised the company to discontinue the use of the addition "and reduced" to the company's name after the lapse of six months from the date of the resolution.

ON 17th October 1893 The West End Café Company, Limited (and 2^d DIVISION. Reduced), presented a petition praying the Court to pronounce an order confirming the reduction of the company's capital, as resolved on by a special resolution of the company, passed on 21st September, and confirmed by the company, on 6th October 1893; to approve of a minute to be registered (under section 15 of the Companies Act, 1867), along with the order, by the Registrar of Joint Stock Companies; and to authorise

No. 73. the company to discontinue the addition of the words "and reduced" to its name.*

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* The company was incorporated under the Companies Acts, as a company limited by shares, on 7th March 1889, for the purpose of carrying on the business of a temperance restaurant at 129 Princes Street, Edinburgh, with power, *inter alia*, to borrow money and to grant bonds and dispositions in security over its heritable property.

Its capital was £11,224 in shares of £1 each. Of these 9224 were A or preference shares, and 2000 were B or postponed shares. Of the A shares only 7910 were subscribed at the date of the petition. The B shares were wholly issued, having been allocated as part payment of the heritable property, plant, and goodwill of the business taken over by the company.

Section 17 of the articles of association provided that, "The said A or preference shares, so far as issued for the time, shall be entitled to a preferential cumulative dividend on the amount paid up thereon, at the rate of 5 per cent per annum, before any dividend is payable on the said sum of £2000 of B shares; but on the clear profit being sufficient, after providing to the satisfaction of the directors for depreciation and other contingencies, the said cumulative dividend, and a dividend at the same rate on the B or postponed shares, the whole of the said A and B shares shall be entitled to draw a dividend at the same rate, and the B shares shall in that event be entitled to participate rateably along with the A shares in the profits of the company; provided always that the directors shall be entitled to set aside a sum not exceeding £150 a-year out of the profits of the company, after paying the 5 per cent divi-

* The Companies Act, 1867 (30 and 31 Vict. cap. 101), sec. 9, enacts,—
"Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any Company shall come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies, as is hereinafter mentioned."

Section 10 enacts,—
"The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words 'and reduced' as the last words to its name, and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the principal Act."

By section 11 of the said Act it is enacted that,—
"A company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction; and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit."

The Companies Act, 1877 (40 and 41 Vict. cap. 26), sec. 3, enacts,—
"The word 'capital,' as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company, and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any), remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act, 1867."

dend to the A shareholders before the B shareholders shall be entitled to any dividend, and that until a reserve fund shall be accumulated amounting to £1000. In the event of the capital of the company being reduced by losses, the same shall be borne rateably by both classes of shares." No. 73.
Jan. 16, 1894.
West End
Café Co.,
Limited (and
Reduced).

The following was the special resolution:—"That the capital of the company be reduced from £11,224, divided into 9224 'A' or preference shares of £1 each, and 2000 'B' or postponed shares of £1 each, to 9224 'A' or preference shares of £1 each; and that the said reduction be, with the consent of the holder of the said 2000 'B' or postponed shares, effected (1) by the cancelment, as being unrepresented by available assets, of 8s. per share of the said 2000 'B' or postponed shares; and (2) by paying off, as being in excess of the wants of the company, of 12s. per share of the said 2000 'B' or postponed shares."

The minute proposed to be registered was as follows:—"The capital of the West End Café Company, Limited, is £9224, divided into 9224 'A' or preference shares of £1 each. At the date of registration of this minute, 7910 of the said 9224 shares have been issued, and the sum of £1 is paid upon each of said 7910 shares."

The petitioner stated;—"The B shares are all held by Mr George Stewart. The company has been gradually making a business, which it is believed is now on the eve of being fairly profitable."

On 14th November the Court remitted to Mr William Traquair, junior, W.S., to inquire and report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital.

Mr Traquair reported, *inter alia*, as follows:—"From the balance-sheets of the company it appears that, in the four completed years of its working, the company has paid only an aggregate dividend of 7 per cent on the A shares as issued, thus leaving a balance of 13 per cent for those years still due to the holders of the A shares. It appears also that no reserve fund has been accumulated, although a considerable sum has each year been written off for depreciation.

"In these circumstances it appeared to the directors and certain of the shareholders that it would be desirable that the B shares should be acquired in the interests of the A shareholders. Negotiations were therefore entered into between the company and the sole holder of the said B shares, with the result that the (provisional) minute of agreement, No. 6 of process, was entered into. By this minute the holder of these shares agreed on certain conditions to give them up to the company for the sum of £1200. For carrying out this arrangement it was suggested that the capital of the company should be reduced in terms of the 9th section of the Act of 1867, as construed by the 3d section of the Act 1877. . . ."

"It will be observed by your Lordships that the special resolution for reduction of capital above quoted proposes to deal with only one class of shares, viz., the B or postponed shares, allocating to it both the loss and the so-called excess of capital. The allocation by a company of the whole excess of its capital to one class of shares seems to your reporter an unusual proceeding, especially where the effect of so doing is to pay the apparent full market value for such shares. Your reporter has been informed that the money required to repay the holder of the B shares the so-called excess of capital is to be obtained by borrowing on the security of the heritable property of the company. This loan, however, it is said, will bear a less rate of interest than the dividend which the holder of the B shares might be ultimately entitled to draw. But the 'A' shareholders appeared satisfied with the expediency of the step, and

No. 73. the holder of the B shares acquiesces in it. The creditors of the company are either heritably secured, or are trade creditors whose debts have been incurred since the date of the petition, and are paid monthly. It is therefore maintained by the petitioners that no one has any interest to object to the proposed reduction.

Jan. 16, 1894.
West End
Café Co.,
Limited (and
Reduced).

"Your reporter is of opinion that the proceedings have been regular. He further finds that there is no diminution of liability in respect of unpaid capital, or interference with the rights of creditors.

"Your reporter has not been able to find a case similar to the present, nor have the agents for the petitioners been able to refer him to any. If, however, your Lordships are satisfied that a loan such as is proposed can be held to constitute excess of capital in terms of the Act, and that the Act permits the payment of such excess of capital to one class of shareholders only, then it appears to your reporter that the prayer of the petition may be granted."

The reporter further reported that in his opinion the Court might altogether dispense with the addition of the words "and reduced."

AFTER hearing counsel on the petition and the report the Court pronounced an interlocutor approving the report, confirming the reduction of capital resolved on, and dispensing with the addition of the words "and reduced" to the company's name from and after 31st March next.

PHILIP, LAING, & Co., S.S.C., Agents.

No. 74. YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY, LIMITED,
Petitioners.—*Lorimer.*

Jan. 16, 1894.
Young's
Paraffin Light
and Mineral
Oil Co.,
Limited.

Company—Constitution—Alteration of Memorandum of Association—Companies (Memorandum of Association) Act, 1890 (53 and 54 Vict. cap. 62), sec 1.—A company incorporated in 1866 under the Companies Act, 1862, presented a petition under the Companies (Memorandum of Association) Act, 1890, for confirmation of a special resolution of the company altering its memorandum of association by giving it power to acquire and pay for the business of any other company carrying on any business which the company might legally carry on; to sell the business or property of the company; and to amalgamate with any other company in the United Kingdom established for objects similar to its own. The Court *refused* the petition on the ground that the Act did not contemplate that such general powers should be conferred, although particular transactions of the kinds specified might be sanctioned.

2D DIVISION. YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY, LIMITED, was incorporated under the Companies Act, 1862, on 4th January 1866.

The objects for which the company was established, as set forth in its memorandum of association, were as follows:—"The extracting or distilling crude oil and other products from coal or shale or other substances; the re-distilling, purifying, or converting crude oil into refined oil, and other products therefrom; the purchasing, leasing, or otherwise acquiring coal, shale, oil, or other substances, for the foregoing purposes, and the disposal thereof by sale, lease, or otherwise; the purchase or acquisition and erection of works, furnaces, retorts, refineries, and others, necessary for the above purposes; the acquisition, by purchase, lease, or otherwise, of lands containing coal, shale, or other minerals, and of lands or premises for the erection of works, offices, workmen's houses, and other requisite buildings; the acquisition, by purchase, lease, or otherwise, of coal, ironstone, or other minerals, found in connection with, or workable along with, said shale; the mining or working of all or any of the above; the pre-

paration, sale, and disposal of the above by sale, lease, sublease, or otherwise; the purchasing of all plant and machinery, and the formation and acquiring of roads, railways, tramways, and other matters or things requisite for the above purposes, or any of them; the selling or disposing of all or any part of the above subjects and premises as may be deemed expedient; and the doing of all such other things as are or may be incidental or conducive to the attainment of such objects."

No. 74.

Jan. 16, 1894.
Young's
Paraffin Light
and Mineral
Oil Co.,
Limited.

On 21st October 1893 the company presented a petition under the Companies (Memorandum of Association) Act, 1890,* for confirmation of the following extraordinary general resolution of the company:—

"That the provisions of the memorandum of association of the company, with respect to the objects of the company, be altered by adding the following to section 3, immediately before the words 'and the doing of all such other things,' &c., viz. :—

"(e) To buy or acquire the business, property, or undertaking of any other company or partnership carrying on any business which the company may legally carry on, and to pay for such business, property, or undertaking in cash or in shares, stock, debentures, or debenture stock of the company, or partly in each of such modes.

"(f) To sell, dispose of, or transfer the business, property, and undertaking of the company, or any branch or part thereof, in consideration of payment in cash, or in shares, or stock, or in debentures or debenture stock, or other securities of any other company, or partly in each of such modes of payment, or for such other consideration as may be deemed proper, and to distribute the price, howsoever paid, among the members in satisfaction of their interest in the assets of the company.

"(g) To amalgamate with any other company in the United Kingdom established for objects similar to any of those for which the company is established."

The petitioners averred;—"The said alteration is required to enable the company to carry out the first four purposes specified in section 1, subsection 5, of the said statute."

On 15th November 1893, the Court remitted to Mr Charles E. Loudon, W.S., to inquire and report as to the regularity of the proceedings and reasons for the alterations proposed of the memorandum of association.

Mr Loudon reported, *inter alia*, as follows:—

"Article (e) is a power usually inserted in modern memoranda of

* The Companies (Memorandum of Association) Act, 1890 (53 and 54 Vict. cap. 62), section 1, enacts,—“(1) Subject to the provisions of this Act, a company registered under the Companies Acts, 1862 to 1886, may, by special resolution, alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, or alter the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, either with or without any such alteration as aforesaid, with respect to the objects of the company; but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding up the company. . . .

"(5) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company—(a) to carry on its business more economically or more efficiently; or (b) to attain its main purpose by new or improved means; or (c) to enlarge or change the local area of its operations; or (d) to carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company; or (e) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement."

No. 74.

Jan. 16, 1894.
Young's
Paraffin Light
and Mineral
Oil Co.,
Limited.

association, and is one which might be of great advantage to the company, while the absence of it might seriously hamper the company in the successful conduct of its business.

"Article (f) Although a similar power is usually inserted in modern memoranda of association, and although it might be of great benefit, yet the alteration undoubtedly confers very wide powers upon the directors, and I am not satisfied that it is required by the company in terms of the Act. But even admitting that the alteration is entirely for the advantage of the company, yet I am of opinion that it does not fall within section 1, subsection 5, and is therefore incompetent.

"Article (g) is also a general power usually inserted in modern memoranda of association, and the petitioners have explained to me that although at present amalgamation is usually carried out by way of sale or of purchase, and the liquidation of one of the two amalgamating companies, yet the power to amalgamate is found to be helpful in the preliminary negotiations incident to such a step.

"With regard to articles (e) and (g), I am doubtful whether alterations conferring powers of a general kind are such as were contemplated by the statute, and I venture respectfully to submit the question for your Lordships' consideration. Apart from this question, the reasons for the alterations appear to me to be satisfactory."

THE COURT refused to confirm the proposed alterations contained in articles (e), (f), and (g), expressing opinions that the Act did not contemplate that such general powers should be conferred before the necessity for using them arose, but that the Court would consider any special transaction which the company might wish to carry out under such articles.

MACONOCHE & HARE, W.S., Agents.

No. 75.

Jan. 17, 1894.
Macpherson v.
Macpherson's
Curator Bonis.

MISS KATHERINE A. MACPHERSON, First Party.—*Mackay—Macphail.*
PATRICK SELLAR (Miss Jane Macpherson's Curator Bonis), Second Party.
—*Dundas—M'Clure.*

Succession—Trust—Precatory bequests—Bequest to A "for the benefit of herself and of B."—Held that under a bequest "to A for the benefit of herself and of her sister B," each sister had a vested beneficial right in fee to one-half of the bequest, but that A was bound to retain B's share during their joint lives as trustee for her.

1ST DIVISION.

MISS ROBINA YOUNG died in Edinburgh on 13th March 1893, leaving a holograph will dated 30th June 1872.

The will contained the following provision,—“Also I give and bequeath to Katherine Alexandrina Macpherson, for the benefit of herself and of her sister Jane Macpherson, both daughters of the aforesaid Agnes Young or Macpherson, all the cash moneys, securities for money, books, wardrobe, and all the rest, remainder, and residue of my estate which I may be possessed of at the time of my decease.”

A third party was nominated trustee and executor under the will.

Miss Jane Macpherson, mentioned in the will, had been all her life weak mentally, and incapable of doing anything to earn a livelihood, and was entirely dependent on those with whom she resided for ordinary personal comfort. These facts were known to Miss Young. After the date of the will, but before Miss Young's death, Mr Sellar was appointed by the Court curator bonis to Miss Jane Macpherson.

Doubts having arisen as to the effect of the bequest to Katherine and

Jane Macpherson, a special case was presented to the Court in which the above facts were stated, and to which Miss Katherine Macpherson was the first party, and Mr Sellar as curator bonis to Miss Jane Macpherson the second party.

No. 75.

Jan. 17, 1894.
Macpherson v.
Macpherson's
Curator Bonis.

The following questions were, *inter alia*, submitted to the Court:—“(1) Whether under the foressaid bequest in the will of Miss Robina Young, the subjects and residue of her estate thereby bequeathed belong absolutely to Miss Katherine Alexandrina Macpherson, she having the discretion of applying them in so far as she may find to be necessary for behoof of her sister without any interference on the part of third parties? or (2) Whether Miss Katherine Alexandrina Macpherson and Miss Jane Macpherson are each entitled to one-half of the said bequest absolutely, Miss Jane Macpherson's half being retained by her sister Miss Katherine Alexandrina Macpherson during their joint lives, as trustee for her, and to be administered by her for Miss Jane's behoof?”

The first party maintained that, by the foressaid bequest to her “for the benefit of herself and her sister Jane Macpherson,” the subjects and residue bequeathed were given absolutely to her, she having the discretion of applying them, in so far as she might find to be necessary, on behalf of her sister, and that she was entitled to dispose of the whole or any part thereof, either *inter vivos* or by will or other *mortis causa* deed, even in the event of her sister surviving her, it being left to her discretion to make after her death, as well as during her life, such provision as she might think expedient for her sister. The bequest was precatory, and no trust was created in her.

Counsel for the second party were not called on.

LORD PRESIDENT.—I think there is no doubt as to the rights of these two ladies. They are equal, giving them an equal interest in the funds in question.

In expression, and setting aside the fact of one of them being, as we were told, of weak mind, there is nothing but parity in the rights of the two. The bequest is for the benefit of Katherine and of her sister Jane, both daughters of Mrs Macpherson. The truster chose one rather than the other as trustee, but she is careful to equalise the rights of the trustee with those of the other beneficiary. Now, when we turn to the statement of facts, which is said to displace the natural meaning to be given to the words used, we find an excellent reason for Katherine being chosen as administrator, but it does not go beyond that.

I am of opinion that the beneficiary rights are equal, and that the second question, although somewhat peculiarly expressed, contains a substantially correct statement of the rights of parties, and should accordingly be answered in the affirmative.

LORD M'LAREN.—The question raised is whether the gift imports an absolute gift to Katherine, or whether it is a trust in her for the benefit of herself and her sister. It was suggested, as the result of recent decisions in England, that the Court should construe the expression used very critically, and that if its meaning is of a doubtful character should not construe it as importing a trust. I do not think it is necessary in this case to consider very carefully the law of England, which I have always supposed to be in this matter the same as that of Scotland, but I would point out that our law requires no special or technical words in order to constitute a trust. If there is an appointment of a beneficiary, and if some person is charged with the administration of the funds beneficially destined, we have the essentials of a trust. If there is a clear indication

No. 75. of a trust to be constituted it is immaterial whether the words "in trust for," or "for the benefit of," or "for behoof of," or other similar words be used. Of all expressions other than "in trust for" I should have thought the words "for the benefit of" A the clearest, because it is equivalent to a declaration that A is a beneficiary in the estate given to B. In this case no distinction is drawn between the extent of the interest to be taken by the two nieces. Katherine, it is true, was not constituted an executor; another executor is named at the end of the will. That executor would cease to act when the estate was realised. The testator did not continue him as trustee probably because she did not expect to leave a large fortune. No trust therefore was constituted in the normal way, but as Jane was unable to attend to business or to administer her share, an informal trust was constituted in the person of Katherine to administer it for her.

Jan. 17, 1894.
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It is impossible to maintain that there was not here a qualified gift, and the result is that Katherine holds as trustee for herself and her sister.

LORD KINNEAR.—I agree. If this bequest is read without reference to the special circumstances of this case it is clear that the beneficial interest given by the testator to Katherine and Jane was exactly the same, and given in the same words. There is nothing to suggest a distinction between the two. It is a bequest to Katherine for herself and her sister. There is *prima facie* no apparent reason why the bequest should be paid to Katherine rather than to Jane. But when we turn to the statement of facts we find circumstances requiring us to put a somewhat different complexion upon the matter. We are there told that Jane is rather weakminded, and dependent on others for ordinary personal comfort, although no curator bonis had, when this will was made, been appointed to her. There is thus a distinct averment that one of the legatees is not a proper person to administer money, but it is not said that her mental condition makes her incapable of the enjoyment of money. We have then an intelligible reason for Katherine being chosen as trustee, but not for any other difference being made between the sisters.

Counsel for the first party having brought to the notice of the Court the precise terms of the second question, the first party maintained that the effect of the will was to give a joint bequest to the two sisters, and that on the death of one sister the fund passed to the survivor. The second party maintained that the fund was bequeathed to her and her sister equally, and vested in them at the date of the death of the testatrix.¹

LORD M'LAREN.—We have now been invited to consider whether the second question, in the precise terms in which it is put, should be answered in the affirmative, because that implies separate interests in the two sisters to the extent of one-half each. It has been suggested that this is a joint bequest, and that a joint character must continue to be attached to it.

I think it is clear that to give effect to this contention would be to give an illegitimate extension to the distinction between joint and several gifts. It is settled that a bequest to persons as a class—*e.g.*, to the children of A—is a joint bequest whether the children be named or not, and that nothing lapses by the predecease of one of the class, the legacy being divided among the survivors.

¹ Bibby v. Thompson, 1863, 32 Beav. 646.

An exception is admitted in the case where the testator has used such expressions as "equally and proportionally" among them. But when the legacy vests its joint character necessarily disappears, because it is then the right of each legatee to receive in money his proportional share of the subject of the gift. There are peculiarities in the case of joint liferents depending on the principle that each termly payment vests separately, but for the purposes of the present case these need not be considered.

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This was a gift which vested at the death of the testator, and was then divisible between Katherine and Jane. There was no doubt a continuing trust, but for administrative purposes only, and that on account of Jane's health. It would be unfair to Katherine to hold that she was unable to dispose of her share in her lifetime unless she survived Jane, and she is as much interested to have her share separated as the curator of her sister.

I am of opinion, after further consideration, that the second question as it stands should be answered in the affirmative.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT answered the second question in the affirmative.

LINDSAY, HOWE, & CO., W.S.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

JESSIE MACDONALD, Pursuer (Respondent).—*John Wilson—W. Thomson.* No. 76.
J. FRITZ RUPPRECHT, Defender (Reclaimer).—*Young—Glegg.*

Jan. 19, 1894.
Macdonald v.
Rupprecht.

Reparation—Slander—Master and Servant.—The head cook in a hotel raised an action of damages against her master, alleging that, being in a violent temper with her for asking for additional assistants in the kitchen, he had called out to her in a loud voice several times in a public part of the hotel, and in presence of several of her fellow-servants, "You are drunk and must go at once"; and further averring that these statements were false, malicious, and without probable cause, were injurious to the character of the pursuer, and hurtful to her feelings, and were made by the defender without taking the trouble to ascertain whether they were true or not and "simply to browbeat" the pursuer.

Held (rev. the judgment of Lord Kincairney, who had allowed an issue of malice), diss. Lord Rutherford Clark, that the action was irrelevant.

ON 20th September 1893 Jessie Macdonald, 6 New Broughton, Edinburgh, raised an action against J. Fritz Rupprecht, proprietor of the North British Station Hotel, Glasgow, concluding for £170 as damages for slander.

2D DIVISION.
Lord Kin-
cairney.

The pursuer averred that on 31st July 1893 she was engaged by the defender as head cook in his hotel, that one of the conditions of the engagement was that she should have the same staff of assistants as the defender employed at the time of her engagement, and that, notwithstanding her repeated complaints, the defender failed to comply with this condition. The pursuer then averred,—(Cond. 4) "On the evening of Thursday, 10th August, in or near the said North British Station Hotel, the pursuer again requested the defender to procure further assistance, and stated that otherwise she feared she would require to give up her situation. Thereupon the defender got into a violent temper, and ordered pursuer to leave the house at once. He further then and there repeatedly accused her, in the presence and hearing of Mary M'Mahon, Jessie M'Lean, Catherine Fisher, and Margaret M'Nab, now or lately in the defender's service, her fellow-servants, of being drunk, and in consequence unfit for

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her work. The defender several times cried out in a loud voice to pursuer, in a public part of the hotel, 'You are drunk, and must go at once,' or used words of like import and effect, meaning that the pursuer was guilty of the debasing practice of drunkenness, and that she was, on account of being drunk, unfit to perform her duties in the said hotel. . . . " (Cond. 5) "The said statements made by the defender concerning the pursuer are false, malicious, and calumnious, and without probable cause, and are injurious to the pursuer in her feelings, character, and reputation. In particular, they are calculated to be and are injurious to the character and position of the pursuer in the practice of her vocation, and to cause her loss, injury, and damage, besides wounding her feelings. The defender made the said slanderous accusation recklessly, and without taking any trouble to ascertain whether or not it was true, and well knowing that there was no foundation for it. He was angry with the pursuer for asking for further assistance, and he simply made this accusation to browbeat her."

The pursuer pleaded;—(1) The defender having uttered the statements condescended on, and the same being false, malicious, and calumnious, and without probable cause, to pursuer's loss, injury, and damage, he is liable in damages to the pursuer therefor.

The defender pleaded;—(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons.

On 14th November the Lord Ordinary (Kincairney) approved the following issue:—"Whether, on or about 10th August 1893, in or near the North British Station Hotel, George Square, Glasgow, and in presence and hearing of Mary M'Mahon, &c., now or lately the defender's servants, or one or other of them, the defender did falsely and calumniously and maliciously say of and concerning the pursuer, 'You are drunk,' or used words of like import and effect, to the loss, injury, and damage of pursuer. Damages £170?"

The defender reclaimed, and the pursuer gave notice of motion to vary the issue by deleting the words "and maliciously."

Argued for the defender;—The action was irrelevant. The words attributed to the defender were, according to the pursuer's own shewing, used *in rixa* merely, and so were not actionable.¹ She averred that the defender used them simply to browbeat her. To say of a person that he was drunk was not necessarily actionable; it was a question of circumstances.² Here the circumstances averred by the pursuer did not disclose an actionable accusation of drunkenness. Even if the words were actionable they were privileged, as having been used by a master to his servant, and no specific allegation of malice being set forth, an issue ought not to be allowed.

Argued for the pursuer;—To accuse a person in presence of others of being drunk was actionable, and was not privileged, unless the accusation was made in the exercise of a duty.³ Here the defender no doubt stood in the relation of master to the pursuer, and as such might in certain circumstances have had the duty of stating that she was drunk, and when such a statement was made in the exercise of the duty malice

¹ Shand v. Finnie, Feb. 10, 1802, Hume's Dec. 612; Cusine v. Begbie, Dec. 10, 1803, Hume's Dec. 622.

² Friend v. Skelton, March 2, 1855, 17 D. 548, 27 Scot. Jur. 234, per L. P. McNeill at p. 555.

³ Balfour v. Wallace, July 14, 1853, 15 D. 913, 25 Scot. Jur. 533; Craig v. Jex Blake, July 7, 1871, 9 Macph. 973, 43 Scot. Jur. 524; Rankine v. Roberts, Nov. 26, 1873, 1 R. 225; Farquhar v. Neish, March 19, 1890, 17 R. 716.

was not to be presumed, but must be averred and proved. The case averred here, however, was that the defender, in a state of violent ill-temper against the pursuer, and in order to browbeat her, several times accused her of drunkenness in the presence of several of her fellow-servants. That was not a case of a statement made in the exercise of a duty.¹ The issue ought therefore to be varied as proposed by the pursuer.

No. 76.

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LORD YOUNG.—This is an action by a cook against her employer for damages for defamation. It appears from the pursuer's statements on record that some sort of row arose between her and the defender; that they both lost their temper, and that upon that occasion he said to her,—"You are drunk, and must go at once." The pursuer bases her action upon the use of the words "You are drunk," but she has added the explanation—a very candid one—that the defender made the accusation "You are drunk" without taking the trouble to ascertain whether or not it was true, that he was angry with the pursuer for asking for further assistance in the kitchen, and simply made the accusation to browbeat her. The question is, whether that is a relevant averment to support an action of damages for defamation. I am of opinion that it is not. If a cook gets into a squabble with her master in the kitchen, and they both lose their temper, and the master, in order to browbeat the servant, says to her "You are drunk," I do not think that that constitutes a case of language which is actionable as being defamatory. I am therefore of opinion that we ought to dismiss the action as irrelevant.

LORD RUTHERFURD CLARK.—Looking at the averments made by the pursuer on record, I think that this is certainly a remarkable case, but notwithstanding these averments, I personally would be inclined to allow the pursuer an issue.

LORD TRAYNER.—I think the pursuer's case is irrelevant. The words used by the defender of which the pursuer complains were uttered by him according to the pursuer's averment while he was in a violent temper, and were uttered not for the purpose of making an accusation against the pursuer, but simply "to browbeat her." The *animus injuriandi*, therefore, which lies at the root of such cases as the present is negatived by the pursuer's own averment.

LORD JUSTICE-CLERK.—I have come to be of opinion with the majority of your Lordships.

THE COURT dismissed the action as irrelevant.

EDWARD P. THOMSON, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

INSPECTOR OF GALASHIELS, Pursuer (Reclaimer).—*C. J. Guthrie—Dundas.* **No. 77.**
INSPECTOR OF MELROSE AND THE BOUNDARY COMMISSIONERS OF SCOTLAND,
Defenders (Respondents).—*Rankine—C. N. Johnston.*

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Inspector of
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Public officer—Ultra vires—Poor—Liability where alteration of boundaries by Boundary Commissioners—Local Government Act, 1889 (52 and 53 Vict. cap. 50), sec. 50.—In an action at the instance of the Inspector of Poor of the parish of Galashiels, to which a part of the parish of Melrose had been transferred by the Boundary Commissioners, the Court decided that the original

¹ Milne v. Smith, Nov. 23, 1892, 20 R. 95; Ingram v. Russell, June 8, 1893, 20 R. 771; Douglas v. Main, June 13, 1893, 20 R. 793.

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parish was still liable for the maintenance of a pauper who had, prior to the Commissioners' order, acquired a settlement in the transferred area. Thereafter the parties having failed to come to an agreement as to the adjustment of rates and liabilities necessitated by the transference, the Commissioners issued an award under section 50 (2) of the Local Government Act, 1889, by which they ordained the parish of Galashiels "to assume responsibility for and relieve" the parish of Melrose of advances made or to be made in respect of paupers who had prior to the transference acquired a settlement in the transferred area; and on the other hand ordained the parish of Melrose to make certain annual payments to the parish of Galashiels. *Held* that the award was within the powers of the Commissioners, and was not inconsistent with the previous decision of the Court.

1st Division.
Ld. Wellwood.

(*See Inspector of Galashiels v. Inspector of Melrose*, May 12, 1892, 19 R. 758.)

By order dated 13th December 1890, the Boundary Commissioners, acting under the Local Government Act, 1889, ordered that so much of the parish of Melrose as was situated in Selkirkshire should cease to form part of that parish, and should form part of the parish of Galashiels. The order came into force in June 1891.

On 12th May 1892 (19 R. 758), in an action between the Inspectors of Poor for the two parishes, the Court decided that that transfer had no effect on the liability of the original parish for the maintenance of paupers who had prior to its date acquired a settlement in the transferred area, either by birth or by residence.

The two parishes having failed to make an agreement as to the adjustment of rates necessitated by the transference in terms of section 50 of the Local Government Act, 1889,* proceedings were taken under subsection (2) of that section.

On 10th November 1892 the Boundary Commissioners (claims having been submitted for both parties) issued the following award:—" (First) We ordain the second parties [the Parochial Board of Galashiels] as from 11th June 1891 to assume responsibility for and relieve the first parties [the Parochial Board of Melrose] of all advances made since that date, or to be made in respect of paupers whose claim is derived from (a) birth prior to 11th June 1891 within the area transferred from the

* "(1) Any councils and other authorities affected by this Act, or by any Order or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses of the parties to the agreement so far as affected by this Act or such Order or thing, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint use, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of an annual payment.

"(2) In default of an agreement as to any matter requiring adjustment for the purposes of this Act, then, if no other mode of making such adjustment is provided by this Act, such adjustment may be made or determined by the Commissioners.

"(3) The Commissioners, when making an adjustment under this Act, shall be deemed to be a single arbiter within the meaning of the Lands Clauses Consolidation (Scotland) Act, 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly."

parish of Melrose to the parish of Galashiels by our said order of 13th December 1890 ; or (b) industrial residence within the said area for the statutory period prior to 11th June 1891. (Second) We ordain the first parties to pay to the second parties the sum of £300 per annum for the period of four years, the sum of £200 per annum for the four years thereafter, and the sum of £100 per annum for the four years next again thereafter, the first payment to be at Martinmas 1892, the second at Martinmas 1893, and so on, interest at the rate of five per cent to run on each of the said payments from the time at which it becomes due till paid ; and (Third) we ordain the first parties to transfer to the second parties, as from 15th April 1892, for the use of paupers in the parish of Galashiels, the right to ten out of the twenty-eight beds belonging to the first parties in the Galashiels Combination Poorhouse, the second parties bearing as from that date the burdens effeiring to the additional share in the said poorhouse thus acquired, and being, on the other hand, entitled to one of the votes at present exercised by the first parties at meetings of the Committee of Management of the said Combination Poorhouse ; and we declare that the provisions of this award shall be in full satisfaction of all claims competent to either of the parties against the other, and a final settlement of all financial questions that have arisen, or that may arise between them, in respect of the foresaid transference of area so far as submitted to us in the foresaid claims and answers."

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On 30th December 1892 the Inspector of Galashiels raised an action against the Inspector of Melrose and the Boundary Commissioners, concluding for reduction of the award of 10th November 1892.

He averred ;—(Cond. 7) "The said award was *ultra vires* of the Commissioners, in so far as it bears to impose upon Galashiels the burdens set forth in the first branch thereof. The Commissioners in pronouncing that part of the award were not adjusting liabilities affected by the Local Government (Scotland) Act, or by the said Order, but were transferring from Melrose to Galashiels liabilities which were not affected at all by the Act or Order."

The defender, the Inspector of Melrose, averred ;—"It is explained that the defender has been informed by the Commissioners that the view of the law established by the decision of the Court, referred to in cond. 2, had all along been adopted by them as the sound construction of the effect of the statute, and has been kept before them in the different readjustments made by them in respect of the property, income, debts, liabilities, and expenses connected with the transfer of areas. It is further explained that in every case of the kind which has come before them, of which there have been a great many throughout all parts of the country, the Commissioners have adopted the same course as in the present, viz., to direct that the parish to which the area has been transferred shall in future relieve the parish from which the area has been transferred of all expenses and liabilities connected with the transferred area. This rule has commended itself to the Commissioners in the exercise of the duty confided to them by the statute as just and convenient, and the orders they have made with respect to money payments have been governed by a consideration of the equities arising from the application of this principle. The Commissioners explained to the parties that in their view it is expedient and reasonable that from the dates of their Orders each readjusted area should bear the burdens existing in respect of past or future birth or residence within it, or any part of it as readjusted, and that the authority which collects and administers the rates from any district should be chargeable with the pauperism of that district. On the other hand, to obviate hardship which might arise

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from a sudden increase of burden consequent on the change, the Commissioners have in many cases, as in the present, made an Order for a certain payment for a limited number of years from one readjusted area to the other, to which an immediate burden greater than the immediate increase of revenue has been transferred."

The pursuer pleaded;—(1) The said award or decree-arbitral being *ultra vires* of the Commissioners so far as regards the first branch thereof, the pursuer is entitled to decree.

The defender, the Inspector of Melrose, pleaded;—The said award or decree-arbitral being within the statutory powers of the Commissioners, the defender ought to be assolizied, with expenses.

On 13th June 1893 the Lord Ordinary (Wellwood) pronounced this interlocutor:—"The Lord Ordinary having considered the debate, together with the process, assolizies the defenders from the conclusions of the summons, and decerns." *

* "OPINION.—By Order, dated 13th December 1890, the Boundary Commissioners, acting under the Local Government (Scotland) Act, 1889, determined and ordered that, subject to the provisions of the Act, so much of the parish of Melrose as was situated in the county of Selkirk should cease to be part of that parish, and should form part of the parish of Galashiels. This Order was confirmed by Act of Parliament, and came into force on 11th June 1891.

"Thereafter a question arose and was litigated between the parish of Galashiels and the parish of Melrose as to the effect of this Order upon the liability of the parish of Melrose for the maintenance of paupers who, by birth or residence in the part of the parish which had been so transferred, had their settlement in the parish of Melrose at the date of the transfer. It was decided by the First Division of the Court, 12th May 1892, 19 R. 758, that the transfer by the Boundary Commissioners did not affect the liability of Melrose for parochial settlements acquired prior to the date of the transfer. [His Lordship then quoted the section, note p. 392.]

"Questions have arisen between the two parishes, *inter alia*, as to the adjustment of liabilities and income and expenses in connection with the administration of the poor-law, as affected by the Order of the Boundary Commissioners. They failed to agree in adjusting their differences, and accordingly under subsection 2 of section 50 the adjustment fell to be made and determined by the Boundary Commissioners. The Commissioners, on 4th August 1892, issued a provisional award, and after considering representations by the Parochial Board of Galashiels, on 10th November 1892 issued the award which is now sought to be reduced, the operative part of which is as follows:—[His Lordship quoted the award *ut supra*.] The pursuers, the Parochial Board of Galashiels, seek reduction on the ground that the first branch of the award was *ultra vires* of the Commissioners, the reason stated being shortly this,—that it was contrary to, and inconsistent with, the express decision of the Court to which I have referred. At first sight the award seems startling, because it ordains the Parish of Galashiels to do what the Court declared that legally it was not bound to do. But when the provisions of the 50th section are examined, I think it will be seen that there is no real inconsistency between the award and the judgment. The judgment is a binding decision as to the legal rights of the parties. The award is intended to operate as an equitable adjustment on the assumption of Melrose's liability being as declared by the Court. Under subdivision (1) the two parishes might, if they had chosen, have agreed, *inter alia*, to transfer liabilities binding upon one or other of them by law, with or without conditions or payment by either party in respect of such transference. There was thus nothing to prevent the parishes from agreeing that the liability resting upon Melrose, in respect of parochial settlements acquired before the date of transfer should be taken over by Galashiels, with or without payment of some equivalent by

The pursuer reclaimed, and argued ;—The first branch of the award was *ultra vires* of the Commissioners. The theory on which the previous case between these parishes¹ was decided was that the liability on Melrose to support the pauper in question after the area in which she resided was transferred to Galashiels, was a liability which was not “affected” by the Local Government Act, 1889. It was only when a liability was “affected” by that Act that section 50 came into force. The question of liability had been settled by the Court, and therefore was not one which the parties could have settled by agreement, still less could they be forced to settle it by arbitration. The award was inconsistent with the decision arrived at by the Court, and was on that ground *ultra vires*.

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Argued for the respondents ;—The decision of the Court merely settled the legal liability of Melrose to maintain the pauper in question. After

Melrose. They did not succeed in adjusting their differences, and accordingly it fell to the Commissioners, acting as an arbiter, to decide whether the parishes were bound, with a view to an equitable adjustment, to do what they might have done had they been able to agree. The matter truly submitted to the Commissioners was whether, in adjusting liabilities, income, and expenses which had been affected by the transfer, it was right and proper that Galashiels should take over the liability in question, and if so, on what terms and conditions. Now, such an agreement or reference was not inconsistent with legal liability resting at the outset with Melrose. On the contrary, that was a condition of the reference, and an element in favour of Galashiels to be considered in the adjustment.

“The following passage from the opinion of the Lord President in the case of *Galashiels v. Melrose*, 19 R. 762, shews that that judgment was not intended to preclude financial adjustment between the parties :—‘It is obvious that such changes might require financial adjustment between the two parishes or other areas, the one of which was losing and the other acquiring the land in question. The portion of land to be disjoined might be so mixed up with the rest of the parish as regards common assets and common liabilities that simply to disjoin might leave a very unjust balance between the parish gaining and the parish losing ; and it requires very slight stretch of imagination to picture cases in which such pecuniary adjustments would be required. The two parishes concerned, therefore, are authorised to make these adjustments for themselves, if they can, and failing them, the Commissioners have power, after they have made an order as to the boundaries, to follow that up by another order effecting such an adjustment as appears appropriate in each case. All that is a comparatively simple proceeding in point of principle, for it relates entirely to the settlement of details, and it does not involve that the parties or the Commissioners are authorised to determine what are the rights of the two parishes apart from such adjustment.’

“If it had appeared on the face of the proceedings that the Commissioners ordained Galashiels to accept liability without counterpart or consideration, the award might have been held to be *ultra vires*. But *ex facie* of the award it appears that what the Commissioners presumably consider a fair counterpart or equivalent is to be given by Melrose.

“Now, by statute the award of the Commissioners is given all the finality of a decree-arbitral pronounced by an arbiter under the Lands Clauses Act ; and it can only be impugned on the recognised grounds on which such decrees-arbitral are subject to review. The Commissioners may or may not have made such an adjustment or given Galashiels such compensation as the Court *tota re perspecta* might have awarded ; but I take it that it is not the province or within the power of the Court to interfere with the Commissioners’ determination on that ground.

“I shall therefore assolkie the defenders, with expenses.”

¹ Inspector of Galashiels v. Inspector of Melrose, Feb. 12, 1892, 19 R. 758.

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that decision was pronounced it was still open to parties to consider the question of a readjustment of rates, on the ground that owing to the transference the rates pressed too heavily on the parish from which the transference was made. The award arrived at an equitable decision of that question, and did not touch in the least the question of the liability of Melrose. The parish of Galashiels was given an equivalent for the payment they had to make, in the second and third branches of the award. Such an equitable arrangement was quite within the powers of the Commissioners.

LORD PRESIDENT.—I have no doubt that the Lord Ordinary's judgment is right. What was decided in the previous case was merely that the liability to relieve Mrs Hay, the pauper there in question, remained on the parish in which she had acquired a settlement by residence, though the part of the parish in which she resided was transferred to another parish by the Boundary Commissioners. The parishes concerned in that case were the same as those in the present, and all that was decided there was which of the parishes was liable.

Here the parties failed to agree between themselves with regard to the adjustment of rates which had been deranged by the rectification of the boundaries. The Commissioners, before whom the matter came, saw that the burden of relieving paupers within the transferred area pinched the parish of Melrose, and accordingly, instead of fixing that so much of the liability should be borne for the future by the new parish they quite properly ordained the new parish to relieve the old parish of the burden of maintaining the paupers, and gave the new parish an equivalent for the burden put upon them.

The award is simply an equitable adjustment of the rates, and does not touch the question of liability which was settled by our former judgment. I think that the decision of the Commissioners was quite within their powers, and the case seems to me to present no difficulty. I am therefore of opinion that we must adhere.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT adhered.

BRUCE & KERR, W.S.—ROMANES & SIMSON, W.S.—Agents.

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WILLIAM DALLAS ROSS, Pursuer (Respondent).—*Murray—Salvesen—Crabb Watt.*

JOHN M'FARLANE, Defender (Reclaimer).—*Comrie Thomson—C. J. Guthrie.*

Master and Servant—Assignment of contract of service by master—Newspaper.—In 1888 M'Farlane, the proprietor of a daily newspaper, appointed Ross to be manager of the paper by letter as follows :—"I hereby accept your offer to serve me as general manager of" the paper "for two years." In 1890 the engagement was renewed by letter, addressed to Ross and signed by both parties, in these terms,—“We have to day arranged your reappointment as general manager of” the paper for five years.

In 1892 M'Farlane sold the paper to Martin, the contracts with the newspaper staff being assigned to Martin, who undertook to relieve M'Farlane of his future liabilities thereunder.

Martin offered to employ Ross as manager on the same terms as before, but Ross being afraid that by accepting this offer he might liberate M'Farlane from his liability under the former contract, declined to accept it without M'Farlane's written consent. In reply to Ross' application for this, M'Farlane wrote, Jan. 19, 1894. Ross v. M'Farlane.
—"You are at liberty to make any bargain you like with Martin without my consent." M'Farlane withheld his written consent until after Martin had withdrawn his offer and had declined to take Ross as manager.

In an action of damages for breach of contract by Ross against M'Farlane, the defender pleaded that the pursuer having been offered employment on the same terms with Martin, was entitled to nominal damages only.

Held that the pursuer was entitled to substantial damages, *per* the Lord Justice-Clerk, on the ground that the defender being in breach of his contract with the pursuer, and not having given the written consent required by the pursuer, was not entitled to plead the offer of employment with Martin in mitigation of damages; *per* Lord Rutherford Clark and Lord Trayner, on the ground that whether the defender was in breach of contract or not, he was bound to have given the pursuer the consent required; *diss.* Lord Young, on the ground that there had been no breach of contract by the defender.

Opinions (*per* Lord Rutherford Clark and Lord Trayner) that the defender by assigning the business to Martin, and so disabling himself from fulfilling the contract with the pursuer, had committed a breach of contract.

ON 24th November 1892 William Dallas Ross, newspaper manager, 2d DIVISION. Lord Low.
Edinburgh, brought an action against John M'Farlane, formerly proprietor of the *Scottish Leader* newspaper, Edinburgh, concluding for £2500 as damages for breach of a contract of employment between the pursuer and the defender under which the pursuer was to be general manager of the *Scottish Leader*, then the property of the defender, for a period of five years from 1st January 1890.

The circumstances out of which the action arose, as disclosed by a proof, were as follows:—

The original contract between the pursuer and the defender was concluded by the following letter sent by the defender to the pursuer on 17th May 1888:—"I hereby accept your offer to serve me as general manager of the *Scottish Leader* for two years, at the annual salary of Four hundred pounds, paid monthly."

Before the termination of the period of this contract, the parties entered into a further agreement (being that founded on by the pursuer), which was embodied in the following letter, addressed by the defender to the pursuer, and signed by both parties:—"My dear Sir,—We have to-day arranged your reappointment as general manager of the *Scottish Leader* on the following terms:—For a period of five years.—that your salary for the first year (1890) be Eight hundred pounds sterling, for the second year Nine hundred pounds, and for the third and subsequent years One thousand pounds, with a bonus of two and a-half per cent on the ascertained net profits of the newspaper after the third year.—Yours faithfully."

On 20th August 1892 the defender sold the *Scottish Leader* to Mr Thomas Carlaw Martin, formerly assistant editor and latterly editor of the paper, the contract between the defender and Martin, *inter alia*, conveying to Martin "the whole contracts between the said first party [the defender] and others connected with or relating to the said newspaper, including those with the editorial, literary, commercial, or mercantile staffs," Martin becoming bound to relieve the defender of all liabilities, arising under such contracts in respect of services rendered after the date of the transfer.

At first the pursuer appeared to have been willing to continue as manager of the paper just as if no transfer had taken place, and his name

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for some weeks appeared on the paper as its receiver of cash ; but ultimately, for the reasons explained by the Lord Ordinary (*infra*, p. 401), he reconsidered his position, and on 1st September sent the following letter to Mr Robson, S.S.C., the defender's agent :—" As I must look to Mr M'Farlane to implement the agreement with me, or otherwise provide me with satisfactory guarantees that it will be implemented, I have to ask you for a copy of the agreement under which the new proprietors have undertaken Mr M'Farlane's obligations so that I may consult an agent, and put the matter on a satisfactory basis."

Mr Robson replied on the same day as follows :—" I cannot give you a copy of Mr M'Farlane's agreement with Mr Martin, nor, in my opinion, are you entitled to ask for it. It relates to many things besides your engagement. Your letter appears to be written under the idea that by his arrangement with Mr Martin you may be barred from any claim on Mr M'Farlane under your engagement with him. I need hardly say that he cannot be liberated from any liability incumbent on him to you under your engagement without your assent, and he has not asked you to give this. With this explanation, I may add that Mr Martin takes over all the engagements with members of the staff, including your own, so that your position remains just as it has hitherto been."

On 9th September the pursuer sent a letter to the defender in which, after saying that Mr Robson had refused to give him a copy of the agreement, and that Mr Martin had interfered in certain matters which had hitherto fallen under his charge as manager, he asked this question : " I wish to know from you whether I am to continue as hitherto, and as your manager to discharge my duties under the agreement, or whether, on the other hand, I am to cease to do so ? Of course I look to you to fulfil your agreement with me. It would be a serious matter for me—apart altogether from the direct pecuniary consideration—if my agreement was not fulfilled."

The defender replied on the same day, prior to which date he had received a copy of Mr Robson's letter to the pursuer of 1st September. In his reply to the pursuer he complained of the pursuer's discourtesy in communicating with his solicitor without his knowledge, and then went on to remind the pursuer that he had said that if the defender had to stop the newspaper he would never think of enforcing his engagement, and that if the paper was transferred to a company he would not object to his engagement running on with the company ; and that when the arrangements with Mr Martin were completed the pursuer had entered most heartily into the matter, and had worked night and day at the transfer. The conclusion at which the defender arrived was this :—" I name these things, and could name much more, to shew that you never once objected to a single arrangement prior to the transfer, and you entered most heartily into matters after the transfer, and homologated the arrangement made with Mr Martin that had relation to 'taking over engagements with members of the staff.' Mr Martin has undoubtedly taken my place, as I told you on the day of the transfer."

On 12th September the pursuer sent another letter to the defender, in which he disputed the accuracy of the defender's narrative of events, and said,—" The position is that I have an agreement with you in writing under which I have certain rights and certain duties. I am not free to alter that or make any agreement with anyone else without having a written arrangement with you to that effect,"—and then summed up the position of matters thus :—" My position is that I adhere to my agreement unless and until a new arrangement is made definitely in writing between you, Mr Martin, and me, and I fear that matters are drifting into diffi-

culty because you and Mr Martin do not approach the point in a business-like way." No. 78.

To this the defender replied on the 13th, in the following terms :—" I ^{Jan. 19, 1894.} explained to you on the day of the transfer all that it was necessary for ^{Ross v.} you to know—(First) that Mr Martin would take my position; and ^{M'Farlane.} (Second) that he took over all the engagements with members of the staff, including yours, so that, as you yourself expressed it, your engagement will just run on."

On the 15th September the pursuer again wrote to the defender as follows,—“ You are not entitled to hand over my engagement to any other without my consent any more than I would be to substitute a new manager for myself without yours, and I hope, for the sake of all concerned, that, without any more delay, you will address yourself to this view of the matter, and obviate difficulties resulting from your breach of my agreement.”

To this the defender replied on the 23d,—“ Mr Martin has taken over your agreement along with that of others, and stands to you in the same relationship which I did. You are therefore quite at liberty to make any agreement with him you like without my consent.”

This letter closed the correspondence between the pursuer and the defender.

Meanwhile a correspondence had been going on between Mr Prosser, S.S.C., the pursuer's agent, and Mr Falconer, W.S., Mr Martin's agent. The position taken up by Mr Prosser in that correspondence was that the pursuer would enter into no agreement with Mr Martin alone, but only into an agreement with Mr Martin and the defender in conjunction; and Mr Prosser seemed further to be under the impression that the pursuer, under his contract with the defender, was entitled to remain manager of the paper although he made no agreement with Mr Martin.

Mr Falconer's position was that Mr Martin had become liable for all the obligations incumbent on the defender under the agreement, in so far as they had not been implemented, and was willing to continue the pursuer in his employment as manager; but that he had no concern with the pursuer's claims against the defender, although he had no wish to prejudice such claims.

On 30th September Mr Prosser wrote to Mr Falconer,—“ Mr Ross is not in Mr Martin's employment, and no question of continuation arises. Hitherto I have been under the impression that we were corresponding because my client was willing to consider any reasonable proposal whereby he should convenience Mr M'Farlane and Mr Martin; but this does not appear to be your view, and Mr Ross, consequently, will adhere to his existing agreement.”

This letter was taken by Mr Falconer as a declinature on the part of the pursuer to accept the employment offered to him by Mr Martin; and accordingly he wrote to Mr Prosser to that effect on the 1st October, and intimated that the pursuer's connection with the *Scottish Leader* must cease.

The negotiations between the pursuer and Mr Martin having thus been broken off, Mr Prosser put himself into communication with Mr Robson. Mr Prosser furnished Mr Robson with a copy of the correspondence which he had had with Mr Falconer, and on the 4th of October he wrote to Mr Robson a letter in which he said,—“ Mr Ross looks to Mr M'Farlane for implement of his agreement, being willing to implement his part of it. I do not understand the treatment which parties are attempting to impose on Mr Ross, unless it be with the intention of getting him into a difficulty

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between two persons, who ought together to communicate with him regarding any change, but seem not inclined to do so."

On the 5th of October Mr Robson replied, and after referring at some length to the correspondence between Mr Prosser and Mr Falconer and to his own letter to the pursuer of the 1st September, he said,—“I now state expressly on behalf of Mr M'Farlane that Mr Ross, by carrying out his existing agreement to act as general manager of the *Scottish Leader* under Mr Martin as coming in place of Mr M'Farlane, and by taking his instructions and payment of his salary from Mr Martin, shall not prejudice any claims he may have against Mr M'Farlane under the agreement. I think that this should be satisfactory."

This letter, which was regarded as satisfactory by Mr Prosser, was communicated to Mr Falconer with an intimation that the pursuer would continue to discharge his duties as general manager of the *Scottish Leader*; but Mr Falconer replied that the negotiations between Mr Martin and the pursuer were finally closed on the 1st October, and could not be reopened; and accordingly the pursuer's connection with the *Scottish Leader* came to an end.

After his connection with the *Scottish Leader* ceased, the pursuer was for a long time unable to obtain employment, but about six weeks prior to the commencement of the proof (8th June 1893) he obtained a situation with the Linotype Company in London at a salary of £300 a-year. He subsequently obtained employment as manager of the newspaper *Black and White*. This engagement was for three months, with a power of renewal, and at a salary at the rate of £400 a-year.

The defender deponed that if in the correspondence between himself and the pursuer he had been asked to give the assurance contained in Mr Robson's letter of the 5th October, he would at once have given it.

The pursuer pleaded;—The pursuer having suffered loss and damage to the amount condescended on through the defender's breach of contract, is entitled to decree as concluded for.

The defender pleaded;—(1) No relevant case. (2) The pursuer is barred by his actings from maintaining the present action, and from recovering damages for breach of contract. (3) The pursuer having declined to continue his services as manager of the *Scottish Leader* in terms of his obligation under said contract, is barred from maintaining the present action. (4) The material averments of pursuer being unfounded in fact and in law, the defender should be assoilzied, with expenses.

On 20th July 1893 the Lord Ordinary (Low) pronounced this interlocutor:—“Finds it proved that the defender, by his actings, has committed a breach of the contract of service entered into between him and the pursuer set forth in the record, and is liable in damages to the pursuer for the loss and damage suffered by the pursuer in consequence of said breach of contract; assesses the damages at the sum of £800, and decerns against the defender therefor.”*

* “OPINION.— . . . The questions to be determined appear to me to be (first) whether the defender has broken his contract with the pursuer? and (secondly) if that question be answered in the affirmative, what is the amount of the damages, if any, in which the defender is liable?

“The defender contends that there was no breach of contract. The agreement which was current when the defender sold the newspaper to Mr Martin is . . . in the form of a letter addressed by the defender to the pursuer, and is signed by both of these parties. The letter runs thus,—‘We have to-day arranged your reappointment as general manager of the *Scottish Leader* on the following terms.’ It was argued for the defender that that was not a contract of personal service but a contract that for the period of five years—which was

The defender reclaimed.

At the hearing senior counsel for the defender stated that, on the authori-

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the term specified—the pursuer should hold the position of general manager of the *Scottish Leader*. The sale of the newspaper by the defender, therefore (it was argued), did not involve a breach of contract, unless the result was to deprive the pursuer of the position of manager. The pursuer, however, was not thereby deprived of the position of manager, because Mr Martin was willing, and offered, to continue the pursuer as manager of the paper upon the same terms as those contained in the agreement. The pursuer refused that offer, and accordingly he alone was to blame for the contract not being implemented.

“That view of the agreement is plausible, but I am of opinion that it is not sound. The agreement is for ‘reappointment’ of the pursuer as manager. I think, therefore, that it is necessary to go back and see what was the nature of the position to which the pursuer was ‘reappointed.’ The pursuer, at the time when the agreement under consideration was made, held office under a letter addressed to him by the defender on 17th May 1888. That letter is in the following terms :—‘I hereby accept your offer to serve me as general manager of the *Scottish Leader* for two years at the annual salary of four hundred pounds.’

“That was clearly a contract of service, and I do not think that there is anything to suggest that, when the pursuer was ‘reappointed’ in 1890, there was any intention to alter the character of the employment.

“Further, the position of manager of a newspaper seems to me to be necessarily a position of service. He manages for the proprietor, and must be under the proprietor’s control, and subject to his orders. And it also seems to me to be an employment which involves *delectus personæ*. The office of manager of a daily newspaper is an onerous and responsible one, and, in order that the manager may perform his duties with credit and efficiency, it is necessary that he and his employer should work well together.

“I am therefore of opinion that the contract between the pursuer and the defender was a contract of personal service ; that the defender was not entitled to assign the pursuer’s services to anyone to whom he might sell the newspaper ; and that the sale of the newspaper by the defender, by which he disabled himself from performing the contract, was technically a breach of the contract. I think that it follows, from what I have said, that the pursuer was not bound, whatever the circumstances might be, to accept the office of manager of the newspaper, under anyone to whom the defender might sell it, on pain of forfeiting all claim against the defender. At the same time, I am of opinion that, the newspaper having been sold, the pursuer could not refuse an offer on the part of the purchaser to continue him in the same position, and with the same emoluments, as formerly, and, at the same time, claim damages for breach of contract from the defender, unless he could shew that he had sufficient and reasonable grounds for refusing the offer.

“Such being my view of the nature of the contract, and of the rules of law applicable to the case, it is necessary to consider what are the facts. . . .

“The pursuer at first appears to have been willing to go on acting as manager, just as if no transfer of the newspaper had taken place. Upon thinking over the matter, however, and consulting a friend, he seems to have come to the conclusion that the position of matters necessitated care upon his part. He knew that Mr Martin had not himself the means required to carry on the newspaper, and he did not know for what period of time the assistance which Mr Martin had obtained would enable him to carry it on. The pursuer therefore had not, under Mr Martin, the same security that his salary would be paid during the period of his engagement as he had when the defender was proprietor of the newspaper. Further, the pursuer had been told that Mr Martin had taken over all the defender’s engagements with his employees, and he feared that if he accepted employment with Mr Martin without having his claim against the defender for any loss which he might sustain clearly acknowledged, he might

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ties, he was not prepared to maintain that the defender was not in breach of his contract with the pursuer, but argued ;—The breach of contract was a technical breach of contract merely, which did not entitle the pursuer to more than nominal damages. A servant who had been dismissed by his

lose any claim which he had against the latter in the event of the newspaper being stopped, or his salary not being paid.

"I do not think that the pursuer's fears were unfounded. He had no security that Mr Martin would be able to continue the newspaper and pay his salary during the term of his engagement, and if he had acquiesced in the assignation of his services to Mr Martin, without taking care to have his claims against the defender reserved, he might have found it difficult to maintain, in the event of the newspaper being stopped, or his salary not paid, that he had not released the defender."

[His Lordship then examined the correspondence between the pursuer and the defender, and concluded]—"In the correspondence I think that they both fell into errors. The pursuer never put specifically to the defender the two questions to which it was important that he should have an answer, viz. (first) whether the defender accepted Mr Robson's view of his liability; and (secondly) whether there were any undisclosed proprietors with whom the pursuer would have to deal as well as with Mr Martin. The defender, on the other hand, wrote in a way calculated, in my opinion, to lead the pursuer to believe that he maintained that the pursuer had agreed to continue in his employment with Mr Martin instead of with the defender, and had thereby freed the defender."

[After setting forth the correspondence between Mr Falconer and Mr Prosser]—"The position taken up by Mr Falconer seems to me to be unimpeachable, but I have considerable difficulty in understanding Mr Prosser's views. . . . Mr Prosser wrote as if the pursuer could still insist upon specific implement of his contract with the defender, and was still entitled, notwithstanding the sale, to continue to manage the newspaper. Such a view, I apprehend, was altogether erroneous. The defender was entitled to sell the newspaper (although he thereby made himself liable to a claim of damages on the part of the pursuer for breach of contract), and the newspaper having been sold, the pursuer could have no possible right to force himself into the office, and to manage the newspaper, without the consent of Mr Martin, to whom it had been transferred. . . .

"I have now referred to all the evidence which appears to me to be material in this case, and the questions to be determined upon that evidence appear to me to be (1) whether the pursuer has established his claim to damages; and (2) if so, at what amount ought the damages to be assessed.

"The argument for the defender is, that the pursuer had the offer open to him of the same employment, upon the same terms, with Mr Martin, as he had previously had with the defender, and that as he chose not to accept that offer, any loss which he has thereby sustained is due to himself and not to the defender.

"I think that it is settled law in the case of breach of contract of service, that if a servant has an offer of employment of the same kind, and with the same remuneration as under the contract which has been broken, which a reasonable man would accept, he cannot reject the offer and claim damages for loss on account of breach of contract.

"Now I think that the offer which the pursuer had from Mr Martin was one which it was reasonable that he should accept. At the same time the circumstances were very peculiar, and it seems to me that the pursuer was not to blame for seeking to have his right of recourse against the defender clearly defined and recognised before finally accepting service with Mr Martin. The pursuer knew that Mr Martin had taken over all the defender's obligations to his employees, and if he had accepted Mr Martin's offer without having his claims against the defender reserved, he might, in the event of the stoppage of the *Scottish Leader*, have found that he had lost his right to make any claim against the defender, and this was an important consideration, because unless Mr Martin succeeded in making the newspaper pay better than the defender had been able to do, the

employer was not entitled to remain idle and claim as damages his full salary for the remainder of the stipulated period of service. He was bound to seek other employment. Here, the moment the breach of contract was committed, the pursuer was offered employment which was in all respects identical with that which he had lost, save only that Mr Martin was the employer instead of the defender. The pursuer was bound to accept that employment, if he desired to preserve his recourse against the defender. It was said that under Mr Martin's employment he would not have had the same security for payment of his salary for the remainder of the stipulated period as he had with the defender. Assuming that to be so, it did not entitle the pursuer to decline employment with Mr Martin, since the defender had never repudiated his liability to make good any ultimate loss which the pursuer might suffer. Mr Robson's letter of 1st September was quite distinct to the effect that that liability remained, and if the defender had been asked to give a similar assurance he would have given it. But he had never been asked to give it. The pursuer had lost his place on the newspaper in consequence of the untenable position which he had taken up in his negotiations with Mr Martin—that he would not enter into Mr Martin's employment, except on a contract to which the defender was a party. Having thus lost his place through his own fault, he was not entitled to damages from the defender.

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Argued for the pursuer ;—The defender having conceded that he was in breach of his contract with the pursuer, the discussion was narrowed to the question of the amount of damages. But although the discussion thus proceeded on the concession of the defender, that concession was in accordance with the authorities. The rule was, although there was no direct decision to the effect, that an employer, if he transferred his business to another, and so disabled himself from fulfilling his contract with his servant, was in breach of his contract.¹ The case of the

chances were that it might be given up long before the expiry of the pursuer's engagement.

"But the pursuer obtained the assurance, which it was important for him to have, from Mr Robson, on the 1st of September; and if he had asked the same assurance from the defender, I do not doubt that he would have got it. I therefore think that the pursuer was himself very much to blame for what occurred.

"I am, however, of opinion that the defender was to blame, in that the natural inference from his letters was that he did not take the same view of his liability as Mr Robson did, but held that the pursuer had agreed to relieve him and to take service with Mr Martin as coming in his place.

"The defender thus not only disabled himself from fulfilling his contract, but, by his subsequent conduct, misled the pursuer, and is to a certain extent responsible for the pursuer's loss of the situation.

"The result appears to me to be that the defender, having broken his contract, having by his letters induced the pursuer to believe that he repudiated liability, and having thereby prejudiced the pursuer in his negotiations with Mr Martin, is liable in damages; while, upon the other hand, the pursuer, by taking up an untenable position in his correspondence with the defender and with Mr Martin, materially contributed to the discontinuance of his employment as manager of the *Leader* and is, therefore, not entitled to the full amount of damages which he could have claimed if there had been no fault on his part. In other words, I think that damages are due, but that the amount of damages is a jury question, to be determined in view of the whole circumstances of the case; so dealing with it, I assess the damages at the sum of £800."

¹ Harkins v. Smith, March 11, 1841, F. C.; Robson & Sharpe v. Drummond, 1831, 2 B. and A. 303; Beckham v. Drake, 1849, 2 H. L. Cases, 579, per Mr

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employer's death or bankruptcy was different.¹ It was said, however, that the pursuer could claim only nominal damages, as he had been offered an employment in all respects as good as that which he had lost. In general, a servant would not be entitled to decline such an offer and claim damages. But the employment here offered was not an entirely new employment. It was an employment under the original contract, which had been assigned to Mr Martin by the defender; but assignation implied delegation.² If, therefore, the pursuer had accepted Mr Martin's service, without having a clear stipulation from the defender that the defender's liability under the original contract remained, in the event of the pursuer's position with Mr Martin proving in any respect inferior to that which it would have been with the defender, the pursuer would have lost his right of recourse against the defender. It was not now disputed that the defender could not relieve himself from liability for such eventual loss, except with the consent, express or implied, of the pursuer; but the defender himself, in his correspondence with the pursuer, took up the position that his liability to the pursuer had terminated absolutely when he assigned the contract to Mr Martin. It was said that Mr Robson's letter to the pursuer of 1st September contained an admission of the defender's liability. Assuming that it did so, it was merely Mr Robson's expression of his own opinion, and did not bind the defender; if the defender, who had the letter before him, intended to adopt it, he ought to have intimated that to the pursuer. Not having done so, he must be held to have repudiated it. The defender having thus, in his negotiations with the pursuer, taken an erroneous view of his liability to the pursuer, the pursuer was not bound to accept the offer of employment with Mr Martin; and the defender consequently was liable in substantial damages for his admitted breach of contract.

At advising,—

LORD JUSTICE-CLERK.—The pursuer was in 1888 engaged by the defender, who was then proprietor of the *Scottish Leader* newspaper, to act as manager of that journal. The agreement was in writing, and was in these words,—“I hereby accept your offer to serve me as general manager of the *Scottish Leader* for two years, at the annual salary of £400.” The pursuer thus plainly entered into a contract to serve the defender as his manager of the newspaper owned by him. The engagement was renewed for a subsequent term of five years on 1st January 1890, on somewhat different terms as to emolument which it is unnecessary at this stage to enter into, but the actual appointment is thus expressed,—“We have to-day arranged your reappointment as general manager of the *Scottish Leader* on the following terms,” and it is signed both by the pursuer and defender. It was therefore a renewal of the contract of service by the pursuer to the defender. The nature of the employment was in no way altered. The pursuer was personally to serve the defender in the position agreed upon. I concur, therefore, with the Lord Ordinary in thinking that there was no obligation on the pursuer to continue in the office of manager of the *Scottish Leader* if the defender should cease to be connected with it, and so necessarily make it impossible for the agreed-on service to be rendered. The

Justice Erle, at p. 606; *Emmens v. Elderton*, 1853, 4 H. L. Cases, 624, per Mr Justice Crompton, at p. 646; *Hole v. Bradbury*, 1879, L. R., 12 Chanc. Div. 886; *Smith's Leading Cases*, p. 153; *Fraser on Master and Servant*, p. 122; *Addison on Contracts*, 7th ed. p. 311.

¹ *Fraser on Master and Servant*, pp. 168, 322.

² *Skene v. Greenhill*, May 20, 1825, 4 S. 26.

defender by selling the newspaper made it impossible for him to implement his part of the contract. That is clear, and indeed was conceded by the defender's counsel.

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On 20th August 1892 the defender informed the pursuer that he had sold the *Scottish Leader* to Mr Martin, a gentleman who had been sub-editor of the newspaper for some time previously, but the pursuer was only informed of this in general terms, and the particulars of the arrangement between the defender and Martin were not disclosed to him. The pursuer and Martin then conferred as to the former remaining on the staff of the paper, and this the pursuer was willing to do. But after consulting a friend he proceeded to take steps to have his position in the matter made definite, feeling probably that under his agreement with the defender his financial position was safe, but that if he was dependent on Mr Martin only, or on undisclosed proprietors behind him, and let go his hold of the defender, he might suffer financially later on if the newspaper should fail. He was therefore not prepared to agree to any arrangement which should simply transfer his services to Mr Martin, without the position being made definite that he did so with the defender still bound, so that what he might fail to get by doing work under Mr Martin during the unexpired part of the term of his agreement he could exact from his original employer. He was afraid that he might be held to have given up all claims upon the defender if he engaged under Martin without the defender's distinct consent. [His Lordship then referred to the letters between the pursuer and the defender, and continued]—I think they make it plain—

1. That the pursuer was willing to work on the *Scottish Leader* after it was sold by the defender, and so relieve the defender to the extent to which he might be remunerated by the new proprietors, provided he was made secure in writing that he did not lose the benefit of his agreement with the defender if his new work failed to yield him the same emolument absolutely or partially.

2. That the pursuer made it plain to the defender that without written agreement he would hold to his rights under the agreement already existing.

3. That the defender intentionally declined to notice the pursuer's stipulations, and endeavoured to make out that Martin had taken over the pursuer, and suggested to the pursuer to make any bargain he liked with Martin.

4. That he intentionally declined to say anything which would admit that he was still bound by his contract, or to give a consent to a new arrangement so as to protect the pursuer from an after repudiation on the allegation of an alteration in the pursuer's legal position should occasion arise for the pursuer demanding that the defender should make good any loss which might follow the change.

5. That the defender so acted in the hope and belief that the pursuer would be persuaded to act without consent or guarantee, and that he might thus escape from his liability.

Matters so remained during a protracted correspondence between the pursuer's agent and Mr Martin's agent, but when at last the former believed that what his client insisted upon was to be admitted by the defender, Martin declined to allow the pursuer to enter the premises of the newspaper, or to do any duty in connection with it. To that the pursuer had to submit, for he was not under any contract with Mr Martin, and could not claim anything against him.

In these circumstances I concur with the Lord Ordinary in holding that there was here breach of agreement. Indeed, as I before stated, it was practi-

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I would therefore move your Lordships to adhere to his interlocutor.

LORD YOUNG.—This is an action of damages for breach of contract, the contract being one in writing between the proprietor of a newspaper and the pursuer that the latter should act as manager of the newspaper for a period of five years, and it is very necessary to have regard to the nature of that contract. It is not a mercantile contract, but a contract between the proprietor of a paper—who might be a lady living in London or Paris or anywhere else—and a gentleman to act as manager for a period of five years. Within the five years the proprietor of the paper, who contracted with the pursuer, found it expedient to sell the paper, and he sold it accordingly to Mr Martin who had been editor of it, but with an agreement between him and Martin that the latter should take over the staff and fulfil all M'Farlane's obligations to all the members of the staff, including the pursuer, the manager. It seems to be thought by the pursuer—and this is indeed the foundation of the action—that by selling the paper to Martin, although with a stipulation that the buyer should take over the staff of the paper, a breach of contract with the pursuer was committed. I am clearly of opinion that that was no breach of contract. It was no part of the contract with the pursuer, expressed or implied, that Mr M'Farlane should continue to be the proprietor of the paper for five years, and that he should not sell it. He might have ceased to be proprietor of the paper by death. He did not contract to live for five years. If he had died and the paper passed to his heirs, would there have been any breach of contract there? I am of opinion that there would not, and that there was just as little in the present case. The defender acted with perfect propriety in arranging with the new proprietor that he should take over the pursuer as manager under the contract with him. I have said nothing hitherto to imply anything to the effect that Mr M'Farlane did not remain bound to see that the contract with the pursuer was implemented. My opinion is that the contract would be completely performed by a new proprietor just as much as it would be performed by the old proprietor continuing the pursuer in the position of manager and requiring him to perform no duties except those which fell within the true meaning and import of the contract, and paying him his salary according to its terms. I am of

opinion upon the evidence that Mr Martin did take over the pursuer as manager of the paper, and did agree to satisfy the whole of his rights under the contract. There is nothing in the evidence to shew that the pursuer was ever required to do anything which was not within his duty as manager under the terms of the contract, or further, that the payments due to him under the contract for his services were ever withheld to the extent of a sixpence. I cannot therefore hold that there was here any breach of contract.

I do not care very much to refer to the letters, which I think are quite unnecessarily numerous, and some of them unnecessarily long, and not expressed with that distinctness which in a business correspondence would have been desirable, but I am satisfied upon the evidence that the pursuer's real grievance was being put under Mr Martin as his master. He preferred Mr M'Farlane. That was what touched and irritated him, but I can give no effect to that irritation. I think it sufficiently proved that the untenable nature of the position of objecting to being put under a new proprietor occurred very strongly to the pursuer, because he said in his evidence that he was willing to act as manager under Mr Martin, but that he desired only an assurance that he would be paid. Mr M'Farlane said—and I believe him thoroughly—that if that assurance had been asked he would have given it, but his position was that he was under obligation to see the contract fulfilled, and he did not require to express his obligation in writing to make it effectual against him. His agent expressed it in writing, but it would have been as binding had he not done so. Mr M'Farlane was under that obligation, and if the pursuer had gone on to perform his duties under Mr Martin—not being asked, as he never was asked, to do anything that was not incumbent upon him, and being paid his salary—there would have been no necessity for any recourse against Mr M'Farlane. I am therefore of opinion that the defender should be assolizied.

LORD RUTHERFORD CLARK.—The counsel for the defender conceded that in selling the newspaper the defender had broken his contract, and that the only question before the Court was a question of damages. I am not disposed to examine a position which was assumed after full deliberation. But so far as I can judge they are right in their view of the law. When the defender by the sale disabled himself from fulfilling his contract, he was I think in breach of it.

But the point is not of much importance. The defender in any view was responsible for the due fulfilment of the contract. He arranged with Mr Martin that the pursuer should be continued as manager under him. If he consented that the pursuer should assume that position without prejudice to his rights under the existing contract, it might be that there would be no breach of contract, or if the sale was a breach, the damages might be merely nominal.

It cannot be doubted that the pursuer had a material interest to see that the defender was not discharged. Mr Martin had no means. He bought the newspaper with borrowed money. Nor so far as we can see had the pursuer any guarantee from the success of the undertaking. It seems to have been disastrous to all concerned.

As I understood the argument, the case was presented by both parties on this issue, Did the defender give or withhold the necessary consent? The defender was bound to give it if he was to plead that the arrangement with Mr Martin was a due fulfilment of his contract, or that the pursuer's claim was

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reduced to nominal damages. For it was essential that the pursuer's claims against the defender should be preserved, and if he entered into the employment of Mr Martin without the defender's consent the defender would have been liberated. At least there would have been a risk of that result, and the pursuer was not bound to run any risk. Nor do I think that I am stating any proposition which the defender disputes. He professes that he was all along ready to give the requisite consent, and that in fact he gave it.

From the first the pursuer took up a distinct position. He would not enter into a contract with Mr Martin without the consent of the defender. On the other hand he was willing to become the manager for Mr Martin if that consent was given. He may have been annoyed that he should be placed under one who had been formerly his subordinate, and who proposed to conduct the newspaper in a manner of which he did not approve. But he did not betray his feelings. Mr Martin himself says that up to the time when the pursuer left the office "the relations between me and the pursuer were entirely harmonious and cordial."

Mr Martin on his part was desirous that the pursuer should continue to act as manager, but on the condition that he entered into his employment. In his letter of 16th September Mr Falconer, as Mr Martin's agent, asked for a definite reply to the question "whether Mr Ross is or is not willing to carry out the agreement with Mr Martin." In a question with Mr Martin the pursuer could expect nothing more. He could not be continued in his office on any other footing than as the servant of the owner of the newspaper. He refused the offer because he could not obtain the defender's consent. He was definitely dismissed by Mr Falconer's letter of 1st October, inasmuch as he had declined "the employment offered to him by Mr Martin on the footing expressed in my letters." The pursuer could do nothing but submit. He had no contract with Mr Martin.

If the defender desired to fulfil his agreement with the pursuer, or to escape with nominal damages on the theory that he was in breach of it, he was, as I have said, bound to give his consent to the pursuer's acceptance of Mr Martin's offer. I go further. I think that he was bound to make it perfectly clear that he was not in any way relieved of his contract; for it was by his act that the position of the pursuer was altered. He was, I think, bound to give the pursuer a full assurance that he would not be injured nor incur risk of injury thereby. Nor can I imagine why anyone who was willing to fulfil his agreement should have any hesitation in giving such an assurance. The strange thing in this case is that the defender maintains that he was always willing to give his consent, and yet that the negotiations between the pursuer and Mr Martin proved abortive for the want of it. I think that the defender was not willing to give his consent, and that it was the refusal of that consent which caused the dismissal of the pursuer. To my mind this is quite clear from the correspondence between the pursuer and defender. [His Lordship then referred to the correspondence.]

The defender is asked for his consent. His answer is that the pursuer may make the agreement without it. The pursuer did not require or desire any such information. I can put no other construction on his letter than that the defender refused to give his consent. I have stated what I conceive to have been his duty in this respect. I am satisfied that his duty was not discharged. He gave the pursuer no assurance that he would not suffer prejudice by entering

into an agreement with Mr Martin without his consent, and his conduct forces on my mind the belief that he was trying to induce the pursuer to transact with Mr Martin on that footing, with a clear perception of the benefit which would thence arise to himself.

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But it is said by the defender that a full consent was given by the letter of Mr Robson dated 1st September 1892. I do not think so, nor did the defender. If he had been of that mind he would have had no hesitation in giving his consent when the pursuer asked for it. He would be doing nothing more than repeating an act of which he had previously approved. But Mr Robson does not deal with the subject. He merely points out three things (1st) that the defender could not be liberated from the agreement without the pursuer's consent; (2d) that such a consent had not been asked; and (3d) that Mr Martin had taken over all the engagements with the staff. He says nothing about the defender's consent nor of the necessity of that consent to preserve the rights of the pursuer. Probably he was under no duty to enter on any such matter. I cannot, however, read his letter as meaning that the pursuer might contract with Mr Martin without forfeiting his claims against the defender. But the just construction of the letter is really a matter of no moment, for the defender refused to act up to the interpretation which he now puts upon it.

A copy of the letter had been forwarded to the defender. He says,—“Your reply is admirable.” It seems to me a very ordinary letter unless it had a meaning which is not apparent on the surface. I think that the defender believed that it might throw the pursuer off his guard and lead him to accept, without the defender's consent, the employment which Mr Martin was likely to offer.

After the pursuer's dismissal by Mr Martin, Mr Robson wrote a letter to Mr Prosser, the agent for the pursuer, on 5th October. It is a remarkable letter, and I think it right to quote from it—[His Lordship read the passage quoted *supra*, p. 400].

How Mr Robson thought that he had expressed in the first letter what he expresses in the second I cannot comprehend. But his letter had no practical effect, for Mr Martin refused to recede from the position which he took up on the 1st October, and the pursuer's dismissal remained a fact. It is not, however, without importance. If it expresses the true sentiments of the defender, they were strangely concealed. The defender did not act in conformity with them. He was repeatedly asked to give his consent and as often he refused or failed to give it. I am surprised to think that the defender, who wrote the letter of 23d September (see page 399), can pretend that Mr Robson's letter is an accurate expression of what he was willing to do. I am persuaded that it did not become an accurate expression until he knew that the pursuer had been definitely dismissed.

I am of opinion that the defender has not implemented his agreement. If the sale was not a breach, he was bound to enable the pursuer to enter Mr Martin's employment without sacrificing or prejudicing his rights under the agreement. In no other way could he implement his contract. If the sale amounted to a breach, he was equally bound to follow the same course if he was to escape with nominal damages.

LORD TRAYNER.—I concur in the opinion of Lord Rutherford Clark.

THE COURT adhered.

BOYD, JAMESON, & KELLY, W.S.—MILLAR, ROBSON, & Co., S.S.C.—Agents.

No. 79. GEORGE HORSLEY AND ANOTHER, Pursuers (Appellants).—*Salvesen—Younger.*

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Horsley v. J. &
A. D. Grimond.

J. & A. D. GRIMOND, Defenders (Respondents).—*Murray—Dickson.*

Ship—Bill of lading—Discrepancy between quantity stated in bill of lading and quantity delivered—Proof—Onus.—Where the quantity of goods delivered by a vessel at the port of discharge is less than that stated in the bill of lading the *onus* of proving that the quantity referred to in the bill of lading was not in fact shipped lies upon the owner of the vessel.

Circumstances in which it was held that a shipowner had not discharged this *onus*.

Observed (*per* Lord McLaren) that where goods intended for shipment are measured by weight, pecuniary claims against the shipowner will not necessarily arise upon a slight discrepancy between the weight stated in the bill of lading, and that ascertained at delivery.

1ST DIVISION.
Sheriff of For-
farshire.

MESSRS GEORGE HORSLEY AND MATTHEW HENRY HORSLEY, owners of the steamship "Hesper," belonging to the port of West Hartlepool, raised an action in the Sheriff Court at Dundee, against Messrs J. & A. D. Grimond, manufacturers, Dundee, for payment of £162, 4s. 11d. as the balance of freight on consignments of jute brought from Calcutta to Dundee.

The defenders produced the bills of lading, which were for 500 bales and 910 bales respectively, and stated that of the 910 bales the pursuers had only delivered 898. They accordingly claimed deduction from the freight sued for of £32, 6s. 6d. as the value of the twelve bales of jute not delivered. The defenders founded on the following clause in the charter-party:—"If quality marks are used on jute they are to be the same size as the leading marks, and contiguous thereto, and if such quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the steamer shall be responsible for the correct delivery of the goods."

The bills of lading specified the markings on the 910 bales.

The pursuers averred that 898 bales only were shipped.

The pursuers pleaded;—(1) The said vessel having performed the said voyage, and delivered to the defenders respectively all the bales of jute shipped by or consigned to them as aforesaid, and delivered on board at Calcutta, pursuers are entitled, by the terms of the bills of lading, to payment of the freight thereof, with interest and expenses as craved for. (4) If the said twelve bales were not shipped at Calcutta, the pursuers are not responsible therefor.

The defenders pleaded;—(1) The pursuers being responsible, in terms of the charter-party and bills of lading, for the correct delivery of the goods, in conformity with the bills of lading, their answer to the defenders' counter claim for twelve bales short delivered is irrelevant and ought to be repelled. (2) The pursuers having short delivered twelve bales of the quantity consigned to the defenders, and received on board the pursuers' vessel, the defenders are entitled to deduction of the value thereof from the balance of freight claimed from them under one and the same contract.

Proof was led. The pursuers examined the captain of the vessel, George Smith, and the first and the second mates, and from their evidence the following facts appeared:—The cargo was brought alongside the vessel at Calcutta in lighters, and was taken from them on board by means of steam winches. The first mate in the fore part, and the second mate in the after part of the vessel directed the loading, and saw that the

tally-clerks employed by the stevedores kept a check on every bale of No. 79. jute as it was put on board.

These witnesses also deponed that every one of the bales shipped at Calcutta was landed at Dundee; that no attempt was discovered on the part of the bargemen to deceive the tally-clerks; that no bales could have been stolen from the ship; and that the twelve bales alleged to have been undelivered could not have been shipped at Calcutta.

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It appeared, however, that on 14th October, during her voyage home, the "Hesper" had stranded in the Gulf of Suez, and remained aground till the 17th. In order to lighten her and get her off 150 bales of the cargo were transferred from the ship into lighters, where they remained about six or seven hours on a moonlight night. The witnesses deponed that they were carefully counted when they were removed from the ship, and as carefully counted when they were moved back into the ship, the officers being satisfied that they were all put on board again. There was evidence to shew that no watchman was placed on board the lighters while the bales were there.

The evidence as to the number of these bales was not quite consistent. In the log-book made out by the first mate they were entered as "about" 150 bales. While, too, the first and second mates deponed that they were taken on board again in the Bay of Suez, the captain deponed that this took place in the Gulf of Suez. The log-book was also shewn to be not quite reliable, for while the complete cargo was stated there to amount to 17,056 bales, the amounts stated therein day by day to have been received on board came when added up to 18,598 bales. The captain further deponed that the "shortage must have been either through a mistake in tallying, or owing to the bales being broken up through rotting in the course of the voyage."

On 31st July 1893 the Sheriff-substitute (Campbell Smith) pronounced this interlocutor:—"Finds that the defenders, J. & A. D. Grimond, are, under bills of lading held by them, entitled to delivery from the pursuers, of 1410 bales of jute, and that they have obtained delivery of no more than 1398 bales: Finds that the pursuers are bound either to deliver the twelve bales still undelivered or to establish a valid excuse for their failure to deliver them, or to give the defenders compensation for their value: Finds that the pursuers have failed entirely to establish any valid excuse for non-delivery of said twelve bales, and that therefore they are liable in damages for the value thereof: Assesses the damages at £32, 6s. 6d."

The pursuers appealed, and argued;—The *onus* lay upon the defenders to shew that the bales of jute were actually shipped, for it was not within the scope of a captain's mandate to bind the owners for goods of which he had not obtained delivery, neither could he bind them by representations in a bill of lading that all the cargo mentioned in it had been shipped when it was not.¹ The only evidence tendered by them was the bills of lading. The pursuers, however, had proved conclusively by the best evidence obtainable, viz., that of the ship's officers, that they had used the most careful and anxious methods of checking the cargo, and were satisfied that all the cargo shipped was delivered at the port of discharge. In view of their evidence, it was inconceivable that twelve bales

¹ Grant and Others v. Norway and Others, 1851, 10 Scott's Reports, C. B. 665; M'Lean & Hope v. Munck, June 14, 1867, 5 Macph. 893, 39 Scot. Jur. 504; Grieve, Son, & Co. v. König & Co., &c., Jan. 23, 1880, 7 R. 521; Owners of the "Immanuel" v. Denholm & Co., Dec. 7, 1887, 15 R. 152.

No. 79. of jute weighing three tons could have been made away with on the voyage. The master must have signed the bill of lading, believing, as in the case of *M'Lean & Hope v. Munck* [*supra*, note 1, p. 411], that the short cargo was duly shipped on board. The only incident which could be said to have broken the continuity of the journey from Calcutta was the stranding of the vessel in the Gulf of Suez, but the pursuers had shewn that the 150 bales temporarily removed from the vessel were replaced on board.

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Argued for the defenders ;—While the receipt granted by a master in a bill of lading was not conclusive evidence against the owners that the goods mentioned in it were actually received on board, it was sufficient evidence of the truth of its contents to throw upon them the *onus* of shewing that a less quantity of goods than that stated in the document was actually received for carriage.¹ Now the pursuers had completely failed to discharge that *onus*. They had proved that the bill of lading was only made out by the captain after most careful and anxious precautions to ascertain the precise quantity of cargo actually shipped. It could not even be said that the bales remained *in statu quo* during the transit from Calcutta to Dundee, and there was nothing to shew that some of the bales temporarily removed during the Suez incident might not have gone amissing. Lastly, even though the pursuers had desired to maintain that the loss of the twelve bales fell under the exception of barratry contained in the charter-party, they would have had to prove affirmatively that the loss fell under that exception by shewing by whom the theft had been committed.²

LORD PRESIDENT.—The merchant here has to establish that the ship took on board 910 bales of his jute, and he proceeds to do so by producing the bill of lading, which acknowledges the amount which he now claims. From that point onwards,—after production of the bill of lading, and it being proved to be signed and delivered by the master,—it falls on the ship to shew that that is not an accurate statement of the amount, and that a less amount was truly that which was received on board. The question therefore is simply as to what was taken on board. Once it is ascertained what was taken on board, then the liability of the shipowner is undoubtedly to make that amount forthcoming, because it is no answer for him to say that the goods have disappeared during the voyage, that being merely a confession of his legal liability to make good the deficiency.

Now, the *onus* in the question of what was taken on board at Calcutta being on the ship, what evidence have we got to make out that 898 and not 910 was the true number of bales taken on board?

The case of the shipowners being in truth an impugning of the accuracy of the statement made at the time by their own master, they certainly take the oddest way of breaking down the accuracy of that written acknowledgment. They put the master and the mate into the witness-box, and these men together prove, first, that the mate went through a most careful and accurate mode of checking what was noted at the time as being put in the ship; and, secondly, that the captain, furnished with the results of this minute and careful process

¹ *M'Lean & Hope v. Fleming*, March 27, 1871, 9 Macph. (H. L.) 38, per Lord Chelmsford, p. 44, 43 Scot. Jur. 365.

² *Taylor v. Liverpool and Great Western Steam Co.*, 1874, L. R., 9 Q. B. 546.

of scrutiny and examination, then, and then only, signs the acknowledgment No. 79. for 910 bales.

The rest of the evidence consists, as the Sheriff-substitute very pungently remarks, of a series of speculations as to how the discrepancy could have arisen. I do not think that there is any successfully established theory made out by that evidence.

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It is to be noted, as was pointed out to us by Mr Dickson, that the punctual and accurate methods which are so well established as having been applied at Calcutta rather seem to have deserted the officers on the voyage, because the log-book shews certain discrepancies about figures, and there are also pieces of evidence which shew that in the history of the treatment and manipulation of the goods on the voyage, and particularly during the incident in the Gulf of Suez, the officers are not concurrent as to the place and time at which the whole of the goods which had been put out on lighters had been taken back, some saying that it was in the Gulf of Suez and some in the Bay of Suez. But this Suez incident really comes to no more than this,—it cannot be asserted that the goods remained *in statu quo* from the time when they were taken on board at Calcutta till they were taken out at Dundee, because a part of the goods was undoubtedly put out on lighters at Suez. I do not think that it is at all satisfactorily proved that such minute and continuous watching took place over the goods in the lighters that the twelve bales might not quite well have been taken away then. But I observe on that merely to shew that here again the ship, having the burden of proof upon it, fails to make out the identity of the quantity put out at Dundee with that taken in at Calcutta, the chain being broken by the Suez incident. I revert to this, that the bill of lading sets up the defenders' case, unless its accuracy has been broken down. The shipowners have carefully proved its accuracy, and they have gone on to shew that opportunities occurred during the voyage for the goods going amissing. It seems to me that the Sheriff-substitute's conclusion is right, although the findings in his interlocutor may be slightly varied.

LORD ADAM.—I am of the same opinion. It is no doubt true that the receipt granted by the master of a vessel in the bill of lading for certain goods is not conclusive evidence against the owners of the vessel that these goods were in point of fact received on board. But, nevertheless, I think that that receipt does charge the owners with the goods. They may discharge themselves in many ways, but the *onus* lies upon them to shew that the goods acknowledged in the bill of lading were never in fact received on board, or it may be that owing to an exception in the charter-party they may discharge themselves of the goods.

Now, looking at the facts in the case, I agree with your Lordship that, so far as the owners are concerned, all the evidence goes to confirm the fact that they did receive the goods. The captain took minute care to see that the goods were checked before he signed the bill of lading.

All that the owners say is, that though they are unable to say how the goods disappeared, they did in point of fact disappear.

I agree with your Lordship, and with the Sheriff-substitute, that that is not sufficient to free them from liability.

LORD M'LAREN.—I am very far from asserting that in every case of discrepancy as to weight between descriptive statements in bills of lading and the

No. 79. quantities of goods actually taken on board and delivered, or even in the case of a discrepancy as to the precise number of a large quantity of bales or packages, the bill of lading is to be treated as a document laying upon the owners an unqualified obligation to deliver according to its terms.

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It has been laid down under different forms of expression, in a series of cases, that the master has no authority to sign bills of lading except for the numbers and quantities of goods which he has taken on board his ship; and if it be proved that bills of lading do not represent goods put on board, then, although the bills of lading may be obligatory on the master who signs them, they will not in the case supposed be binding on the owners.

But the question of fact which arises in this case is, I apprehend, to be solved according to the principle laid down in the case of *M'Lean & Hope v. Fleming* by one of the noble and learned Lords taking part in that case. Lord Chelmsford, after stating the legal limitation of the master's authority, proceeds,—“But it is not to be presumed that the master had exceeded his duty. His signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them and proving that he received a less quantity of goods to carry than has been acknowledged by his agent.” Now, the facts of the case in which this principle was laid down were of this nature: It was a case of a contract for carrying a cargo of bones from the Black Sea to Scotland. The ship came home only half filled. The master had protested for short cargo, but in ignorance of the language in which the bills of lading were expressed the master had signed bills of lading representing a quantity in quintels amounting to a full cargo of bones. All the Judges who took part in the decision, both in this Court and in the House of Lords, were of opinion that the owner had discharged the *onus* of proving that the full cargo represented in the bills of lading was not in fact shipped. I observe the Lord Chancellor says,—“As regards the matter of fact, I think it is proved to demonstration that the cargo never was on board.” But one sees that even in cases where there is no fraud or systematic “short delivery,” there may be discrepancy of weight arising from the carelessness of weighers and difficulty of maintaining a perfectly efficient system of checking the weights and the like. I am anxious that in anything we decide in this case it should not be supposed that in a question as to weight the amount or quantity stated in the bills of lading is to be precisely binding on the owners of the ship, and that in case of a slight discrepancy between the weight stated in the bill of lading and the weight as ascertained at delivery, pecuniary claims against the owners would necessarily or probably arise. Here we have nothing to do with weight, but the contract expressed in the bill of lading is for the delivery of a specific number of bales of jute. These are not small objects as to which mistakes in counting might easily be made. They are bales weighing 4 cwts. Their loading necessarily proceeds slowly though aided by steam machinery, and there ought to be no difficulty in keeping a rigorously exact account of the number of bales put on board. Therefore in such a case I should think the presumption that the bills of lading truly represent the cargo put on board is peculiarly strong, always supposing that there is no fraud on the part of the master.

There is evidence no doubt that the fraudulent abstraction of cargo is a thing which is extensively practised at the port of shipment, Calcutta, but there is no suggestion that there was fraud in this particular case, and I am unable to

find in the evidence any statement which proves that a full cargo was not put on board, or which even throws reasonable doubt on the correctness of the bills of lading. If this vessel had performed her voyage without detention at any place, the circumstance that the holds never were opened, or that the goods never were displaced, in the course of the voyage, and that all cargo found in the hold at Dundee was delivered, might have gone some length to prove or to suggest the probability of numerical error in the bills of lading. We are not dealing with a case of that kind, because we know that the ship was stranded near Suez, and it is common ground that 150 bales or thereby were removed from the ship and put into lighters, where they lay for a whole night, and a question arises whether the full number of bales was put on board again.

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Now, the witnesses who were examined on this point—the master and the ship's officers—say that they were satisfied that all the bales were put on board on the following day, and I do not doubt that in the evidence which they have given these witnesses express their honest belief as to the state of the facts on which they were examined. Still, I cannot see that the evidence altogether excludes the possibility of certain bales having been lost in the process of transshipment. Theft is not the only possibility. Bales may have fallen into the sea when being loaded or unloaded, or when they were lying loose in the lighters. In short, we are necessarily in some ignorance of the history of this incident of the voyage. It is not urged on the part of the owners that they are within one of the known exceptions of a contract of carriage. If their case had been that the ship was stranded, that they used their best endeavours to take care of the cargo during the operation of lightening the ship, but that some of the bales had disappeared notwithstanding the use of proper precautions, a different question would have been raised, and one can easily see that in such a case the owner might succeed in avoiding liability on different grounds. But the owners' case, as maintained by evidence and in argument, is that it has been proved that all of the bales taken out of the ship at Suez were restored, and they seek to bring the case to this—that it is certain that the full quantity of goods set out in the bills of lading was not put on board. I do not think that the evidence is so conclusive on that point as to satisfy me that bales may not have disappeared in the course of the voyage. The result is that the owners have, I think, failed to discharge the duty, which was incumbent upon them if they wished to avoid the present claim, of establishing that the master had signed bills of lading in excess of the quantity of goods put on board, so that to the extent of the difference the owners are not bound by his act. I agree with your Lordships that the interlocutor ought in substance to be affirmed.

LORD KINNEAR—I am of the same opinion. A shipmaster has no authority to bind his owners by an acknowledgment on a bill of lading for delivery of goods which have never been taken on board; but on the other hand, the master is the owners' agent to receive the goods when the ship is on general freight, and therefore his bill of lading is evidence against them, that the goods which he acknowledges to have been shipped were in fact shipped. The owners may be released of the obligation which it *prima facie* imposes on them to deliver the goods in good order, if they can shew that as matter of fact these goods were not put on board; but then the *onus* of falsifying their own bills of lading or the master's bills of lading lies on them. Therefore it appears to me that the

No. 79. only question we have to consider is the question of fact whether the owners have demonstrated that the bales now in question, which their master acknowledged, were never in fact put on their ship. On that question **Jan. 23, 1894.** *Horsley v. J. & A.D. Grimond.* my verdict is in the negative. We cannot infer the quantities shipped from the quantities delivered, because, in consequence of what occurred in the Gulf of Suez, the owners have failed to prove that all the goods shipped at Calcutta were carried safely to Dundee. I think they have failed to disprove the bill of lading, and therefore I agree with your Lordships that the Sheriff-substitute's interlocutor should be in substance affirmed.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 31st July 1893: Find in fact that the master of the 'Hesper' signed and delivered to the defenders, J. & A. D. Grimond, bills of lading, by which it is acknowledged that 1410 bales of jute were shipped at Calcutta by the said defenders; that the pursuers have failed to prove that the said number of bales was not actually shipped; that the pursuers have failed to deliver more than 1398 bales: Find in law that the pursuers are liable in damages to the amount of the value of the 12 bales not delivered: Assess the damages at £32, 6s. 6d.: Decern against the defenders, J. & A. D. Grimond, for" &c.

LINDSAY & WALLACE, W.S.—J. SMITH CLARK, S.S.C.—Agents.

No. 80. **MRS ELIZABETH SILVER AND OTHERS, Pursuers.—Crabb Watt.**
GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Defenders.—
James Ferguson.

Jan. 23, 1894.
Silver v. Great North of Scotland Railway Co.

Process—Diligence—Railway.—In an action of damages brought against a railway company by the representatives of a wayman in their employment who had been run over by an accident train, the pursuers applied for a diligence to recover a great variety of writings. The Court, without determining whether the pursuers might not be entitled to recover some of the writings on a more limited application, *refused* the diligence asked for.

1st DIVISION. AN action was brought in the Sheriff Court at Aberdeen against the Great North of Scotland Railway Company by the widow and children of William Silver, a wayman on the defenders' line of railway, who was killed on 23d January 1893 by being run over by an accident train which had been despatched to assist in removing an obstruction to the line caused by the breakdown of a goods train upon the defenders' up line at Buxburn Station.

The grounds of action were that the defenders' system was defective; that they took no proper precautions for the safety of waymen upon the line; and that the despatch of the accident train was unnecessary, the local staff having proved sufficient to cope with the emergency.

Proof having been allowed, the pursuers appealed to the First Division for jury trial, and moved for a diligence in terms of a specification containing eleven articles.*

* Article 3. The rules and regulations of the Caledonian, North British, and Glasgow and South-Western Railway Companies.

Article 5.—"All written communications passing between the defenders' stationmaster and other officials at Buxburn Station on the one hand and the defenders' train and passenger superintendent, locomotive superintendent, inspector of permanent way, and other officials at Aberdeen, or any one or more of them

The defenders intimated that they were willing to give their own rules and regulations which were asked for in the first two articles, and *quoad ultra* objected.

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land Railway
Co.

LORD PRESIDENT.—I think this application must be refused altogether. It is possible that we might be able to pick out here and there a bit of one or another article which might be the subject of a legitimate application. But the time of the Court is not to be occupied in discussing a scheme by which the pursuers have weaved a web of documents to obscure what is in reality a very simple issue. If the pursuers as the case proceeds can make a limited and relevant application, we will consider it. But as the application now stands it must I think be refused.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM, as being a shareholder in the defenders' company, declined.

THE COURT refused the diligence.

MILLER & MURRAY, S.S.C.—T. J. GORDON & FALCONER, W.S.—Agents.

JOHN R. BLAKISTON, Petitioner.—*Dickson—Cullen.*

THE LONDON AND SCOTTISH BANKING AND DISCOUNT CORPORATION,
LIMITED, Respondents.—*Jameson—Guy.*

No. 81.

Jan. 24, 1894.
Blakiston v.
London and
Scottish
Banking and
Discount
Corporation,
Limited.

Company—Prospectus—Material misrepresentation—Rectification of register—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 35.—B, who had received an allotment of shares in a limited company in March 1893, in June presented a petition to have his name removed from the register of shareholders and for repetition of payments, on the ground that he had been induced to apply for shares by the statement in the prospectus that S, whom he knew to have a high reputation for business ability and integrity, was one of the directors; that he had subsequently learned that prior to the allotment S had intimated

on the other hand, upon 23d, 24th, and 25th January 1893, having reference to the breakdown at , the clearing of the line, the despatch of the breakdown engine, the protection of firemen, waymen, and the death of William Silver, and also all books kept by or on behalf of any of said parties containing records of messages and orders, written or telephonic, passing between them, or any of them, of said dates with reference to said matters."

Article 5 similarly asked for all communications passing between "the defenders' train and passenger superintendent at Aberdeen, or any person on his behalf, and (1) the defenders' locomotive superintendent, or anyone on his behalf; (2) the defenders' inspector of permanent way, or anyone on his behalf, and also between the defenders' said locomotive superintendent and inspector of permanent way, or anyone on behalf of either of them."

Article 6 asked for "the written instructions by the defenders' train and passenger superintendent to the driver of the breakdown engine," and "the reports of his journey made by the driver and by the defenders' locomotive superintendent to their official superiors."

Article 7 asked for the report by the stationmaster at Buxburn with reference to the breakdown, and all books kept by the stationmaster at Buxburn.

Article 8.—"The report by the defenders' stationmaster or other official in charge at Woodside to his official superior in the defenders' service with reference to the death of the said William Silver upon 23d January 1893."

Article 9 asked for the defenders' report to the Board of Trade.

Article 10 asked for the principal plan of the defenders' line of railway between Kittybrewster and a point 500 yards north of

No. 81. to the company that he withdrew his consent to become a director, and that the company had made the allotment to the petitioner without intimating to him that S was not to be a director.

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1ST DIVISION.

The facts above stated having been proved, *held* that B was entitled to have his petition granted.

ON 10th June 1893, John R. Blakiston, inspector of schools, Sheffield, presented a petition under section 35 of the Companies Act, 1862 (25 and 26 Vict. c. 89), for rectification of the register of the London and Scottish Banking and Discount Corporation, Limited, by removing therefrom his name as holder of forty ordinary shares of £10 each, and one founder's share of £10, and for repayment of the sums paid by him in respect of these shares.

The petitioner averred that he was induced to take the shares by a statement in a prospectus, dated March 1893, to the effect that Robert Scrafton, Esq. (director, Appleton, French, & Scrafton, Limited), who, as was well known to the petitioner, enjoyed a high reputation for business ability and integrity, was to be one of the governors or directors of the company.

"The petitioner has learned, and now avers, that before the said shares were allotted to him the said Robert Scrafton had intimated to the company and to the other governors named in the prospectus that he withdrew his consent to become a governor of the company, and declined to allow his name to be used in any way by the company. The governors of the company when they allotted the said shares to the petitioner were aware of the statement in the prospectus and of Mr Scrafton's withdrawal, but the fact of said withdrawal was not communicated to the petitioner, who acquired the shares and paid the said sums in ignorance thereof. The failure to inform the petitioner of Mr Scrafton's withdrawal was a fraudulent misrepresentation, and the petitioner was thereby materially deceived and induced to acquire said shares."

The company lodged answers, in which they stated that when the prospectus was issued Scrafton had consented to be one of the governors; and they further denied that he had intimated his withdrawal before the shares were allotted, or that they had been guilty of any fraudulent representation or misrepresentation.

The evidence taken at the proof is examined in detail by Lord Kinnear and Lord M'Laren (*infra*).

The material facts established were as follows:—In January 1893 Mr Scrafton, after meetings and negotiations with Mr A. F. Baker, the provisional secretary of the company, who had invited him to become a director of the company to be formed, agreed to do so, subject to the condition that he should have an opportunity of meeting with the other intended directors for the purpose of going over the articles and memorandum of association, and of satisfying himself in regard to the character of the business which the projected company was going to carry on. Early in March a prospectus was published relative to the formation of the company, in which Mr Scrafton's name was announced as a governor without his having had any meeting with the other directors. On this coming to his knowledge, on or about 7th March, he did not intimate his immediate disapproval of the publication, because he thought he could withdraw at any time before allotment was made. On 11th March, however, he wrote a letter to the secretary, in which he said,—“I am advised that as one of the governors advertised in the prospectus issued to the public I am responsible for every statement in the prospectus, and as I have had no opportunity whatever of verifying the statements contained therein, I cannot take any responsibility in

regard to them, and have therefore no alternative but to request that my name may be removed as a governor from the prospectus, and notice may be sent to the public press to this effect, and that in the event of the company going to allotment, notice may also be sent to each shareholder informing them that I had resigned my position as a governor before the company went to allotment." On the 8th of March the petitioner applied for his shares, and on the 14th he received a letter of allotment. No intimation was made to him to the effect that Scafton had withdrawn from the directorate. It was also proved that the petitioner had taken his shares relying on the statement in the prospectus that Scafton was to be a director. He had no personal knowledge of Scafton, but knew that he was a director of Appleton, French, & Scafton, Limited, Middlesborough, a firm of millers of established reputation, and possessing mills in six of the principal towns in Durham and the north of Yorkshire.

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Argued for the petitioner;—It was established by the evidence that Scafton had made it quite clear to Baker that he could not entertain any proposal that he should join the directorate of the projected company unless he first had an opportunity afforded him of meeting his codirectors in order to look into the memorandum and articles of association and satisfy himself that the business of the projected company was sound and likely to become lucrative. That indeed was only what any prudent man would do before he lent his name to a prospectus and became liable for the accuracy of what it contained. Now, this condition was never fulfilled, and therefore in publishing his name in the prospectus as director the respondents had acted illegally. It was quite true that early in March his attention was called to the printed prospectus, but on the 11th, a few days later, he wrote to the secretary in peremptory terms requesting that his name should be withdrawn from the prospectus, and if the company went to allotment that each shareholder should be informed of the fact. In these circumstances, it was the duty of the respondents to have intimated this to every intending shareholder, and their failure to do so amounted to concealment of a material fact entitling any person who had been induced thereby to take shares to have his contract rescinded. Now, the petitioner had deposed that he had applied for his shares solely in reliance on the name of Scafton in the list of directors. It was also proved that that name was well known both to him and in the commercial world as connected with a firm of established reputation. He had no personal knowledge of Scafton, but he considered the name as a guarantee of the soundness of the prospectus. He had therefore been induced to take his shares by a material concealment or misrepresentation which entitled him to rescission of the contract, and to the remedy prayed for.¹

Argued for the respondents;—It was clear from the evidence that Scafton had intended to become a director of the company, and although he had intimated to the secretary that he desired a meeting with the projected directors in order that he might look into the prospects of the company, he had never taken the trouble to demand one. Moreover, although he was proved to have known on 7th March that the prospectus contained his name, he had made no objection till the 11th,

¹ *Re The Life Association of England, Limited* (Blake's case), 1865, 34 Beavan, 639; *In re Scottish Petroleum Co.* (Anderson's case), 1881, L. R., 17 Ch. Div. 373; *Smith v. Chadwick*, 1881, L. R., 20 Ch. Div. 27, per Jessel, M. R., 50, also 1884, 9 App. Cases, 187; *Karberg's case*, 1892, L. R., 3 Ch. 1.

No. 81. by which time the petitioner had sent in his application for the shares. There was then prior to the petitioner's application no misrepresentation as alleged. But further, even assuming, what was not clearly proved, that Scrafton's letter of 11th March had been intimated to the governors before the shares were allotted to the petitioner on the 14th, there was no obligation upon them to inform him of this fact before allotment, and their failure to do so did not therefore amount to misrepresentation entitling him to rescission of his contract.¹ Lastly, the reliance alleged by the petitioner to have been placed on Scrafton's name was not of that kind which could entitle him to rescission. He admitted that he did not know Scrafton personally, but only by hearsay, as a man of sound financial standing. It had been decided in England that reliance upon the business reputation of a person whose name had been falsely published in a prospectus, without personal knowledge of such person, could only justify rescission where the person relied on was a recognised leader in the commercial world, such as a Rothschild.²

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LORD KINNEAR.—This is a petition by Mr Blakiston to have his name removed from the register of shareholders of the London and Scottish Banking and Discount Corporation, Limited. The averments of fact which are set forth in the petition, and upon which the petitioner claims this remedy, are, that he was induced to take shares in reliance upon the statements contained in the prospectus of the company, that one of the gentlemen who had agreed to become a director was a certain Mr Robert Scrafton, who enjoys a high reputation for business ability and integrity; and that he has learned, and now avers, that prior to the allotment of shares to him the said Robert Scrafton had intimated to the company and to the other governors named in the prospectus that he withdrew his consent to become a governor of the company and declined to allow his name to be used in any way by the company. Then he goes on to say,—“The governors of the company when they allotted the said shares to the petitioner were aware of the statement in the prospectus, and of Mr Scrafton's withdrawal, but the fact of said withdrawal was not communicated to the petitioner, who acquired the shares and paid the said sums in ignorance thereof. The failure to inform the petitioner of Mr Scrafton's withdrawal was a fraudulent misrepresentation, and the petitioner was thereby materially deceived and induced to acquire said shares.”

It was maintained for the respondents that the petitioner cannot succeed in this petition unless the Court is satisfied that he has made out a case of fraud against them, that he has in fact made out no such case, and therefore that the petition must be dismissed. I may say at the outset that I do not see any ground for charging the governors of this company with fraud; but I think that, nevertheless, the petitioner is quite entitled to have the remedy he seeks, if he has succeeded in proving the averments of fact on which the petition is presented,—even although the inference which he draws from these statements of fact, that there was a fraudulent intention, should not be well founded, as I think it is not,—because the averments of fact, if they are proved, come to this, that a certain representation was made to him which was material to induce him to enter into the contract with the company; that he relied upon this

¹ *Hallows v. Fernie*, 1867, L. R., 3 Eq. 520, and 1868, L. R., 3 Ch. App. 467.

² *Smith v. Chadwick*, 1881, L. R., 20 Ch. Div. 27, per Jessel, M. R., pp. 50 and 51.

representation when he applied for shares, and that if it were true when it was first made, it had ceased to be true when the company came to conclude the contract by allotting shares to him on his own application. No. 81.

I think, further, when one comes to consider the proof, that the petitioner has made out his case. What he says is that when he first saw the prospectus of this company, he thought, and said to a friend who was with him at the time, that it appeared to be a good thing, and therefore I have no doubt that, on considering the terms of the prospectus itself, he was disposed to become a shareholder of the company. But then nobody of ordinary good sense would act on such an inclination to the effect of acquiring shares and becoming a shareholder unless the statements in the prospectus appeared to him to be vouched by the name of some person either known to himself or enjoying a general reputation known to him, from which he could infer with some confidence that the statements in the prospectus were true. Jan. 24, 1894.
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Now, he says that what induced him to have confidence in this prospectus was that he saw that one of the directors was Mr Scafton, a director of Appleton, French, & Scafton, Limited, Middlesborough. It appears that he is not personally acquainted with this gentleman, and he has no opinion from any knowledge of his own, of his personal capacity, but he does know that the company of which he is a partner is a company of high reputation, and there is evidence that that is the reputation which this company enjoyed. Now, I do not think we have anything whatever to do, in considering this question, with the actual position of this company, of which we know nothing. The only question is whether Mr Blakiston did or did not rely on the general reputation of the company, and upon the fact that Mr Scafton, who was set out on the face of the prospectus as having agreed to be a director, was a managing partner,—a member of a well-known company enjoying a high reputation. He says so himself, and I must say I see no reason for distrusting his evidence. I think we must believe that he resolved to make the application for these shares because, as he said, he was satisfied that a member of this firm, which was well known to him, would have nothing to do with a bogus company. That is to say, he was satisfied that Mr Scafton would not have allowed his name to appear on the prospectus as one of the directors of the company unless he had made such investigation as satisfied him in allowing himself to be held out to the world as vouching for the matters of fact contained in the prospectus, and also for the solidity of the promises which it held out to the public or applicants for shares. Now, I have no doubt, if that be proved as matter of fact, it is a material statement, inducing a member of the public relying on it to become a shareholder; and that if it is not true in point of fact that Mr Scafton gave any authority for the publication of his name in this form, that is a sufficient ground for rescission of the contract. The result is that Mr Blakiston entered into the contract under error as to an essential point, and that his error was induced by the representations of the other contracting party.

The question remains, whether the representation contained in the prospectus was or was not true, either at the first when the prospectus was published, or at the time when the company concluded their contract with Mr Blakiston by allotting shares on his application. As to the authority which Mr Scafton had given to publish his name as a person who had agreed to become a director, I do not think that there can be any question on the evidence, because Mr Scafton gave a perfectly clear account of all that passed between himself and

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the provisional secretary of the company at the time when he was considering the question of becoming a director, and the only other party to that conversation, the secretary in question, has not been called to dispute Mr Scrafton's statement. I take it therefore that we must assume that that statement is true, and that if Mr Baker, the secretary in question, had been in the box he must have confirmed all that Mr Scrafton says. Now, what he says is this, that having been invited to become a director of this company, he considered the matter favourably, and about the 12th or 13th January he had some correspondence and meetings with Mr A. F. Baker for the purpose of giving his decision on the question. He says that at this meeting Mr Baker said that "so far our arrangements were progressing satisfactorily, but, of course, a meeting would be held of the governors before the prospectus was issued, and before anything was definitely done, so that, of course, I did not trouble in regard to it at all." Then Mr Scrafton went to Norway, and returned on 28th January, and he says—"I saw Mr Baker on my return at the office of the company. He said that nothing much had been done during my absence, and that it would be some little time before the company would be ready to issue the prospectus, and to obtain the capital. But he said that, of course, the governors would be called together for the purpose of going through the articles of association and the prospectus and the agreements and so on before anything was done. I said that, of course, I would be glad to meet the other gentlemen who were proposing to be governors, to go into the business, and see on what lines it was proposed to be done in order that I might be quite satisfied in regard to the character of the business. That is all that passed at that meeting." Then he says at a later part of his examination that he had considered it quite necessary that he should see the articles and memorandum of association before he agreed to be a director.

Now, on that evidence it is, of course, quite clear that there was no completed agreement which could justify the promoters of this company in publishing to the world that Mr Scrafton had agreed to become a director, because he had only agreed to become a director subject to the condition that he should have an opportunity of meeting with the other proposed directors and going over the prospectus and the articles and memorandum of association with them. Mr Jameson referred us to a letter from Mr Baker to Mr Scrafton, dated 10th January, which seems to confirm this view of the matter so far as it goes, because he writes to him, and says,—“I had hoped to have had the pleasure of seeing you here, and if it is impossible for you to call, I am afraid we must abandon the idea of your associating yourself with us. We have the final meeting on Monday to complete prospectus.” There is a little difficulty in reconciling the date of this letter with the evidence. It is not quite clear. I do not think Mr Scrafton is asked about it, or if he is, I have not observed it in the evidence. It is not quite clear whether this was written before or after Mr Baker's interview with Mr Scrafton. If it was written after and referred to it, then it would be confirmation of Mr Scrafton's evidence, when he said,—“I must be present at the meeting of directors before I finally agree to become one,” because what Mr Baker points out is that there is going to be a meeting, and that if he cannot be there, they must give up the idea of his becoming a director. However that may be, the fact remains that on Mr Scrafton's evidence, which, for the reason I have given, I think the respondents cannot dispute, he expected that before he finally agreed to accept the office of a director

he must have an opportunity of going over the prospectus and the memorandum and articles of association with the other directors. Now, if that be so, there was certainly no authority for publishing a prospectus with Mr Sraffton's name in it as a director until such a meeting had taken place. And that I think would be quite conclusive of the whole question between the parties were it not that it appears that after the prospectus had been published Mr Sraffton became aware of the fact, although he had given no previous authority for issuing a prospectus with his name in it to the public—he became aware of the fact that it had been issued, and did not at once object to it and put a stop to the publication. He found from a communication which he received from a newspaper office that the prospectus was being advertised. A newspaper proprietor asked him to obtain the company's advertisement for his paper, and Mr Sraffton wrote on 7th March forwarding the application of the newspaper to Mr Baker, the secretary of the proposed company, and saying nothing more against the proposed publication of the prospectus than this,—“I expected directors would be called together before prospectus issued.” Now, the prospectus had been issued before Mr Baker received that letter. There was no antecedent authority to publish to the world a prospectus with Mr Sraffton's name as one of those who were to be directors. The question that appears to be raised is, whether this letter did not supply the previous want of authority, by indicating to the persons in the administration of the company that Mr Sraffton was aware of the intention to publish his name, and did not oppose it. Now, that might be natural if the question were whether Mr Sraffton was in a position to complain of anything that the directors had done upon receipt of that letter. But that is not the question between the parties in this case. Mr Sraffton says,—“I did not take any immediate steps though I saw that my name was being published to the world, but I was aware that I would have an opportunity of withdrawing before allotment,”—that is to say, if on further inquiry he was not satisfied to go on and become a director of the company, he would be entitled to say—“You have no right to publish to the world that I have agreed to be a director, and you must not allot shares to anybody on the faith of a prospectus containing my name,” because he was not only entitled to withdraw from the office of director, but to withdraw from the position in which he was placed before the public as a person who had given his approval of the statements in this prospectus. And therefore Mr Sraffton was probably right enough in thinking that no harm would be done by his abstaining from intimating an immediate disapproval of the publication, because he could withdraw before allotment was made on the faith of the prospectus already published. Therefore it does not appear to me, so far, that the company has placed itself in a position of being able to say to anybody who has applied for shares on the faith of that prospectus that they had in fact Mr Sraffton's authority for saying he had agreed to become one of the directors.

But then the matter does not rest there, for, after consideration, Mr Sraffton writes a most clear and peremptory letter to the secretary for the company on the 11th March, in which he says,—“I am advised that as one of the governors advertised in the prospectus issued to the public I am responsible for every statement in the prospectus, and as I have had no opportunity whatever of verifying the statements contained therein, I cannot take any responsibility in regard to them, and have therefore no alternative but to request that my name may be removed as a governor from the prospectus, and notice may be

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sent to the public press to this effect, and that in the event of the company going to allotment, notice may also be sent to each shareholder informing them that I had resigned my position as a governor before the company went to allotment," and then goes on to say he had never in his previous experience become identified with any company without having an opportunity of knowing more about it than he knew about this one. Now, a question has been raised whether this letter was or was not before the administrators of the company when they made the allotment of which the petitioner complains. I think we must hold it quite clearly established that it was before them. Mr Scrafton is quite distinct in his evidence in saying that he wrote a letter in these terms and gave it to be posted, and he is corroborated by his clerk, against whose evidence I can see nothing that can be said, and he is further corroborated by the circumstance that his letter, or a letter of the same date, written from him, and containing the same information, must have been received by Mr A. F. Baker, because in this letter he communicates a certain address in London as the place where he would be found on Monday and during the following week, and on Monday he received a telegram from Mr Baker to that address. But then I think what is absolutely conclusive, if there were ever any doubt at all on the evidence, is this—that in the first place Mr Baker, who was a responsible officer of the company at the date of this letter, and must have received it if it was despatched at all, is not called as a witness to deny that he received it, and again that the persons who proceeded to allot the shares, and before whom this letter ought to have been laid if Mr Baker did his duty, are not called to say that they did not see it. Certain directors of the company who were appointed subsequent to the allotment were called to say that they knew nothing about it, but we have not the evidence of the persons by whom the allotment was actually made, and I think if the intention of the respondents had been to prove that the allotment was made without any knowledge of this letter having been written and being before their secretary, they ought to have called on persons who made it and who were managing the company's affairs at the time. Mr Scrafton's evidence as to what passed between him and Mr Baker would perfectly well explain the proceeding of the company to go on with the allotment notwithstanding that they had Mr Scrafton's letter before them, for he says that, according to Mr Baker's account, they did so intentionally in order that the allotment might not be delayed by other possible resignations. Now, we have no contrary evidence, and again I say that if the company intended to dispute Mr Scrafton's account of what passed at that meeting with Mr Baker, the same obligation lay upon them as lay on them in regard to the letter: they were bound to produce Mr Baker as a witness or account in some way, which they have not done, for his absence.

Now, if the result of the evidence is that at the time when the subscribers of the memorandum of association—for I understand it was they who made the allotment—proceeded to allot the shares to Mr Blakiston,—that is to say, to complete the contract of the company with him as an independent shareholder,—they were aware that Mr Scrafton, of the firm of Appleton, French, & Scrafton, whose name they had published for the purpose of giving confidence in the statements in their prospectus to those persons who might know Mr Scrafton and rely on his capacity and his honesty—if they knew at the time they were completing the contract with Mr Blakiston that Mr Scrafton declined to be a director, and had withdrawn any consent he might have been supposed to have

previously given for that purpose, I think they were not entitled to withhold that information from the persons contracting with them. If it be proved—and I think it is proved—that Mr Blakiston made his offer in reliance on the reputation of Mr Scafton, and that at the time his offer was accepted by the allotment of shares the administrators of the company were perfectly well aware that Mr Scafton had not agreed, and did not intend to agree, to be a director, then I think the petitioner has made out his case, that he has been induced to make this contract in reliance on representations material to induce to that result, and that that representation was made by the company in the knowledge that it was in fact untrue. I am therefore of opinion that the prayer of the petition should be granted.

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LORD ADAM concurred.

LORD M'LAREN.—This is an application by Mr Blakiston to be relieved of his contract to take shares with the London and Scottish Banking and Discount Corporation, Limited, on the ground that he was induced to enter into the contract by fraud; but at an early stage of the argument it became apparent that the petitioner had taken upon himself an unnecessary *onus*, and that it was sufficient for the purpose of this case that he should prove that he had purchased the shares—or rather agreed to take the shares—under essential error, induced by an agent of the company. Now, a consideration of the case involves two elements, whether there was in the mind of Mr Blakiston error relating to the essentials of the contract to take shares, and whether he took the shares in reliance on erroneous statements made to him—in other words, whether he was induced by the secretary of the company, or someone for whom the company is responsible, to enter into this contract.

On the first point, I think that while the evidence involves a variety of considerations, the import of it as a whole is clear that there was error in the statement made in the prospectus of the names of the directors of the company, and in allowing that statement to remain after one of the directors had intimated his withdrawal. Mr Scafton, the gentleman concerned, certainly admits, and his letters prove, that he had responded favourably to an invitation to join the company as a director—that he was willing to become a director, provided he was satisfied as to the prospects of the concern, and the truth of the statements made in the prospectus which was to be given out. I think there can be no doubt of that; but I think also that he was well entitled to make his consent to join the company conditional, especially when we consider that under a recent statute persons who allow their names to appear in prospectuses as directors are held responsible for the accuracy of the statements which they subscribe. Now, it may be, if we were here on a question between the company and Mr Scafton, that Mr Scafton had not taken all the opportunities that were open to him to become acquainted with the affairs of the company. He went off to Norway just at the time when the meeting of gentlemen who were proposed as directors was to take place, and it may be that the promoters of the company were entitled after what had passed in the verbal communings, and after Mr Scafton's letters, to insert his name in the proof prospectus believing that they would be able to satisfy him on the points on which he had stipulated for information. And I would say further, that when Mr Scafton received the proof, and especially after he had been informed that the prospectus was advertised, he was hardly in a position to say, if he left that advertisement uncontradicted, that he had

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not authorised its publication. But then we are not here in a question between Mr Scafton and the company—Mr Scafton may or may not have had good reasons for withdrawing. It rather appears that he had been led to take the final step by information which he received at the last moment from a different source; but he was entitled to withdraw at any time before allotment, and in the letter which Lord Kinnear has read he does most unequivocally resile from his informal undertaking to join the board, and gives his reasons for so doing. It is clear enough that this letter was received on the morning of the day appointed for allotment, because we have a telegram sent to the address given in the letter.

Now, in that state of the facts, and the contract between Mr Blakiston and the company being still incomplete,—because, of course, it required acceptance by the company in order to make a contract—they were in no way bound to allot the shares,—in that state of the facts, if the company were to proceed to allot shares to a shareholder who relied on Mr Scafton's name in the knowledge that Mr Scafton no longer intended to be a director, I must say that, whatever may have been their original position, they were certainly inducing him to go on and complete a contract under material error as to a matter affecting the constitution of the company. It is no answer to say that at the time when they signed the prospectus the promoters believed Mr Scafton was to join them. The truth is, that at the time when the contract was completed Mr Blakiston was under essential error, and that was induced by the neglect of the promoters of the company to give him notice of the change of circumstances that had taken place.

As regards the second point, the materiality of the change of matters consequent on Mr Scafton's withdrawal, I think that it must always be a material circumstance to a person who intends to subscribe to a company, that in a statement submitted to him there is a guarantee for good administration by a board of directors, consisting of men of substantial financial position and business capacity. In one of the cases cited the observation is made, with which I agree, that the names of the directors would generally be the first thing that is looked at by anyone who thinks at all of subscribing to a company. Now, I think that the illustration given in the case of *Chadwick* of a person induced to take shares in reliance on the names of one of the two leading financial houses in the world, is not to be taken as a normal case of what was meant by the learned Judge, but rather as an extreme illustration. It does appear to me that a party seeking to invest in a new company may very well rely on the circumstance that the list of directors contains a name which he knows as the name of a firm of established reputation—such a firm as we have here of millers, who have six mills in six of the principal towns of Durham and the north of Yorkshire, and which is known to be an established firm. The fact that a director is a partner of that firm might very well be considered a material element by someone who was not personally acquainted with him, but who merely looks to his known reputation. People entrust the conduct of their business and the treatment of their ailments to professional persons on no other ground than that they know these names as the names of leading men in their professions, and therefore I think there is nothing in the statement of Mr Blakiston that is at all improbable, and certainly there is no contradiction of his statement that he did in fact rely on Mr Scafton's name, and would not have made the application for shares but for the circumstance that he, or someone of like reputation,

known to him to be a man of business habits and capacity, was on the list of directors. No. 81.

Now, the result of these considerations is, that, in my view of the case, the promoters of the company were not entitled to proceed with the allotment so far as Mr Blakiston was concerned after having received notice of Mr Scafton's withdrawal. They might, if they pleased, have adjourned the allotment, and might have tried to satisfy Mr Scafton; but supposing they failed to do so, or supposing they did not choose to apply to him again, then their clear duty was to intimate to all applicants for shares this change in the constitution of the company. It was all the more necessary that they should do so, seeing that, as I have pointed out already, in a recent statute applicants could hold those who subscribed the prospectus as guarantors of the statements contained in it.

I am therefore of opinion with your Lordships that the petitioner is entitled to have his name taken off the register.

The LORD PRESIDENT concurred.

THE COURT granted the prayer of the petition.

J. & A. F. ADAM, W.S.—GEORGE A. MUNRO, S.S.C.—Agents.

JOHN MACKENZIE, Pursuer (Appellant).—*Kennedy—Greenlees.* No. 82.
CAMERON OF LOCHIEL, Defender (Respondent).—*C. J. Guthrie—Clyde.*

Crofter—Succession—Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 16.—Held that, under the 16th section of the Crofters Act, 1886, a crofter is not entitled to bequeath his right to his croft to the son of his mother's sister. Jan. 24, 1894.
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Process—Appeal—Competency—Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 16.—Question whether the decision of a Sheriff, finding that a person to whom a holding had been bequeathed was not one of the relatives to whom the deceased might legally bequeath his holding, was a final decision in the sense of the Crofters Holdings Act, 1886. Jan. 25, 1894.
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DUNCAN M'INNES, a crofter on the estate of Cameron of Lochiel, died on 9th May 1892, leaving a general disposition and settlement, which he, *inter alia*, specially conveyed his whole right, title, and interest in and to his croft to John Mackenzie, a son of the testator's mother's sister. 2D DIVISION.
Sheriff of Inverness, Elgin, and Nairn.

Lochiel having intimated that he objected to receive Mackenzie as crofter in the holding, Mackenzie brought an action in the Sheriff Court at Fort-William against him, praying for decree that he was crofter of and in the croft lately occupied by M'Innes in virtue of M'Innes' disposition in his favour, and of the provisions of the Crofters Holdings (Scotland) Act, 1886.*

* The Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 16, enacts,—"A crofter may, by will or other testamentary writing, bequeath his right to his holding to one person, being a member of the same family,—that is to say, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee'), subject to the following provisions:—

"(a) The legatee shall intimate the testamentary bequest to the landlord or his known agent within twenty-one days after the death of the crofter. . . .

"(c) Within one month after intimation has been made to the landlord or his known agent, he may intimate to the legatee that he objects to receive him as crofter in the holding. . . .

"(d) If the landlord or his known agent intimates that he objects to receive

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Lochiel pleaded, *inter alia*;—(1) No title to sue. (3) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the action. (8) The pursuer not being of the same family as the said Duncan M'Innes,—that is, not being a person who, failing nearer heirs, would succeed to the said Duncan M'Innes in case of intestacy, he is not entitled to the bequest in his favour.

On 23d October 1893 the Sheriff-substitute (Baillie) pronounced this interlocutor:—"Finds that Duncan M'Innes, a crofter, who died on 9th May 1892, bequeathed, *inter alia*, his right to his holding to the pursuer, and that the pursuer was related to the testator through his mother, who was a sister of the testator's mother: . . . Finds that, in the circumstances stated, the pursuer is not a member of the same family as the testator within the meaning of section 16 of the Crofters Act, 49 and 50 Vict. cap. 29, and that the bequest is *quoad* the right to said holding null and void: Therefore sustains the first, third, and eighth pleas in law for the defender: Refuses the prayer of the petition: Finds the defender entitled to expenses," &c.

The pursuer appealed. The respondent objected to the competency of the appeal.

Argued for the appellant;—(1) The appeal was competent. A statutory declaration that the decision of the Sheriff, or other inferior Court, "shall be final," did not of necessity exclude review.¹ Here the decision which was said to be final was a decision upon an objection by the landlord to receiving the pursuer as a crofter, on the ground that he was not a legatee in the sense of the Act. That was an objection on law, and did not raise a question as to what was "reasonable." Such phraseology pointed to objections by the landlord to the individual legatee, and assumed that he was a legatee in the sense of the Act,—that was to say, that he was within the relationship required by the Act. To hold that the decision of the Sheriff was final on questions as to the classes of persons entitled to succeed under the Act would make it impossible to correct any diversity of construction that might arise in the Sheriff Courts. (2) On the merits the Sheriff-substitute was wrong. It was conceded that on the first part of the 16th section of the Act taken by itself the appellant could not prevail, for he could never have succeeded to the deceased *ab intestato*, but the proviso at the end of the section showed that relations by affinity were included; "sons-in-law" being mentioned *per expressum*. It was reasonable, therefore, to put a wide construction on the word "family" in the earlier part of the clause, and to hold that relatives on the mother's side as well as on the father's were within the scope of the

the legatee as crofter in the holding, the legatee may present a petition to the Sheriff, praying for decree declaring that he is the crofter therein as from the date of the death of the deceased crofter, of which petition due notice shall be given to the landlord, who may enter appearance and state his grounds of objection, and if any reasonable ground of objection is established to the satisfaction of the Sheriff, he shall declare the bequest to be null and void; but otherwise he shall decern and declare in terms of the prayer of the petition.

"(e) The decision of the Sheriff under such petition as aforesaid shall be final.

"Provided always that in the case of any legatee or heir-at-law more distant than wife, son, grandson, daughter, grand-daughter, brother, or son-in-law, it shall be competent to the landlord on his own part, or on the part of neighbouring crofters, to represent that, for the purpose of enlarging their holding or holdings, the holding ought to be added to them. . . ."

¹ Edinburgh and Glasgow Railway Co. v. Earl of Hopetoun, July 1, 1840, 2 D. 1255.

enactment. A person might inherit under the Act although he was not the heir *ab intestato* of the deceased.¹ No. 82.

The defender was not called on.

Jan. 25, 1894.
Mackenzie v.
Cameron.

LORD JUSTICE-CLERK.—The petitioner here has no case upon the merits of the action; he is not a member of the testator's family.

I confess I feel some doubt as to the competency of this appeal, but with the view I take of the case it is not necessary to decide that question.

LORD YOUNG.—The appellant's counsel conceded in the course of the debate that his client could not have any claim to this croft if his right was to be judged by the earlier words of the 16th clause of the Crofters Act—that is to say, the appellant is not a person who, failing nearer heirs, would succeed to the testator in case of intestacy. Therefore I consider that the appellant's case does not come under the provisions of the Act, unless we think that that position is not conclusive of the matter.

It was argued that the latter part of the section shewed that the testator could leave his croft by testamentary writing not only to those who would have succeeded in case of intestacy, but that the word "family" used in the Act must be largely extended so as to include anyone who is connected with him by ties of relationship. In my opinion we cannot read the statute in that way, and therefore I think the appellant has no claim to this croft.

On the question of whether the Sheriff-substitute's interlocutor is final on this question, my opinion is that the statute contemplates that the landowner may have some reasonable objection to the person to whom the croft has been bequeathed, if that person is one to whom under the statute the croft may have been legally bequeathed, and in that case the landowner is invited to come before the Sheriff to state his reasonable objection, and the Sheriff's decree on that matter is stated to be final. My opinion is, however, that if the objection is that the croft has been bequeathed to a person to whom it could not legally be bequeathed, as not being within the relationship prescribed by the Act, the decision of the Sheriff finding that he is or is not within that relationship would not be final. I do not think that is a "reasonable ground of objection" in the sense of the statute, or that the Sheriff's decision is final as regards it. If it were otherwise the Sheriff might find that a person who was no relation whatever of the testator was a member of the family to whom the croft had been given, or on the other hand he might find that some near relation, a son of the testator perhaps, and to whom no reasonable person could take objection, ought to be rejected, and in each case his judgment would be final. I do not think that that is the meaning of the statute. It is not, however, necessary to decide that question in this case, because it is enough for decision that this appellant has no claim on the croft under the statute.

LORD RUTHERFURD CLARK.—With regard to the competency of the appeal I admit I have some doubts, but I do not enter into that question.

It is enough for my decision that I am clear the appellant has not a right to this croft under the provisions of the Crofters Act.

LORD TRAYNER.—I am clear that the appellant has no claim to this croft, as he is not a member of the family of the testator as defined by the statute.

¹ M'Lean v. M'Lean, June 10, 1891, 18 R. 885.

No. 82. As regards the competency of the appeal it is not necessary for us to decide that question, and it has not been fully argued, but the present inclination of my opinion is against the competency.

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THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the pursuer on the appeal, dismiss the same, and affirm the interlocutors of the Sheriff, dated 23d October and 16th November 1893, appealed against, and decern: Of new decern against the pursuer for the sum of £5, 16s. 3d. decerned for in the interlocutor of the Sheriff, dated 16th November 1893: Find the defender entitled to expenses in this Court," &c.

JAMES ROSS SMITH, S.S.C.—LINDSAY, HOWE, & Co., W.S.—Agents.

No. 83. **JAMES STEVENSON, Petitioner.—Murray—Maconochie.**
MRS F. L. STEVENSON, Respondent.—Ure—M'Lennan.

Jan. 30, 1894.
Stevenson v.
Stevenson.

Husband and Wife—Parent and Child—Custody of Child—Cruelty to Wife—Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27), sec. 5.—In a petition by a husband for custody of his children against his wife, who had removed the children from his custody and from the jurisdiction of the Court under pretence of taking them on a visit to their grandfather, the wife averred that on some occasions the petitioner had treated his children with cruelty, and that their health and morals would suffer if they were given up to their father, and further averred cruelty on his part towards herself. The Court *granted* the prayer of the petition, holding that the averments as to the father's conduct to the children were not such as to shew that, in the event of their being given into the custody of the father, their moral and physical welfare would suffer; and that (following *Lang v. Lang*, January 30, 1869, 7 Macph. 445, and *Stewart v. Stewart*, June 3, 1870, 8 Macph. 821), the averments of cruelty to the wife did not afford ground for interference with the father's right to the custody of his children.

*Observed (per the Lord President) that the applicability of the decisions in Lang v. Lang, 7 Macph. 445, and Stewart v. Stewart, 8 Macph. 821, as to the relevancy of averments of cruelty to the wife by the husband in such cases as the present, did not seem to be materially affected by the Guardianship of Infants Act, 1886.**

1ST DIVISION. ON 6th July 1893 Colonel James Stevenson, a domiciled Scotsman, presented a petition in which he prayed the Court to ordain his wife, Mrs Florence L. Stevenson, to deliver up to his custody the children of the marriage, viz., a boy, born 1st May 1886, and two girls, born on 19th June 1887 and 11th March 1889 respectively.

He stated that his wife had left his house at Braidwood, Lanarkshire, on 26th April 1893, taking the children with her, and that she had refused to return to him though he was anxious that she should.

Mrs Stevenson lodged answers, in which she averred that the petitioner had treated her cruelly during their married life. She condescended on various acts of violence to her, and averred that he had systematically insulted her, threatened her with personal violence, and generally ill-

* Sec. 5 provides,—“The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, . . . and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just.”

treated her. With regard to her leaving the petitioner's house she averred,—“The respondent was driven to the conclusion that she must cease to live with the petitioner owing to his cruelty. She was constantly apprehensive, not only on her own account but on account of her children, of outbursts of violence on the petitioner's part. She, however, found it necessary to arrange for leaving in such a way as would enable her to get the children removed along with her. She consequently endured her husband's conduct until March 1893, when she requested the petitioner, owing to her impaired health, to allow her to go with the children to visit her parents at St Leonards-on-Sea. In order to procure his consent to her doing so she agreed that the visit should be limited to a few weeks. Had she not taken this course the petitioner would have absolutely prevented her taking away the children along with her.”

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With regard to the petitioner's treatment of the children she averred that if they were given up to him their health and morals would be endangered, and that “the petitioner has neglected and taken no interest in the said children, and has otherwise so conducted himself that the Court should refuse to enforce his right to their custody, and in particular has allowed them to be brought up by the respondent at her own expense for such a length of time and under such circumstances as to deprive him of any ground for alleging that he has in any one particular duly discharged his parental duties.”

She averred further,—“He constantly called her [the respondent] a ‘pig,’ a ‘brute,’ a ‘damned liar,’ and an ‘ugly devil,’ told her to go to the devil in the presence and hearing of her children, used other insulting expressions to her, and annoyed her in numerous ways. . . . Not only did the petitioner subject the respondent personally to every kind of annoyance and humiliation, and threaten to take her children away from her, but he expressed his threats, and habitually used profane and blasphemous language, in the presence of the children themselves. The consequence was that the eldest child of the marriage, who is now only about seven years old, acquired a habit of repeating the oaths which his father used, and on being checked for this he defended himself on the ground that he was quite entitled to use the same language as his father. The petitioner in this way has gravely endangered the morals of the children. . . . Further, he has on some occasions treated the children with actual cruelty. In particular, on one occasion in the course of the winter 1892-93, he stamped violently with his shooting boots upon the foot of the son of the parties, Samuel Delano, causing it to swell and to become inflamed; on another occasion he thrashed the elder daughter, aged six, in a severe and painful manner; while at other times his conduct has been such as to alarm and terrify the children. . . . The petitioner possesses no income from which to maintain the said children suitably to their station if they should be handed over to him.”

She further stated that the son was suffering from rupture and required frequent surgical aid and careful treatment, and that such treatment could only be insured under her supervision and that of a skilled nurse.

She further averred that the petitioner's means, which she stated were about £350 a-year, were insufficient to bring up the children properly or suitably. Her own means consisted of a provision of £600 per annum from her father under her marriage-contract, and an additional £400 per annum subsequently allowed to her.

She founded, *inter alia*, on the 5th section of the Guardianship of Infants Act, 1886.*

* *Supra*, p. 430.

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The petitioner denied the averments of cruelty to his wife and children, and stated that he had a sufficient income to educate and maintain the latter.

Argued for the petitioner;—It was settled law that a father is the natural custodian of his children, and the Court would oust him from that position only if it were shewn that the children would suffer in life, health, or morals by being left with him.¹ Under the Guardianship of Infants Act, 1886, the Court had possibly a freer hand given to it in dealing with such cases, but the considerations for the Court were the same after the Act as before it.² Cruelty to a wife did not oust the father from his position as natural guardian.³ Nor was it sufficient to state that the father was not in sufficiently good circumstances to make the child as comfortable as it would have been with the mother; all that was required was that he should be able to keep them from suffering from actual want.⁴ In this case the averments of cruelty to the children amounted to nothing at all.

Argued for the respondent;—In questions of this kind, under the Guardianship of Infants Act, 1886, the way in which the father had fulfilled his whole marital duty was to be taken into consideration, and cruelty by a husband to his wife was a breach of that duty, and entitled the Court to say that he was unfit to have the charge of his children.⁵ The principles of the common law in England with regard to such questions were the same as those of Scotland,—the paternal right, the whole marital duty of the husband, and the interests of the children, were all equally to be regarded. The decision of the Privy Council in *Smart's* case was of the highest authority, if not actually binding on the Court.

At advising,—

LORD PRESIDENT.—The petitioner is a Scotsman, resident on his estate of Braidwood, in Lanarkshire. The present application to the Court is occasioned by his wife having removed his children from his house, as she now avows in her answers, on the pretence that she was taking them to pay a few weeks' visit with her to her parents in England, but really with the intention of never returning, and of keeping the children in England.

This is a bad beginning to the respondent's case, and places her in an unfavourable position so far as conduct is concerned. She can take no advantage by the fraud she perpetrated on her husband, and her case must be considered as if she, and not her husband, were *in petitorio*. Now, when the answers are analysed, it will be found that, despite their great length, there is very little substance in them. What we are in search of is some definite reason for believing that it would be injurious to the interests of the children that they should remain in their father's house, which is their proper home, and from

¹ *Lang v. Lang*, Jan. 30, 1869, 7 Macph. 445, 41 Scot. Jur. 159; *Steuart v. Steuart*, June 3, 1870, 8 Macph. 821, 42 Scot. Jur. 480; *Symington v. Symington*, March 18, 1875, 2 R. (H. L.) 41.

² *Sleigh v. Sleigh*, Jan. 20, 1893, 30 S. L. R. 272.

³ *Lang v. Lang*, *supra*; *Steuart v. Steuart*, *supra*; *Beattie v. Beattie*, Nov. 10, 1883, 11 R. 85.

⁴ *Delaney v. Edinburgh and Leith Children's Aid and Refuge*, June 7, 1889, 16 R. 753; *Mackenzie v. Mackenzie*, March 5, 1881, 8 R. 574; *Lays v. Lays*, July 20, 1886, 13 R. 1223.

⁵ *Smart v. Smart*, L. R. [1892], A. C. 425; *Elderton v. Elderton*, 1883, L. R., 25 Chan. Div. 220; *In re Halliday*, 1852, 17 Jur. 56.

which they have been surreptitiously removed. The answers are largely taken up with complaints of the petitioner's conduct towards his wife. But, even taking those statements as true, they cannot be held to be relevant having regard to the decisions in *Lang* and *Steuart*, the applicability of which does not seem to be materially affected by the Infants Act of 1886. Moreover, it is impossible to disregard the fact that the respondent has not sought the remedy of separation, which this Court could have given her if she had had an authentic case of cruelty.

So far as the allegations in the answers relate to the petitioner's conduct towards the children, they amount to very little that is substantial, and do not seem to me to present a case giving rise to any reasonable conviction that the children will be injured in health, mind, or morals by living in their father's house. On the other hand, our refusing the petition would perpetuate the breaking up of the family.

In reaching the conclusion that the prayer should be granted, I have in consideration the welfare of the children, the conduct of the parents, and the wishes as well of the mother as of the father.

LORD ADAM and LORD KINNAR concurred.

LORD M'LAREN was absent.

THE COURT granted the prayer of the petition, and found no expenses due to or by either party.

MACONOCHE & HARE, W.S.—J. MURRAY LAWSON, S.S.C.—Agents.

MRS ANN WATSON, Pursuer (Reclaimer).—*A. J. Young—Clyde.*
MISS ELLEN ANN RUSSELL AND OTHERS, Defendants (Respondents).—*W. Campbell.*

No. 84.

Jan. 30, 1894.
Watson v. Russell.

Process—Reclaiming Note—Competency—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 52.—Held that it is incompetent to reclaim against an interlocutor, pronounced on the reclaimer's motion, with a view to submitting a prior interlocutor to review.

THIS action was raised by Mrs Ann Watson, Windygates, Fife, against Robert Morison, accountant, Perth, trustee under the settlement of Miss Helen Cruickshank, dated 20th July 1886, and against Miss Ellen Ann Russell and others, concluding for reduction of the settlement and codicils, on the ground that the testator was not of sound mind at the time they were executed.

On 23d November 1893 the Lord Ordinary (Low) held production satisfied. The original documents had not been produced, but only copies.

The pursuer did not ask leave to reclaim against this interlocutor.

On 5th December the Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the parties on the proposed issues, of consent assolizies the defender, Robert Morison, from the conclusions of the summons, and decerns: Finds him entitled to expenses: Allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report: *Quoad ultra* approves of the said issues as now adjusted and settled, and appoints the same to be the issues for the trial of the cause."

The issues approved were the issues proposed by the pursuer.

The pursuer reclaimed, with a view to the recall of the interlocutor of 23d November holding production satisfied.

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Russell.

The defenders, Miss Russell and others, objected to the competency of the reclaiming note, on the ground that it was not competent for the pursuer to reclaim against an interlocutor which had been pronounced at her own request.

The pursuer founded on section 52 of the Court of Session Act, 1868.* At advising,—

LORD PRESIDENT.—The reclaimer has not satisfied me of the competency of her reclaiming note, the objection to which is palpable. The interlocutor against which the reclaiming note is presented was pronounced on her own motion, as is evidenced by the fact that the issues which the Lord Ordinary approves of are those very issues which were lodged by the pursuer as the issues proposed by her for the trial of the cause.

Apart from the 52d section of the Court of Session Act, 1868, no argument was advanced in support of the proposition that a party is entitled to reclaim against an interlocutor pronounced on his own motion; and good sense forbids the idea.

Now the 52d section does not purport to enable a party to reclaim against a particular interlocutor who formerly could not have reclaimed against that interlocutor. It merely says, so far as the reclaimer is concerned (and therefore, so far as this question is concerned), that every reclaiming note shall have the effect of submitting to review the whole of the prior interlocutors instead of merely the interlocutor primarily and directly reclaimed against. The hypothesis of the section is that there is a competent reclaiming note against the interlocutor purporting to be reclaimed against, and the criteria of that competency are not altered by the 52d section.

I am, therefore, of opinion that this reclaiming note should be refused as incompetent.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT refused the reclaiming note.

REID & GUILD, W.S.—J. & J. GALLETLY, S.S.C.—Agents.

No. 85.

Jan. 30, 1894.
Symington v.
Campbell.

JOSEPH A. SYMINGTON, Pursuer (Respondent).—*Kennedy*—*J. W. Forbes*.
JAMES CAMPBELL, Defender (Reclaimer).—*C. J. Guthrie*—*Chree*.

Title to sue—*Acquisition of right and title after action raised*.—A, the purchaser of a vessel from B, brought an action of damages in his own name and as assignee of B against C for injuries which had been done to the vessel prior to the date of the purchase. The summons was served on the 28th June 1893. On the 29th June the seller of the ship assigned to A all claims competent to him against C. *Held* (1) that at the date of the action A had no right to damages for injury done to the vessel prior to his purchase, and had no title to sue; and (2) that the subsequent assignation did not remedy the defect.

* Section 52 of the Court of Session Act, 1868, provides,—“Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer-House, shall have the effect of submitting to the review of the Inner-House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause. . . .”

JOSEPH A. SYMINGTON raised an action of damages "for his own individual right and interest, and also as assignee of Robert Symington," against James Campbell of Jura, concluding for £400. The summons was signeted and served on 28th June 1893.

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He stated, *inter alia*, that he was the owner of a vessel called the "Alarm," which he had purchased on 18th May 1893 from Robert Symington, who again had bought it from James M'Allister and James Nelson in 1890. That in an action of damages brought by the defender Campbell against M'Allister and Nelson in January 1893 the vessel (being Robert Symington's property) had been illegally arrested on 3d February. "The defender having seized the said vessel, has since detained it in his possession. After seizure the messenger-at-arms employed, William Dunlop, proceeded to dismantle the said vessel. . . . The process of dismantling was carried through without reasonable care and skill, which the defender, or those acting for him, were bound to exercise, but negligently, and with reckless disregard of the pursuer's property. . . . Further, instead of keeping the vessel in safe harbour and taking all reasonable precautions for its preservation, as defender, or those acting for him, were bound to do, the said vessel was allowed to drift, and was ultimately run aground on the open beach in what is called the 'Clay Hole,' and was left there, where it still remains, without anyone being instructed to take charge of it. In consequence thereof the said vessel has now become unseaworthy. . . . In its present condition it is of little value, and would require extensive and thorough repairs. These repairs cannot be executed at Stranraer, and the vessel is unseaworthy, and cannot, in its present state, be removed, and is fast breaking up. . . .

1st Division.
Lord Kin-
cairney.

"Serious loss and damage has been suffered by the pursuer and his author through the said illegal and wrongous action. The said vessel, when seized, was in course of a trading voyage between Belfast and Stranraer. Further, by the detention of said vessel, there has been lost the trading season which was just beginning when its seizure was effected, and to repair the vessel will take some considerable time. Further, the said vessel has been so injured by the manner in which she has been dismantled and dealt with since the defender took possession of her that it will cost not less than £250 to refit and replace the said vessel in as good a condition as when she was seized. The said Robert Symington has assigned to the pursuer all claims competent to him in respect of the illegal arrestment or detention of the said vessel, and of the damage done to said vessel by the fault or negligence of the defender, or those for whom he was responsible."

The pursuer produced an assignation by Robert Symington in favour of the pursuer bearing to be granted in consideration of a sum presently paid and dated 29th June 1893.

The pursuer pleaded;—(1) The arrestment and detention of the said vessel having been illegal and unwarranted, the defender is liable therefor in reparation to the pursuer. (2) The dismantling and subsequent dealing with said vessel having been illegal and unwarranted, the pursuer is entitled to reparation therefor.

The defender pleaded;—(1) No title to sue.

On 20th December 1893 the Lord Ordinary, Kincairney, reserved the defender's plea of no title to sue so far as it related to the pursuer's claim of damages on account of the alleged illegal and unwarranted arrestment of the vessel, and, *quoad ultra*, repelled the defender's plea of no title to sue, and allowed a proof.

The defender reclaimed, and argued;—*Title to sue*.—As owner of the ship the pursuer had no title to sue, for, on his own statement, the alleged

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damage had been done prior to the date when he became owner. As assignee of the seller he had no title, for the action was raised on the 28th June, the date on which the summons was served,¹ and the assignation was dated the 29th June. This was not the case of a person having a substantial right at the date of raising the action, and going on to formally complete his title before decree, for prior to the assignation the pursuer had no right at all. The passage in *Stair*² referred to by the pursuer did not therefore apply.

The pursuer argued;—*Title to sue*.—The pursuer had an independent title as owner of the ship to vindicate against anyone not shewing a better title all claims for compensation arising directly out of injuries done to the ship at whatever date. But if that title were in itself insufficient, then the defect was cured by the assignation. That had been lodged before the closing of the record. It would have been sufficient had it been lodged at any time before decree.³

LORD PRESIDENT.—I see no answer to the objection raised by the defender to the pursuer's title.

At the date when the summons was signeted and served, both things being done upon the same day, the pursuer had no assignation from Robert Symington; and accordingly, so far as regards the injuries alleged to have been inflicted upon the owner of the vessel during the ownership of Robert Symington, this pursuer had no title to sue, and valid objections have been raised to the action going on. This is not the case of a person having at the time of raising the action a substantial right, requiring only formal completion. The title of the pursuer here depends on an assignation, which he does not say had been gone into at all before the action was raised. The whole transaction took place after the summons had been served. This sweeps away, on the pursuer's own shewing, his title to nearly all that he is suing for. It is clear that a man who buys a ship does not thereby buy all previous claims for damages connected with the ship, and therefore the pursuer's claim for damages, so far as rested on what took place before he became owner of the ship, goes by the board. I go further and say that there is no averment on this record of any injury having been inflicted upon the owner of the ship after May 1893, when the pursuer bought it. The latest incident averred is that the vessel was allowed to drift away owing to the defender's carelessness, and in consequence got into an unseaworthy condition. Now, all this occurred before the 17th May 1893. There is, it is true, a suggestion by the pursuer as to damage having been suffered by him, owing to the non-delivery of the vessel by the defender, but his averments upon this point are of too shadowy and unsubstantial a character to be worthy of consideration, and are irreconcilable with his account of the hopeless condition of the ship at and prior to the date in question. I am of opinion that the defender has stated a good objection to the pursuer's title, that the Lord Ordinary's interlocutor should be recalled, and the action dismissed.

LORD ADAM.—I am of the same opinion.

¹ *Alston v. Macdougall*, Nov. 18, 1887, 15 R. 78; *North v. Stewart*, July 14, 1890, 17 R. (H. L.) 60, Lord Watson, p. 63.

² *Stair*, iv. 38, 18.

³ *Stair*, iv. 38, 18; *Malcolm v. Dick*, Nov. 8, 1866, 5 Macph. 18, Lord Justice-Clerk, p. 20, 39 Scot. Jur. 17; *M'Andrew v. Reid, &c.*, July 11, 1868, 6 Macph. 1063, 40 Scot. Jur. 600; *Walls' Trustees v. Drynan*, Feb. 1, 1888, 15 R. 359.

The pursuer here alleges that he has a good title to sue, upon two grounds, No. 85.
1st, that he is the purchaser of the ship; 2d, that he is the assignee of all
claims for damages connected with the ship.

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The facts with regard to the second of these two propositions are as follows:—The summons in this action was served upon the 28th of June, which, according to the authorities cited to us, is the date of the raising of the action. The assignation is dated June 29th, the day after the raising of the action. The question before us is whether at the date of raising the action the pursuer had a title to sue. I think he had not, and that suspecting this he procured the assignation next day in order that he might have a good title. It has been suggested that this case is like that of executors who have been held able to sue competently before getting confirmation, and that in consequence it is competent for the pursuer here to sue. But the difference between the cases is that the executors had a good title at bottom, which they only required to have formally made absolute, while the pursuer here had absolutely no title, till the assignation had been entered into. “But,” says the pursuer, “I have a title *qua* purchaser.” This title he obtained in May 1893, but all the damage to the vessel was done before that date, and the mere fact of becoming the proprietor of a ship will not give the purchaser the right to claims for damages sustained before his purchase. The pursuer tried to remedy this defect by procuring the assignation, but he did so too late for the purposes of this action.

I am therefore of opinion that the pursuer has no title to sue.

LORD M'LAREN and LORD KINNAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the defender's plea of no title to sue, and dismissed the action.

W. R. MACKERSY, W.S.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

THOMAS GIBSON, Pursuer (Appellant).—*Salvesen—Wilton.*
ROBERT STEWART, Defender (Respondent).—*Jameson—Macfarlane.*

No. 86.

Jan. 30, 1894.
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Reparation—Personal injury—Road—Horse frightened by manure piled on ground adjoining road—Occupation of ground by trespasser.—In an action of damages for personal injury the pursuer averred that the defender was the proprietor of a farm of which the pursuer was tenant, and from which he was to remove at Whitsunday; that before the term of removal the defender entered on a field on the farm and placed thereon a heap of bags of manure covered with a tarpaulin, which flapped in the wind, close to the private road leading to the farm-house; that on 12th May, while the pursuer was driving along the road his horse shied at the manure bags, and overturned the conveyance, whereby the pursuer was seriously injured. He further averred that the defender in placing the bags where he did was a trespasser on the ground in the pursuer's occupation. *Held* (1) that the pursuer's averments, apart from the statement as to trespass, were not relevant to support an issue of fault on the part of the defender in placing the manure near the road; but (2) that he was entitled to an issue whether the defender wrongfully placed the bags of manure upon a field in the occupation of the pursuer, and whether the pursuer was injured by his horse taking fright thereat.

THOMAS GIBSON, Dumfries, raised an action in the Sheriff Court at 1ST DIVISION.
Kirkcudbright against Robert Stewart, Esq. of Culgruff, concluding for Sheriff of
£500 for damages in respect of personal injury alleged to have been Dumfries and
caused by the fault of the defender. Galloway.

The pursuer became tenant of the farm of Airds, of which the defender was proprietor, at Whitsunday 1891, on a lease for fifteen years. On

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12th December 1892 he executed a deed of renunciation of the lease in favour of the defender, whereby he became bound to remove from the houses and grass lands at Whitsunday 1893, and from the land in white crop at the separation of the crop.

The pursuer averred that on the afternoon of 12th May, "when driving down the loaning or farm-road that leads from Airds farm-house to the public road, the pursuer observed, for the first time, a large quantity of bags of artificial manure built up within a corn field on his said farm of Airds, and immediately adjacent to the said loaning on the west side thereof. . . . The defender had no right to the pursuer's corn crop growing there, nor to the use of that part of the field where the bags were placed. The bags were placed close to pursuer's corn crop, close to the side of said loaning where it is unfenced, and near to the gate between said corn field and a fallow field, in the latter of which the pursuer afterwards learned the manure was to be used. The height of the bags so built up was over 7 feet, and they were placed within 2½ feet of the inner wheel track of said loaning. They presented an unusual appearance, and emitted a strong, offensive smell. For the purpose of removing any cause of alarm in his pony on account of the manure bags, the pursuer in driving down said loaning and observing the said bags, came off his trap, and as a precautionary step in taking the animal past them for the first time, he walked past them alongside his pony. The pony went safely past. . . ." (Cond. 5) "In returning from Castle-Douglas the same afternoon about six o'clock, the pursuer drove his pony safely through the gate from the public road into the said loaning, up which it proceeded for about eighty yards, until it came to the said gate between the said fallow and corn fields, when owing to a turn in the said loaning near the said gate, the manure bags came first into full view. Just when the pony reached said gate and when it would be within ten yards or thereby of the said manure heap, without any warning, it turned sharply round with its head towards the dyke with which the loaning is there fenced on the south side of the said fallow field, with the result that the inside shaft of the conveyance broke, and the whole weight of the pursuer and his niece being thrown upon the other shaft it also broke causing them to fall upon the road. Since the pursuer had previously passed the said manure bags, a tarpaulin or other covering had been thrown over them, the loose portions of which were waving or flapping with the wind. . . ."

The pursuer then averred that he had been seriously injured by the accident, and averred further;—(Cond. 7) "The accident to the pursuer was due to his said pony taking fright, and swerving or shying through the fault of the defender in placing such an unsightly and offensive obstacle as the said bags of manure so near the said (at that part unfenced) loaning, and where he had no right to place them. They created a nuisance to the said loaning, and rendered it unsafe for driving horses along it. So placing them there was not only in the circumstances negligent of the defender, but was also in breach of his said contract of lease with the pursuer, by virtue of which the defender had no right to use that part of the field where the bags were placed, during the occupation of the pursuer thereunder. The defender placed the manure bags in said field without any consent from the pursuer to his doing so, and at his own risk. He was well aware that they would be a source of danger to horses passing up and down the said loaning, as the defender had previously placed some tiles, near to the part where he afterwards placed the manure bags, to which the pursuer had objected, and warned him that said tiles might be a source of such danger. The accident to the pursuer

was the natural result of the defender placing said manure bags where he did. Further, the insufficient and negligent manner in which the said tarpaulin or other covering was secured by the defender, also materially contributed to the accident. . . ."

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The pursuer pleaded;—(1) The pursuer having been injured through the fault of the defender, is entitled to reparation as craved, with expenses.

The defender pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant, and insufficient to support the prayer of the petition. (2) The pursuer having approached with said pony what had to be regarded by him as a known danger, and the accident having resulted therefrom, the action should be dismissed. (6) The deposit of said manure bags being an ordinary act in farming operations, no liability attaches to the defender in connection therewith. (7) The place where said manure bags were put being ground neither cultivated nor beneficially used, but mere waste land belonging to the defender, he was entitled to put same there in the exercise of his legal rights without incurring any liability for so doing. (8) Contributory negligence.

On 28th October 1893 the Sheriff-substitute (Lyell) repelled the defender's first plea in law and allowed a proof.

The pursuer appealed to the First Division for jury trial, and at the hearing proposed the issues quoted below.*

Argued for the respondent;—The pursuer had not averred anything to shew that the defender's action in putting the manure bags where he did was anything but an ordinary act of husbandry on his part, and the action ought, therefore, to be dismissed as irrelevant. The land was coming out of lease at the date of the accident, and an incoming tenant, in such circumstances, was entitled to enter upon the land and put manure on it ready for spreading. Further, there was no plea on record to the effect that in entering on this piece of ground the defender was trespassing. The English cases cited by the pursuer were all cases of the wrongous use of a highway, which this road was not. It was the ordinary farm road. The pursuer had passed the heap in the morning and knew it was dangerous; he should, therefore, have led the horse when returning.

Argued for the pursuer;—The defender had at the time of the accident no right to enter upon the land on which the manure heap was placed. The land was in the pursuer's sole possession, and the defender in entering on it was simply a trespasser. He had no right as incoming tenant to enter upon a field still in the occupation of the pursuer. Further, he was in fault in putting the heap where he did, as it was likely, particularly

* "1. Whether on or about Friday the 12th day of May 1893, and while driving along the loaning leading to Airds farm-house from the public road in the said parish of Crossmichael, the pursuer was injured in his person through the fault of the defender in placing a quantity of bags of manure furnished with a tarpaulin covering on ground then in the occupation of the pursuer and immediately adjoining the said loaning, to the loss, injury, and damage of the pursuer?

"2. Whether on or about Friday the 12th day of May 1893, and while driving along the loaning leading to Airds farm-house from the public road in the said parish of Crossmichael, the pursuer was injured in his person through the fault of the defender in wrongfully and negligently placing a quantity of bags of manure furnished with a tarpaulin covering on ground then in the occupation of the pursuer and immediately adjoining the said loaning, to the loss, injury, and damage of the pursuer?"

No. 86. when covered by a badly secured tarpaulin, to frighten horses passing along the road.¹ On both these grounds there had been such fault as to make the defender liable for the accident.

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At advising,—

LORD PRESIDENT.—The pursuer alleges that as he was driving along a farm road his horse took fright at a pile of bags of manure covered with tarpaulin which had been placed by the defender on a field adjacent to the road, that he was thrown out and seriously hurt. The main part of the argument which we heard for the pursuer was on the footing that the defender, who is proprietor of the ground on which the heap was placed, was in fault in having put near a road something which might and did frighten a horse, and the argument proceeded exactly as if the defender were the lawful occupant of the field and the road a public road. In this view the case against the defender was that, having regard to the contiguity of the road, the defender was in fault in putting down a heap of manure so near that a passing horse might take fright at it.

In my opinion the case so laid is irrelevant, none of the decisions support it, and any bearing which the statute law has on the question is adverse to the pursuer. The proximity of even a highway does not lay an embargo on the cultivation of the adjoining fields, and the deposit of a heap of manure is an ordinary incident of agriculture. Many of the sights and sounds of modern agriculture may startle a horse, but people who go along country roads must lay their account with such risks. The pursuer made nothing in argument of the circumstance that there was a tarpaulin over the manure which flapped in the wind, and, if this were a ground of liability, no housewife would be safe to put her clothes out to dry on her own washing-green within sight of a road. It is obvious that country life would be impossible if the most ordinary and everyday act could not be done without the risk of an action of damages on the ground that somebody's horse had been thereby startled.

The English cases cited are divisible into two classes—first, those in which there has been an illegal encroachment on the highway itself, and second, those in which some more unusual operation, such as digging a pit in a field, caused an unusual danger. Neither class has any application to the matter in hand. So far as statute law is concerned, the fact that in some statutes some limitations are placed on the free use of adjoining lands suggests that the common law does not recognise such restrictions.

Accordingly, I am against allowing the issue originally proposed, which stands second of the amended issues proposed at the close of the debate.

There is, however, another view of the pursuer's case, very obscurely indicated on record, which requires more consideration. It is said that the defender had no right to use or come upon the ground in question at all for agricultural purposes, inasmuch as the pursuer was still tenant of the farm; that the defender's putting the manure heap where he did was an encroachment on the rights of the pursuer, and an act of trespass; and that the result of this trespass was the accident to the pursuer. It is obvious that the case thus presented is in a totally different chapter of law to that which I have just discussed. The case which I have discussed was that of lawful occupiers of ground adjacent to a road, and

¹ Harris v. Mobbs, 1878, L. R., 3 Exch. Div. 268; Wilkins v. Day, 1883, L. R., 12 Q. B. D. 110; Hardcastle, 1859, 4 Hurlston and Norman, 67; Hadley v. Taylor, 1865, L. R., 1 C. P. 53.

the case advanced against them was that they had violated the maxim *sic utere tuo ut alienum non lædas*. The case now presented makes trespass the gravamen against the defender—the form of trespass being the deposit of manure on ground which he had no right to use for such a purpose—road or no road. Now, I consider this case relevant; and, although it is very badly stated, and the pleas as applied to it quite unscientific, I think that the pursuer is entitled to an issue. The issue now proposed by the pursuer is not appropriate, and does not present the question which I have stated. The primary question for the jury, with the aid of the Judge, will be whether the defender committed a trespass by putting his manure where he did, apart altogether from the nearness of the road, and solely with regard to the rights of the pursuer under his lease. The next question arises only if this one be affirmed, and it is whether the shying of the horse was caused by the manure heap being placed where it was.

The issue which I propose is as follows:—"Whether on or shortly before the 12th day of May 1893 the defender wrongfully placed a quantity of bags of manure, furnished with a tarpaulin covering, on ground then in the occupation of the pursuer under lease between him and the defender of the farm of Airds in the parish of Crossmichael; and whether on or about the said day the pursuer was injured in his person through his horse taking fright at the said bags or tarpaulin, to the loss, injury, and damage of the pursuer?"

THE COURT settled the above issue as the issue for the trial of the cause.

THOMAS M'NAUGHT, S.S.C.—MACRAE, FLETT, & RENNIE, W.S.—Agents.

WILLIAM DIXON, LIMITED, Pursuers and Real Raisers.

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CHARLES SEWELL AND OTHERS (W. S. Dixon's Trustees), Claimants
(Reclaimers).—*Dickson—Macphail*.

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R. D. MACKENZIE AND OTHERS (Mr and Mrs Church's Marriage-Contract Trustees), Claimants (Respondents).—*Jameson—Salvesen*.

Lease—Mines and minerals—Construction—Right to occupy houses.—The proprietor of a mineral field, and of the surface of certain detached pieces of ground on which were built workmen's houses, stores, &c., let the minerals for a period of thirty-one years with the usual rights to work the same, and with right also to the tenant "to use and occupy," during the currency of the lease, the houses, &c., the tenant paying and so relieving the landlord of all feu-duties and taxes payable in respect of the houses, and also undertaking to keep in repair and insure the same; "for which causes and on the other part," the tenant bound himself to pay a fixed rent, or, in the option of the landlord, specified lordships.

Some years afterwards the landlord died. Under his testamentary arrangements, the mineral field was left to his sister, but the detached houses remained part of his general testamentary estate.

In a competition between the sister and the testamentary trustees of the deceased, the latter averred that the value of the detached houses was at least £275 per annum, after deducting the sums necessary to pay the feu-duties, &c., and claimed that they were entitled to payment of that sum annually out of the fixed rent or the lordships.

Held (diss. Lord Young) that the whole of the fixed rent or lordships was payable in respect of the right to work the minerals, the occupation of the houses being a separate right, the consideration for which was the payment of the feu-duties, &c.

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2D DIVISION.
Ld. Kyllachy.

By lease, dated in 1873, between William Smith Dixon, of Govanhill, ironmaster in Glasgow, as first party, and the firm of William Dixon, Limited, as second party, the first party, "in consideration of the rents, lordships, and others after mentioned," let to the second party "All and Whole the whole coal, ironstone, fireclay, and other metals and minerals still remaining in those parts of the lands of Carfin, belonging to the first party, in the county of Lanark, for thirty-one years," as from 1st September 1872, with powers to work and carry away the same,—“With right also to the said second party during the currency of this lease to use and occupy the stores, manager's house, and dwellings for workmen, and other houses and gardens attached thereto, situated at Carfin, the second party paying and so relieving the first party and his foresaids of all feu-duties payable to their superiors in respect of those held by them from other parties in feu, and also paying to the first party and his foresaids a ground rent for those built on land belonging to them forming part of Carfin estate, at the same rate as the rent payable by the second to the first party for land under the separate lease of Carfin farm and others, and paying and relieving the first party and his foresaids of all public and parochial burdens and taxes of every kind in respect of the said houses and others, whether exigible from landlord or tenant, and also insuring the stores and managers' houses against fire, and also maintaining the said houses in a proper state of repair during the currency of this lease: . . . For which causes, and on the other part, the second party bind and oblige themselves to content and pay to the first party, and his heirs, executors, and assignees, the yearly rent or lordships after specified, and that half-yearly on the last days of February and August . . . *videlicet*—the sum of £800 sterling yearly of fixed rent, or, in the option of the first party or his foresaids, the royalties or lordships following, *videlicet* . . . And further, the second party bind and oblige themselves to satisfy and pay to the first party's tenants in the surface of the lands the minerals in which are hereby let, for such portions of the said lands as are now occupied, or which may be hereafter occupied, by the second party, excepting only the houses and others hereinbefore mentioned, and that at such rates as may be arranged between the second party and such tenants, and failing arrangement, as may be fixed by two arbiters mutually chosen, or by an oversman to be appointed by such arbiters, and that in addition to the fixed rent or lordships hereinbefore mentioned.”

Besides the lands of Carfin, the minerals of which were let under the foregoing lease, Mr Dixon was proprietor of several adjoining feus, but not of the minerals therein, which were reserved by the superior or the seller. Most of the houses referred to in the lease were situated on these detached feus, three only being on the lands of Carfin.

Mr Dixon died on 16th June 1880. Under his testamentary arrangements, the lands of Carfin, with the whole minerals therein, but subject to the lease, were conveyed to his half sister Mrs Church and through her to her marriage-contract trustees. On the other hand, the detached feus, with the houses thereon, remained the property of Mr Dixon's trustees.

Down to 31st August 1890 the whole lordships falling due under the lease were paid to Mrs Church's marriage-contract trustees, Mr Dixon's testamentary trustees having made no claim to any portion of them.

Thereafter, Mr Dixon's trustees intimated to the mineral lessees, William Dixon, Limited, that they were entitled to share in the lordships to the extent of the annual value of the houses on the detached feus belonging to them and occupied by William Dixon, Limited.

In consequence William Dixon, Limited, did not pay the lordships for

the two years ending 31st August 1892 to Mrs Church's trustees, and on 16th January 1893, they as pursuers and real raisers brought a multipointing for determination of the respective rights of Mrs Church's trustees and Mr Dixon's trustees in the lordships for these years, being in all £3198, 10s. 5d.

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Mr Dixon's trustees averred that the gross annual value of the detached feus and houses thereon was £562, and that the nett annual value, after deducting the feu-duties, rates, and taxes payable by the tenants under the lease, was £275, and claimed to be ranked and preferred to the whole fund *in medio* in payment *pro tanto* of arrears at the rate of £275 per annum since Mr Dixon's death, or alternatively to be ranked to the extent of £550, being the alleged nett annual value of the houses for the two years ending August 1892.

Mrs Church's trustees maintained that all the items composing the fund *in medio* were payable in respect of the subjects of which they were in right, and that no part of the fund was payable in respect of or attributable to the occupation of the houses, &c. in question, on the ground that the clause in the lease which conferred on the mineral tenants the right to such occupation expressed *in gremio* the full agreed-on consideration therefor. Mrs Church's trustees therefore claimed the whole fund *in medio*.

On 17th June 1893 the Lord Ordinary (Kyllachy) repelled the claim for Dixon's trustees and sustained that for Church's trustees, and ranked and preferred the latter accordingly.*

Dixon's trustees reclaimed, and argued;—Where subjects belonging to one person were occupied by another the presumption was that the occupier held the subjects as tenant in consideration of the payment of a rent

* "OPINION.— . . . The question appears to me to depend upon this, whether, upon the just construction of the lease, the miners' houses in question are let simply as part of the mineral subject, or, on the other hand, are let as a separate subject, and for a separate consideration.

"I am of opinion that the latter is the correct view. The right to occupy the houses (along with other houses as to which no question arises) is certainly let by a separate and distinct clause in the lease; and that clause undoubtedly specifies certain definite payments or prestations which are the conditions of such right of occupation. In particular, the tenants are taken bound to pay for the houses on the estate of Carfin proper certain ground rents which are to be calculated in a certain manner, and for the houses in question, which are built upon feus, the feu-duties payable to the superiors. They are also bound to relieve the lessor in both cases of all public and parochial burdens effeiring to the houses which are thus let to them; and all this is stipulated apart from and in addition to the proper mineral rents or lordships which are imposed upon the tenants by the clauses in the lease which follow.

"It is true that the obligation to pay the mineral rents or lordships begins in the usual way with the words 'for which causes and on the other part,' and the trustees found upon that expression as implying that the mineral rent or lordship is payable, *inter alia*, for the right to occupy the houses. But it rather appears to me that this is giving too much weight to the mere collocation of the clauses; especially seeing that, as matters stood at the time, the question which has now arisen was not foreseen, and was of no importance. And, on the whole, I prefer the construction which assumes that, according to the scheme of the lease, the houses were let as one subject on certain terms, and the mineral field as a separate subject on certain other terms. I am the more disposed to adopt this view that it appears to have the support of two judgments pronounced in the Valuation Court by Lords Fraser and Lee in 11 R. 844 and 12 R. 639."

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adequate to the value of the subjects.¹ Here, however, the contention on the other side was that Dixon's trustees held these houses not as tenants but merely in virtue of a right to use and occupy, which was incidental to the lease of the minerals, or, at least, that if they were tenants of the houses, the only consideration for such tenancy was the obligation to relieve from feu-duties, &c. Such a construction ought not to prevail if another was possible, where, as the reclaimers averred and offered to prove, the consideration was wholly inadequate to the value of the houses. That another construction was possible was clear from the opinion of the Lord Ordinary, who did not say that the reclaimers' construction was absurd, merely that he preferred the other. "For which causes" *prima facie* included the possession of the houses as well as the right to work the minerals. There might be some apparent difficulty in apportioning the fixed rent or royalties, but if the Court were satisfied that the reclaimers were entitled to the fair annual value of their houses, it ought not to be difficult to determine what that value was. The decisions by the Lands Valuation Judges, referred to by the Lord Ordinary, were not binding here, nor were they *res judicata* between the present parties, who were not parties there.

Argued for Mrs Church's trustees;—The Lord Ordinary had taken the sound view. In construing the lease it must be kept in view that the granter was proprietor both of the minerals and of the houses, and probably did not contemplate the possibility of the two passing to separate owners. The real subjects let were the minerals, and they were the only consideration for which the rent or royalties were paid; the right to use and occupy the houses was a mere incidental right, the consideration for which was the obligation to relieve the granter of feu-duties, &c. The tenants were under no obligation to occupy the houses, and if they did not do so, could it be suggested that they were entitled to an abatement out of the fixed rent or the royalties equal to the value of the houses, less the taxes, &c.? Further, the rent of the houses, if any money rent was due, must bear a certain proportion to the aggregate money rent paid, and thus if, as had in fact happened, royalties, not fixed rent, were paid, the rent of the houses would vary with the amount of royalties paid; but it was absurd to suppose that the value of the houses should rise with the increase in the output of the coal.

At advising,—

LORD YOUNG.—The material facts seem to be these: In 1873 Mr W. Smith Dixon, who was then proprietor of the lands of Carfin, and also of certain lands adjoining, granted to the pursuers (the real raisers) a lease of the minerals of Carfin "with right to use and occupy the stores, manager's house, and dwellings for workmen, and other houses and gardens attached thereto, situated at Carfin." These stores, houses, &c., were most, not all of them, situated not on the lands of Carfin, but on the adjoining lands, of which, as I have said, Dixon was also proprietor. Three of them, of the annual value of £78, were on Carfin. The words "situated at Carfin" were reasonably descriptive of all of them. Mr Smith Dixon died in 1880, and under his testamentary settlements his testamentary trustees (who are the first claimants) became, and are now, proprietors of the lands adjoining Carfin on which the houses, with the exception of the three I have noticed, are situated, while his sister Mrs Church became proprietor of the lands of Carfin in which the minerals exist, and subsequently conveyed them to her marriage trustees, who are the second claimants.

¹ Glen v. Roy, Nov. 28, 1882, 10 R. 239.

The fund *in medio* consists of the rent for the years 1891 and 1892 under the lease of 1873 (which still subsists) and amounts to £3198, 10s. 5d., being the aggregate of the lordships payable for these two years.

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From Mr Smith Dixon's death in 1880 down to 1891 the whole rents were paid to Mrs Church's trustees, his testamentary trustees having made no claim to them. They have, however, come to think that they have a right, which it is their duty to assert, to a fair rent for the houses standing on the ground of which they are the proprietors, and their consequent claim has led to this multipoleinding. The tenants (the raisers) have no interest in the matter—no claim being made against them beyond the fund *in medio* which they are ready to pay to the party having right.

No question of amount can be decided on the case as it stands. The only question argued was the general question whether the testamentary trustees have any right to rent under the lease as being proprietors of the houses, &c., referred to, which they admittedly are, and have been since 1880.

The testamentary trustees aver that the annual value of the houses, their property, of which the tenants are in possession under the lease, is £562, and we must assume that they may prove this if allowed an opportunity. Assuming the truth of the averment, it would certainly *prima facie* be unjust to deny the owners a corresponding return from those who have the whole use and occupation of them. Mrs Church's trustees, however, maintain that this *prima facie* view is overcome by the terms of the lease, subject to which the testamentary trustees became owners. They contend that by this lease the tenants had right "to use and occupy" these houses for this rent and return only, viz., that they should pay and so relieve the proprietor of all feu-duties payable in respect of those houses held in feu, and paying a ground rent for those built on ground belonging to the proprietor "forming part of Carfin estate" at a certain farm rate—the same as the tenants paid for a farm on the Carfin estate under another lease—and paying and so relieving the landlord of all taxes and keeping the houses in repair. Ground rent at a farm rate applies only to the three houses on the land part of the estate of Carfin, and with these we have here no concern. The view therefore is that the tenants were by the lease to have the houses in question for the return of relieving the owner of feu-duty, taxes, and cost of keeping in repair, and that none of the rent payable under the lease, i.e., none of the fixed rent, or lordship in excess of it, was payable for the right to use and occupy them, that right being accorded altogether irrespective of such rent. The Lord Ordinary accepts this view, and in support of it refers to two judgments of Lord Lee and Lord Fraser in the Valuation Court upon the import of this very lease in a question between the lessees and the Assessor.

I shall have something to say regarding these judgments before I conclude, but in the meantime I observe—1st, that the only parties to the lease who were before the Valuation Court were the lessees; 2d, that they admitted that the actual value of the buildings now in question, as they then (in 1885) stood as lettable subjects, was over £600; 3d, that they admitted, and indeed contended, that the rent (whether fixed or lordship) specified in the lease was applicable, or at least was intended to be so, to the buildings as well as to the minerals, both being alike subjects let by the lease, and that the view that the landlord had given them property worth over £600 only because they undertook to relieve him of the landlord's burdens upon it, was on the mere statement of

No. 87. it extravagant. I take the figures as stated in the Valuation Court—value of the property £602; landlord's burdens £129.

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The parties now before us in this competition are the two landlords—for there are two—viz., Mrs Church's marriage trustees, as owners of Carfin and its minerals, and Mr Smith Dixon's testamentary trustees, as owners of the buildings, &c., on the adjoining lands—both being equally let by the lease. When two subjects let by the owner of both under one lease to one tenant, pass on the landlord's death to two successors—one succeeding to the one, and the other to the other—there must necessarily be an adjustment of their respective rights under the lease, with a partition of the rent accordingly, and that this necessity occurs here is not disputed. Where the lease bears that each of the subjects is let as a distinct and separate subject, at a distinct and separate rent, there will of course be no difficulty in making the adjustment, and consequent partition, for in such case you have in effect two leases although in one deed. I think, and I must say, without doubt, that this cannot, at least *de plano* and without inquiry, be predicated of the lease before us. I say “without inquiry,” for it is conceivable that property may not be worth more for use and occupation than the feu-duty and the public burdens upon it, so that relief of these will be a fair equivalent for such use and occupation given by an ordinary business lease, without grace or favour. This, however, would not be “rent” in the ordinary or any reasonable sense of the word, and the landlord in such lease would no doubt return the rental of the subject let as *nil*. The record is not so precise and satisfactory as it might, and probably ought, to have been, and I have been unable to reconcile the valuations given with those which appear to have been given and accepted in the Valuation Court. But I understand that the testamentary trustees (the owners of the houses) undertake to shew to our satisfaction—1st, that the lease was for a fair rent of both subjects at their lettable value; and 2d, that the fair lettable value of the subject to which they succeeded was about £600. The matter in hand is a just and equitable adjustment of the rights of successors to distinct and separable portions of the subjects let by the lease, with a corresponding partition of the rent, and in dealing with it I think the facts I have stated must, if admitted or proved, be taken account of. Suppose them admitted, the injustice of giving the whole rent to the one party, and to the other only relief of feu-duty, taxes, and repairs is too obvious to require more than simple expression.

Now, is there any *prima facie* unlikelihood in the case which the testamentary trustees aver and (as I understand) undertake to prove? As regards the fair lettable value of their property their statement is confirmed by the valuation in 1885 of the statutory authority under the Valuation Act, and it is not suggested that there was any notable rise of value between 1873 and 1885, although it may possibly be proved that there was. Then as regards the notion that it was the intention of the lease to let the tenants have this property at a fraction of its value (really only for relieving the owner of the owner's burdens), I am disposed to assent to the view of it taken by the tenants under the lease, viz. (as Lord Fraser states it), “that no landlord would give to a tenant property worth £602, 9s. merely because the tenant undertook to relieve him of obligations to the amount of £129, 13s. 4d.” His Lordship does indeed observe upon this that he does “not appreciate the force of the argument,” adding as his reason, “the landlord was content upon receiving a certain lordship,” (viz., in consideration of that) “to let to his tenant upon easy terms all

the houses, stores, and schools which have been separately valued"—i.e., to let to his tenant at £129 what is worth £600. But this simply means that the rent is a fair rent on the whole—the deficiency in the rent with respect to the one subject being made up by an exactly corresponding excess with respect to the other. To do this in terms and of purpose would be unmeaning if not foolish, the same end and result being rationally and without injustice attained by holding that the rent is one rent for both subjects, undistributed (or unapportioned), because both belonged to the lessor and were let to the same lessee.

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In the matter immediately before us, viz., a division or partition of the rent (or rents, if you please, although I think the singular more accurate—the relief from burdens not being in my opinion rent in any reasonable sense of the term) between the two successors, in several parts of the subjects, to the original owner of the whole, we have, I think, a satisfactory principle of justice and equity to guide us. There is no reason for regarding this lease otherwise than as an ordinary business contract for fair valuable consideration on both sides, the tenants giving as rent the fair lettable value of what they got. Nor is there any difficulty in ascertaining what was the fair lettable value of that part of the subjects which has descended to the testamentary trustees. It was indeed ascertained in 1885 to be about £600. The present owners say it is £562. But if the parties differ, the value can be ascertained, and I think the ascertainment should be as at 1873, the date of the lease, and that this (taking account of the tenant's obligation to relieve of burdens falling on the landlord) is as regards these subjects the value which the tenants get from the owner of them in return for the rent they pay. Nor, in my view, does this value ever fluctuate either up or down. The remainder of the value which the tenants take under the lease they take from the owners of Carfin and its minerals, and it may fluctuate, and has in fact always done so, the rent being arranged with reference to the quantity of minerals carried off, which was of course contemplated as a very possible varying quantity. The fixed rent of £800 is the least payable, and taking the testamentary trustees' estimate on record of the value of the property which the tenants have from them, viz., £275, the balance of £525 is what Mrs Church's trustees are on an apportionment or partition (perhaps the preferable word) entitled to receive as the value which the tenants have in their property, although it might consist of mere permission to mine if they pleased, and to exclude others. If they work mines to such extent as to acquire minerals yielding lordship beyond £800—the fluctuation in the value of what they have from Mrs Church's trustees begins to operate, but to the exclusive benefit of these trustees, the testamentary trustees asking no share of it.

I am of opinion, therefore, that the rent ought to be partitioned or divided between the owners of the subjects which produce it, and in respect of which it is paid, according to the value of the subjects contributed by each respectively, and this will, I think, be fairly and satisfactorily done by giving the testamentary trustees the fair lettable value of their property which the tenants have by the lease, without taking any account of the increase of rent beyond £800 in respect of the extended working and appropriation of the minerals. To the whole of this increase the owners of the minerals (Mrs Church's trustees) are in my opinion justly entitled. But I need not dwell on this topic, as the testamentary trustees claim no part of the increase, but put their claim exactly as

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If, therefore, we shall sustain the view contended for by the testamentary trustees, there is no difficulty in making the partition of the rent accordingly, and the only question is whether that view ought to be sustained. It is simply this, that these trustees are entitled to so much of the rent as represents the fair lettable value at the date of the lease of the property which has passed to them, taking account of the tenant's obligation to keep it in repair and to relieve the proprietor of all taxes and burdens upon it falling on them as such. I think it is sound, and ought to be sustained for the reasons which I have stated at length. There really ought to be no dispute between such parties as are before us as to what that fair value is, but if there should be, there can be no serious difficulty in ascertaining it.

A suggestion was made in the course of the argument of a distinction between letting and giving right to use and occupy for a term, which I should have noticed sooner had I attached importance to it, which I confess I did not. I have, however, since writing all that I have already read, and communicating it to your Lordships in consultation, learnt that such distinction is favourably regarded by your Lordships, who dissent from the views which I have expressed, and it is, I think, therefore my duty to express distinctly my opinion upon it. The view, as I understand it, is this—that when a right to work minerals for a term is let to a tenant with right to the tenant to use and occupy specified buildings during the currency of the lease, the tenant paying and so relieving the landlord of all taxes and burdens thereon, and keeping them in repair, the buildings are not really let at all, but only a right of use is given, when the tenant finds it convenient to take it, as an accessory convenience to him in his mineral workings, and that he is bound to relieve the landlord of the burdens and keep the subjects in repair only during such periods as he may find it convenient and so choose to make use of them. I cannot assent to this view as applicable to this lease or to the buildings in question, which really form a village adjoining the mineral workings, and consist of dwelling-houses, shops, stores, and two schools. The word “let” is certainly unnecessary to the constitution of a lease of houses, which is, I think, very clearly effected by any words which give right to use and occupy for a term. The term here is thirty-one years from September 1892, and during the whole of it the tenant has the exclusive right of use and occupation, which the lessor can, during that term, neither take himself nor give to another. The proposition that the tenant's obligation to make the stipulated return (whatever that is) does not, as regards the term, correspond with the term of his right and the landlord's obligation to give that right, whatever use the tenant makes of it, or whether he makes none, is in my judgment untenable. If that were taken to be the meaning of the contract, it would follow that it was to the tenant's advantage, at least in his opinion, that he should, during the currency of the lease, have the control of the buildings to the exclusion of the landlord and all others, whether he found it convenient to use them or not; that the landlord gave him this advantage in consideration of no other return than relief of taxes, &c., corresponding to the periods (and there might be none) of use by the tenant, and that the fact of the landlord giving it to his own manifest detriment was not to be regarded as one of the “causes” for which the tenant on his part agreed to pay the stipulated rent. Suppose that the subject, the right to use and

occupy which was by the lease given to the mineral tenant, the same language being used, had been—not buildings—but a farm (and farms are often let to mineral tenants) of the same lettable value, say £600 a-year, with the proviso that he should relieve the landlord of the burdens, no matter what or of what amount, but only a fraction (larger or smaller) of the lettable value, would it be a true view of the contract that the farm was not one of the subjects thereby let, and was not to be taken account of as referred to in the rent clause commencing with the very intelligible and familiar words—"For which causes and on the other part"? If so, it might indeed follow that if the minerals and the farm passed to different proprietors, the proprietor of the minerals would take the whole rent, the proprietor of the farm taking nothing in the view that the tenant had it rent free.

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If the learned Judges in the Valuation Court thus construed the lease now before us, I could not follow their opinion in adjudicating upon the interests of the parties now before us, which are of a different order and of much greater magnitude than those which had to be considered between the assessor and the tenants under the Valuation Act. It is noticeable that the view on which they proceeded—Lord Fraser at least, for I doubt whether Lord Lee concurred in it—was not presented by the terms of the case stated by the magistrates and adjusted by the parties, and does not appear to have been suggested in the argument. Lord Lee says (12 R. 641)—"But it is maintained that by the lease the stipulated rent of £800 and the stipulated lordship are not due for the minerals alone, but for the combined right of working the minerals and using the houses. The terms of the case support this view, but it is necessary to look at the lease itself in order to see if it is sound." I quote this only to shew that the case adjusted and settled by the parties supported the view of the true meaning and construction of the lease which I have taken. His Lordship proceeds to say—"On an examination of the lease I am of opinion that unless the fixed rent of £800 or alternative lordships are to be regarded as the consideration stipulated for the minerals, it is necessary to revalue the whole subjects. But this is not what is asked by the appellants." And again "it is not one of the facts of the case that the rent of £800 or alternative lordship is in excess of the annual value of the minerals alone." This seems to indicate that a revaluation of the whole subjects would or might have been ordered had the appellants asked for it, or that a statement in the case that £800 (or lordship at the rate named) was in excess of their lettable value would have received effect.

But the question before us is quite another question than this. The whole rent bargained for as such, "for which causes, &c.," may not in 1885 have been in excess of the annual value of the minerals alone, and yet it may have been so in 1873, at least in the estimation of both the parties contracting, who agreed to it as the fair rent and return for the houses and minerals together.

LORD RUTHERFURD CLARK.—The case is attended with much difficulty, but I am disposed to follow the Lord Ordinary, and to concur in the decisions which have been already pronounced. The mineral field is, I think, the true subject of the lease. I regard the right to occupy the houses as a privilege which is given in order that the landlord may obtain the rent of the minerals for which he stipulates. The houses are not let as the other subjects are let. For the tenants are not bound to occupy them, and while nothing can be payable unless

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they occupy, the rent stipulated in the lease is not the less due to the landlord if they do not occupy. The conditions on which they may occupy are stated. They are bound to pay feu-duties and landlord's taxes, &c. I take this to be the consideration for their occupation, and I think that subject to these payments the landlord gave his tenants a right to occupy the houses rent free, as the condition of obtaining the mineral rent. I am aware that in form the rent is stipulated as the consideration for all that the landlord had conceded to his tenants. But we may disregard form in order to give effect to the true meaning of the parties, and I think that we do so when we hold that the rent was truly payable for the right to work the mineral field. It is to be observed that the rent in the option of the landlord might be a lordship on the output, and it is, in my opinion, the most natural construction of the lease to regard such a payment as a rent for the minerals alone.

At the date of the lease the point which we are considering could be of no practical importance. It was immaterial to the owner of the whole subjects from which of them the return was to be made. But this makes it all the more likely that he was regarding the return for the minerals alone, and making an arrangement by which that return should be as large as possible.

If the rent were held to be payable for the houses as well as for the minerals it must be apportioned. It would in that case be a *cumulo* rent, and there could be no other alternative. I see great difficulty in effecting an apportionment, especially as the landlord has been in use to exact a lordship greatly in excess of the fixed rent. The reclaimers were not able to furnish any satisfactory principle. I see no other than this, that the *cumulo* rent should be apportioned among the subjects comprehended within the lease in the ratio of their value. Apart from the difficulty of putting a value on the mineral estate, the application of this principle would lead to very anomalous results. The rent of the houses would be increased in proportion to the increase of the lordships on the minerals. The increase in the output cannot increase the value of the mineral subject. On the contrary it necessarily diminishes it. If the output is maintained, the necessary result would be that an increasing share of the lordship must be apportioned to the houses, and it may be a share altogether exceeding a reasonable rent.

It was said by the reclaimers that in order to fix the rent of the houses we must take the rent at which they are let by the tenants and deduct that rent from the fixed rent or lordship. But this is in no sense apportionment, and is, therefore, inadmissible. Nor can I hold that in making the necessary apportionment we are to take the fixed rent alone, for there is no fixed rent due if the lordships are exacted, and the lordships are payable for the same "causes" as the fixed rent.

These considerations may not be in themselves conclusive, but to my mind they support the construction which I have put on the lease.

LORD TRAYNER.—I quite appreciate the argument addressed to us in this case on behalf of the claimants Dixon's trustees, to the effect that the stipulated rent, whether fixed rent or royalty, is to be paid in return for or in consideration of the whole rights conferred on the tenants in that part of the lease which precedes the rent clause, and that therefore some part of the rent is due and paid in respect of the houses in question. The words "for which causes," &c., with which the rent clause commences, might bear the construction put upon

it by Dixon's trustees without doing any violence to the language used. But a consideration of the whole clauses of the lease bearing upon the question now to be decided leads me to the same conclusion as that which the Lord Ordinary has reached. The real subject of the lease is the mineral let, and for it the rent is stipulated. That the stipulated rent is payable for the minerals and for the minerals only, appears to me to be a conclusion supported by the fact that that rent is to be estimated or ascertained by a royalty or lordship on the quantity of minerals worked by the tenant, a mode never adopted so far as I know for ascertaining or fixing the rent of houses. It is quite true that the lease stipulates for a fixed rent or royalty in the option of the landlord. But that in effect is just stipulating for lordship, with the proviso that the landlord shall never be required to accept less as lordship in any year than the sum denominated fixed rent. In addition to the right to work the minerals for which the royalty or lordship is to be paid, a right is conferred on the tenant to occupy certain houses, but the conditions upon which that right may be exercised are stipulated for separately from the conditions on which the minerals are to be worked. If the houses are occupied by the tenant, then he is to keep them in repair, and to pay the feu-duty and landlord's taxes effeiring thereto. These, however, seem to me to be the whole of the tenant's obligations in respect of his occupancy of the houses. If he does not exercise his right of occupying the houses he incurs no obligation to the landlord for repairs or otherwise. But his other obligations in respect of the minerals are not affected by his occupancy or non-occupancy of the houses. I think with the Lord Ordinary that the right to occupy the houses is a separate right from the right to work the minerals, and that the conditions on which the two rights or either of them may be exercised are separately stipulated. I agree further with the Lord Ordinary in thinking that the argument for Dixon's trustees is based more upon the mere collocation of the clauses in the lease than upon the terms of the clauses themselves. If the clause conferring the right to occupy the houses in the precise terms in which it now stands had been inserted after the rent clause, there could have been no question.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

MELVILLE & LINDSAY, W.S.—F. J. MARTIN, W.S.—Agents.

DAVID RITCHIE AND ANOTHER (J. F. Watson's Trustees), Pursuers
(Respondents).—*Dickson—James Reid.*

JOHN ANDREW HAMILTON, Defender (Reclaiming).—*D. Dundas—
C. K. Mackenzie.*

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Succession—Vesting—Substitution.—A testator by holograph settlement left the liferent of his whole estates, heritable and moveable, to his widow. He then disposed of the fee of his estates, and, *inter alia*, provided, "I leave to my nephew J. F. W. my estate of B, but I wish it expressly understood that in the event of my said nephew dying without leaving any lawful heir-male of his body, then and in that event my said lands of B are to revert back to my nephew J. H."

J. F. W. survived the testator, but predeceased the testator's widow unmarried, and was survived by J. H. J. F. W. left a general trust-disposition and settlement of his whole estates, heritable and moveable.

In a question between J. F. W.'s trustees and J. H., *held (diss. Lord Young)*

No. 88. that the fee of the lands of B vested in J. F. W. at the testator's death, subject to a simple substitution in favour of J. H., in the event of J. F. W. dying without leaving an heir-male of his body, which substitution had been evacuated by J. F. W.'s general disposition.

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2D DIVISION.
Lord Low.

WALTER WHYTE, of Bankhead, died on 16th September 1880, leaving the following holograph writing, which was held to be testamentary—*Hamilton v. Whyte*, July 13, 1881, 8 R. 940, aff. June 15, 1882, 9 R. (H. L.) 53:

“ Bankhead 19 June
1873

“ Notes of intended Settlement by Walter Whyte of Bankhead.

“first—I liferent my wife Mrs Margaret Pollok or Whyte, in my whole estate both Heritable & Moveable burdened with an Annuity of £300 Stg Three hundred pounds sterling a year to my Sister Mrs Jane Macknish Whyte or Hamilton Widow of the late James Hamilton Writer in Glasgow should my wife survive me—at the death of my Wife said Annuity to cease, In place thereof I leave to my said Sister Mrs Jane Macknish Whyte or Hamilton in liferent only and to my nephew John Hamilton Writer in Glasgow in fee my pro indiviso half of the lands of Kenmuir situated in the parish of Old Monkland & County of Lanark, likewise my pro indiviso half of the lands of Shettleston situated in the Barony parish of Glasgow & said County of Lanark—To my nephew James Hamilton I leave my lands of Cuthill & Newmill of Brieche &c. situated in the parish of Whitburn & County of Linlithgow subject to the liferent of his mother the said Mrs Jane Macknish Whyte or Hamilton I also leave to my nephew James Frances Watson presently residing at Ardmore House in the Parish of Caddross Dumbartonshire, my Estate of Bankhead situated in the parish of Rutherglen and County of Lanark, but I wish it expressly understood that in the event of my said Nephew James Frances Watson dieing without leaving any lawful male heir of his body—Then & in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton, my Moveable Estate at the death of my said wife is to be equally divided between,” &c.

Mrs Whyte, the testator's widow, died on 20th September 1892, predeceased by his nephew James Francis Watson, who died unmarried on 3d April 1883, leaving a trust-disposition and settlement, dated 14th September 1870, by which he conveyed to trustees, as trustees for the ends, uses, and purposes therein mentioned:—“ All and Sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, at present belonging or that may belong to me at the time of my decease, including also all means and estate over which I have the power of testing and disposal, together with the writs and vouchers of the same, and all action, diligence, and execution competent to follow thereupon.”

On 1st March 1893 James Francis Watson's trustees raised an action against John Andrew Hamilton [designed John Hamilton in the settlement], of which the leading conclusion was for declarator that the lands of Bankhead “were vested in the said James Francis Watson in fee, absolutely and without restriction or limitation, except a life-rent in favour of the testator's widow, Mrs Margaret Pollok or Whyte, and were validly and effectually conveyed to and vested in the pursuers as trustees of the said James Francis Watson, by the general conveyance or disposition in their favour contained in his foresaid trust-disposition and settlement, dated and recorded as aforesaid, for the ends,

uses, and purposes therein set forth: And it ought and should be found and declared, by decree foresaid, that the destination in favour of the defender contained in the foresaid settlement of the said Walter Whyte of his estate of Bankhead, including therein the whole of the subjects before described, in the event of the said James Francis Watson dying without leaving any lawful male heir of his body, was, and has been, evacuated by the conveyance or disposition in favour of the pursuers contained in the foresaid trust-disposition and settlement of the said James Francis Watson, and that the defender has no right or title to or interest in the said estate of Bankhead." There were also conclusions for reduction of two notarial instruments with reference to the lands of Bankhead, and of a decree of general service as heir of provision to James Francis Watson, expedite by the defender, but as it was admitted that if decree of declarator were granted, decree in terms of the reductive conclusions followed as a matter of course, the latter need not be further noticed.

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The defender lodged preliminary defences, and a record was made up.

The pursuers pleaded;—(1) By the terms of the late Mr Whyte's settlement the fee of the estate of Bankhead having vested in his nephew James Francis Watson, and having been conveyed by Mr Watson to the trustees in his trust-disposition and settlement, the pursuers are entitled to decree of declarator as concluded for. (2) The destination of the estate of Bankhead in the said Walter Whyte's settlement in favour of the defender having been evacuated by the conveyance to his trustees in the trust-disposition and settlement of the said James Francis Watson, the pursuers are entitled to declarator to that effect as craved.

The defender pleaded;—(1) The pursuers' averments are irrelevant. (2) The defender is entitled to absolvitor in respect—(a) That, under the late Walter Whyte's settlement no right of fee in the subjects in question ever vested in the late James Francis Watson. (b) That, in view of the terms of the destination of the said subjects contained in the said settlement, the said James Francis Watson was barred from granting any gratuitous deed dealing with the said subjects to the prejudice of the defender. (c) That it was a valid condition and qualification of any right conferred on the late James Francis Watson by the said Walter Whyte's settlement that the subjects in question should revert to the defender in the event of the said James Francis Watson dying without leaving a male heir of his body. (d) That the trust-disposition and settlement of the said James Francis Watson was inept and ineffectual to affect the said subjects or to alter the destination thereof contained in the settlement of the late Walter Whyte. (e) That, on a sound construction of the late Walter Whyte's settlement, and in view of the events which have occurred, the fee of the said subjects is now vested in the defender.

On 1st July 1893 the Lord Ordinary (Low) pronounced decree in terms of the declaratory conclusions, and granted leave to reclaim.*

* "OPINION.—I confess that this case does not seem to me to be one of difficulty.

"In the first place, I think that it is clear that the fee of the estate of Bankhead vested in James Francis Watson. The testator gave his widow a liferent of the whole estate, and in regard to the estate of Bankhead the words of the settlement are,—'I also leave to my nephew James Francis Watson, presently residing at Ardmore House, in the parish of Cardross, Dumbartonshire, my estate of Bankhead.'

"Now, that is an absolute conveyance, subject only to the liferent of the testator's widow, and I do not see how it can be contended that the conveyance

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The defender reclaimed, and argued ;—The fee of Bankhead had never vested in James Francis Watson, he having predeceased the liferentrix, and as he had died without leaving an heir-male of his body, the fee was now vested in the defender. Had this been a conveyance in trust, with directions to the trustees to hold Bankhead for behoof of the testator's widow in liferent, and on her death to convey the fee as in the deed, it could hardly have been disputed that, on the authority of the cases from *Young v. Robertson*¹ downwards, the vesting of the fee in the events which had happened was postponed ;² and although there was no conveyance in trust here, the same result ought to follow, in accordance with the testator's evident intention, which was to postpone the vesting of the fee until the death of his widow, with the view, it might be conjectured, of ensuring as far as possible that the fee should then pass to a relative of his own. "At the death of my wife" was to be read into each sub-

is not to take effect, at all events to the effect of giving the fee to the donee *a morte testatoris*.

"But then it is said that there was a clause of return here, to take effect, in the event which happened, of James Francis Watson dying without leaving any lawful heir-male of his body, and that that clause of return cannot be evacuated by him, at all events by a voluntary conveyance, or by deed of settlement. I think that it has long been settled that although a clause of return to the granter or his heirs is good against a donee, a clause of return in favour of a stranger is not in any higher or better position than a simple substitution. I am of opinion that the clause of return here is, for the purpose of questions of this sort, a return in favour of a stranger. There is no averment upon record that John Andrew Hamilton was heir-at-law of the testator, and whether he was in fact so or not he is not called in that capacity, but simply as 'my nephew John Andrew Hamilton,' and it is not unimportant to notice that James Francis Watson, to whom the direct conveyance of Bankhead was made, is also a nephew of the testator. So here we have an absolute disposition of the estate to one nephew, and a clause of return in favour of another nephew.

"It seems to me that, upon the authorities which were cited at the bar, that is just a substitution, and a substitution which it was in the power of James Francis Watson surviving, as he did, the time when the gift came into operation, viz, the death of the testator, to evacuate if he chose to do so.

"The next question is, whether or not he has evacuated that substitution by the general deed of settlement which he left. Now, I think that it has been settled by the case of *Thoms* that a general disposition carries all the estate over which the granter had power of disposal, and the extraneous circumstances which, in the case of *Glendonwyn*—and I think one other case—were held to overcome that general view, simply shew, I think, that that is the general rule, because it was assumed in that case that a general disposition would carry everything over which the granter had power of disposal, unless there were circumstances to shew that he did not intend to do so.

"Now, here there are no such circumstances whatever. You have an estate conveyed to him which he might dispose of, and you have him disposing, in the most absolute terms, 'All and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, at present belonging or that may belong to me at the time of my decease.' I think that it is clear that that carried this estate, which, as I have said, vested in him, and which, although it was subject to substitution, he could dispose of, with the effect of evacuating that substitution. I therefore apprehend that decree must be pronounced in favour of the pursuers. . . ."

¹ *Young v. Robertson*, Feb. 14, 1862, 4 Macq. 319.

² *Bogle's Trustee v. Cochrane*, Nov. 29, 1892, 20 R. 108 ; *Cumming's Trustees v. White*, March 2, 1893, 20 R. 454.

sequent bequest of the fee of the several portions of the testator's estate. No. 88.
 A writing like the present ought to receive a liberal construction so as to carry out the testator's intention, for it was a holograph writing; it was styled "notes of intended settlement," shewing that the testator contemplated the preparation of a formal deed; and it was in the form of a will, not a *de presenti* conveyance. Words of bequest were now effectual to carry heritage, as being equivalent to a disposition or conveyance.¹ That meant such a disposition as would carry out the testator's intention, and not necessarily an absolute disposition in favour of the person first called under the will.² It was said that the defender's contention could be sustained only on the assumption that the fee was *in pende* until the death of the liferentrix, or at least until the death of J. F. Watson without leaving an heir-male of his body. But the argument that a right of fee could not be *in pende* would not be sustained—except in the class of cases to which its application must now be regarded as settled by authority—where the result would be to defeat the testator's clear intention. It was not necessary, however, to hold that the fee here was *in pende*. The will was capable of the construction that the fee vested in J. F. Watson, subject to defeasance in the events which had occurred, or what was here in effect the same thing, subject to a clause of return which J. F. Watson could not evacuate by any gratuitous deed. Even if the fee had vested in J. F. Watson absolutely, there was admittedly a substitution in favour of the defender, and this substitution had not been evacuated by J. F. Watson's general settlement.³

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Argued for the pursuers;—The gift of Bankhead was equivalent to a conveyance in fee to J. F. Watson, and that conveyance took effect on the death of the testator. If it did not take effect then, the fee was necessarily *in pende* until it took effect. The sound construction of the will was that there was a mere substitution in favour of the defender, and that substitution had been evacuated by J. F. Watson's settlement. It was now settled that a general disposition evacuated a prior special destination, not granted or taken by the granter of the general disposition, unless there was evidence extrinsic or within the will of a contrary intention.⁴ There was no such evidence here.

At advising,—

LORD YOUNG.—Walter Whyte, who died in 1880, was at his death owner of the lands of Bankhead, and the question in the case is as to how he has settled the succession to these lands by his will dated 19th June 1873, it having been decided by this Court and the House of Lords that the will is valid and effectual to settle the succession according to its true construction and legal import. The question thus comes to be, what is the true construction and import of the will in this matter. That the succession to these lands in liferent is by the will settled on the testator's widow is clear and undisputed, and she accordingly enjoyed the liferent from his death in 1880 until her own death in 1892. The question therefore is, how is the succession to the fee settled?

¹ Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), secs. 19 and 20.

² Studd v. Cook, May 8, 1883, 10 R. (H. L.) 53.

³ Glendonwyn v. Gordon, May 19, 1873, 11 Macph. (H. L.) 33, 45 Scot. Jur. 183.

⁴ Thoms v. Thoms, March 30, 1868, 6 Macph. 704, 40 Scot. Jur. 364; Gray v. Gray's Trustees, March 24, 1878, 5 R. 820; Campbell v. Campbell, July 8, 1880, 7 R. (H. L.) 100.

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That it is primarily settled on the testator's nephew James Francis Watson is undoubted. Whether this primary settlement is absolute—or only contingent on James Francis Watson's survivance of the testator—or whether it is contingent on his survivance of the liferentrix, is the question in dispute. The words, the effect of which is in dispute between the parties, are these,—“But I wish it expressly understood that in the event of my said nephew James Francis Watson dying without leaving any lawful heir-male of his body, then and in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton.” The words “revert back” are obviously inaccurate and inappropriate, but I think they must nevertheless have effect as importing that in the event specified the lands shall go to John Hamilton, or that the succession thereto (the succession to the testator therein) shall devolve on John Hamilton. The event specified is—“my said nephew James Francis Watson dying without leaving any lawful heir-male of his body,” and no time or limit of time for its occurrence is expressed. But the parties were agreed, and I think rightly, that some intention, to be collected from the will, must be imputed to the testator on this subject. He necessarily contemplated Watson's survivance or predecease at some period or other capable of being specified, although not in terms specified by himself, and meant that if he survived that period the succession should devolve on him, and that if he predeceased it leaving an heir-male of his body, the succession should devolve on that heir; and, on the other hand, that if he predeceased that period without leaving such heir, the succession should devolve on John Hamilton. What is that period? The pursuers say the death of the testator. The defenders say the death of the liferentrix.

Now, in answering this question we must, I think, have regard to the fact that the instrument we have to construe is not a deed of conveyance, but a will expressive of a testator's intention. The distinction is material. In construing and determining rights under a deed of conveyance we are governed by established technical rules which we cannot generally—certainly not always—sacrifice to a well-founded conviction that they lead to results contrary to the maker's intention. In the case of a will intention always prevails. We may possibly mistake the intention, but we must give effect to what we are judicially convinced was the intention, and authorise and order to be done whatever is formally necessary to carry it out. Now, a more striking case of a will, a writing only expressive of intention, as distinguished from a deed of conveyance, than that which occurs here cannot easily be conceived. The maker's intention as to the settlement of his heritable as well as his personal property is expressed, and must have effect as to both according to intention, and I should think clearly, without allowing any conveyancing technicalities to prevail over the intention, as they might in a deed of conveyance of land. And in my endeavour to reach the intention I cannot distinguish between land and money, but must, I think, take the same language as meaning the same thing with respect to either.

The Lord Ordinary assumes that there is in this instrument an absolute conveyance of Bankhead to J. F. Watson, subject only to the liferent of the testator's widow, and if the assumption were sound I should not question the conclusion that the fee is therefore given *a morte testatoris* notwithstanding the subsequent provision for the event of the death of the disponee without an heir of his body.

But have we any such case to deal with? I think not. The testator expresses his will to the effect that his widow shall liferent everything, whether land or money, and that at her death there shall be distribution of every thing, both land and money. There could be no distribution before. In the distribution some of the objects of his bounty are to have land, and others money. His nephew J. F. Watson is to have land—the estate of Bankhead—and it is in the expression of the testator's will to this effect that he expresses his wish that it shall be understood that in the event of J. F. Watson dying without an heir-male of his body the estate of Bankhead shall go to John Hamilton. Now, it seems to me clear, as matter of intention, that what the testator meant was, that if neither Watson nor an heir-male of his body existed at the period of distribution Bankhead should go to Hamilton. This is certainly the meaning which, on the very same words, we should have imputed to the testator using them, had the subject been money; and in construing a will so as to reach the testator's intention no reason occurs to me why we should construe the same language differently according as the subject of it is land or money. Prior to the Act of 1868 the language of mere will without *de presenti* conveyance was inoperative, but this is no longer so, and the language of will is as operative with respect to land as with respect to money. Our system of public records necessitated provision for making up a recordable title. Such provision is accordingly made by declaring that when in a will words are used with reference to land, which, if used with reference to money or other moveable property, would give a right to the beneficiary to claim and receive the same, they shall be deemed equivalent to a general disposition of such land within the meaning of sec. 19 of the Act of 1868, so that a recordable title may be completed as provided in that clause. But the formal completion of the title being the sole purpose of this provision, and indeed the sole purpose of sec. 19 of the Act, it would, I think, be outside and foreign to that purpose to take any account of the provision in construing words of survivorship, or, which is the same thing, words providing for the event of predecease. The disposition to be implied from words of testamentary bequest or expression of will, must be a disposition in accord with the meaning and intent of the will. If the meaning and intent to be collected from the will now in question be that Watson should have absolute right to Bankhead *a morte testatoris*, and that it should thereafter be subject to his debts and deeds (of course saving the liferent), then the implied disposition will be a disposition to him, and a title may be completed accordingly. If, on the other hand, we shall be of opinion that the testator meant that Hamilton should have the lands in the event of Watson predeceasing the liferentrix without leaving an heir-male of his body, then the disposition to be implied for the purpose of completing a title must be a disposition to him.

It was suggested as a difficulty that a fee in land cannot be *in pendente*. I do not appreciate the difficulty, which I think imaginary. It would certainly have equally existed had the testator signified in the most explicit terms his will and intention to be that in the event of Watson surviving the liferentrix he should have Bankhead, or predeceasing her leaving an heir-male of his body, that such heir should have it, but that in case of his predeceasing the liferentrix without leaving such heir, that then Hamilton should have it. I could not countenance the notion that such a will would be inoperative or incapable of execution according to the only meaning which the words expressing it could

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bear, because of a difficulty in finding a place of rest and repose for the fee during the subsistence of the liferent.

I have already observed that I think the construction of the survivorship clause (or clause providing for the event of predecease) would have been clear had the subject of the gift been moveable property or mixed property, both heritable and moveable, and need not refer to the authorities, of which the case of *Young v. Robertson*, 4 Macq. 314, is now perhaps the chief. That was a case relating to both heritable and moveable estate, and there being a trust, there was of course a disposition which did not, however, and could not affect the construction of the survivorship clause. Suppose the testator here had left to his nephew Watson the lands of Bankhead, and also the sum of £10,000, with exactly the same expression of his will in the event of Watson dying without leaving an heir-male of his body, is it doubtful that the event would, on the authority of *Young v. Robertson*, have been referred to the death of the liferentrix, or would it have been referred to the death of the testator as to the land, and to that of the liferentrix as to the money?

LORD RUTHERFURD CLARK.—I agree with the Lord Ordinary.

By force of the Act of 1868 the will is equivalent to a general conveyance in favour of James Francis Watson. If it were not it would not affect the heritage of the testator. It is only operative because it is a conveyance or equal to a conveyance. Further, I think that it came into operation from the testator's death. There is no other time assigned. The creation of a liferent and annuities did not postpone the disposition of the fee. These are burdens merely, either on the land or on the fiar. Accordingly, under the will, James Francis Watson, on the death of the testator, could have made up a feudal title to the lands by expediting a notarial instrument under the Titles to Lands Act. That he did not do so is of no importance, for the will as a general conveyance vested in him a personal fee.

It is said that the clause which declares that on failure of heirs of the body of James Francis Watson "the said lands of Bankhead are to revert back" to John Hamilton, has the effect of suspending the conveyance till the death of the liferenter. I cannot see that it has. The words of the clause seem to imply an immediate fee. For unless such a fee were taken the lands could not "revert" to Hamilton, and Watson seems to be the only person from whom they could so revert. But I am not disposed to put my judgment on any such narrow ground. I think that the clause is a substitution of Hamilton on the failure of Watson and the heirs of his body. It can be nothing else if we hold that the conveyance took effect on the death of the testator.

If there had been a trust, and if the trustees had been directed to convey on the death of the liferenter, the case would have been different. For in that case it would probably be held that the trustees were bound to convey to a beneficiary who survived the period at which they were directed to convey, and that no interest could vest in anyone who died before that date. But we are here dealing with a direct conveyance, which, unless there be some limitation to the contrary, must come into operation at the testator's death, and as on this view it necessarily created a fee in Watson, the clause in favour of Hamilton can only be a substitution.

I am further of opinion that the substitution was evacuated by the general settlement of James Francis Watson. I need not say more on this head.

LORD TRAYNER.—I agree with Lord Rutherford Clark.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

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DONALD M'VICAR, Pursuer (Reclaimers).—*Dickson—Clyde.*

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THE SCHOOL BOARD OF THE PARISH OF KILTEARN, Defenders (Respondents).
—*Lord-Adv. Balfour—Sym.*

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School—Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62)—Emoluments of teacher appointed prior to Act—Government grant.—The schoolmaster of a parish, appointed prior to 1872, raised an action against a school board for payment to him of the whole Government grant for the year 1892-93, in which he averred that "in terms of his appointment and according to the usage of the parish" his emoluments included "... (3) the whole of the ordinary Government grant earned by and payable to" the school; that the school board had acknowledged and acted upon the terms of his appointment; and that he had received payment of the whole grant down to 1892. He also founded upon a "special agreement" contained, as he alleged, in certain minutes of the school board dated in 1888 and 1890, which set forth that, as the schoolmaster received "all the annual grant earned by the school, it was not incumbent upon them to appoint salaried" teachers, but that they were willing "to sanction the appointment of such 'at his own expense,'" and that they sanctioned certain appointments accordingly. The Court *dismissed* the action as irrelevant, in respect that the pursuer had no right to the Government grant in virtue of his office as an "old" teacher, and had stated no relevant case of a specific contract with the school board giving him a right thereto.

DONALD M'VICAR, schoolmaster of the parish of Kiltearn, raised an action against the School Board of that parish for payment of £157, 2s., being the amount of the ordinary Government grant for the year from February 1892 to February 1893.

1st DIVISION.
Ld. Wellwood.

The pursuer set forth that he had been appointed schoolmaster of the parish of Kiltearn by the heritors in January 1871, and that since the passing of the Education (Scotland) Act, 1872, he had continued to act as teacher under the School Board.

He averred,—(Cond. 2) "The emoluments of the pursuer, in terms of his appointment, and according to the usage of the parish, include, besides house and garden—(1) a fixed salary, which, as at his appointment, was at the rate of £35, but was, by minute of the School Board, of date 3d June 1873, increased to £50, in respect of the reduction then made in the rate of school fees; (2) the whole school fees; and (3) the whole of the ordinary Government grant earned by and payable to said school. In 1889 the school fees were abolished, and the compensation payable to the pursuer in lieu thereof has not yet been adjusted by the School Board. The pursuer was, since his appointment in 1871 down to 1892, duly paid the said fixed salary and the whole of said ordinary grant. Down to 1889 he also received the whole school fees. The School Board have all along and down to 1892 acknowledged and acted upon the terms of the pursuer's appointment and the usage in the parish, as above set forth; and, by minutes of date 20th August and 11th December 1888 and 25th February 1890, it was specially agreed by the School Board with the pursuer that, in respect of the said terms on which the pursuer held office, he should himself provide and pay the necessary monitors

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and pupil-teachers, and he has done so accordingly in the case of two pupil-teachers.*

The defenders stated that they "disputed the pursuer's claim to be entitled in every year during which he is schoolmaster to the whole Government grant, whatever it may be, as part of the emoluments in which he is secured." They averred that he had not been prejudiced in his emoluments by the defenders, but was in receipt of a sum exceeding what he got in 1872.† They explained that they had paid to him out of the Government grant a sum which greatly exceeded the amount of grant which he had received at the passing of the Act in 1872.

The pursuer pleaded;—(1) The pursuer having right to the whole ordinary Government grant earned by the school in virtue of his appointment, as condescended on, the defenders are bound to pay the amount thereof. (3) In any event, in respect of the agreements condescended on between the School Board and the pursuer relative to the appointment of the pupil-teachers of said school, the pursuer is entitled to decree, as concluded for.

The defenders pleaded;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (3) The defenders not having undertaken to pay to the pursuer the whole Government grant, and, *separatim*, not being bound so to do, the action cannot be maintained.

On 16th November 1893 the Lord Ordinary (Wellwood) repelled the third plea in law for the pursuer "in so far as stated as a separate ground of action," and before further answer allowed a proof. ‡

* "Excerpt from minute of meeting held 20th August 1888.—The clerk produced a letter dated 18th May 1888 from Mr M'Vicar, teacher, making application for two temporary monitors owing to the increase in the average attendance of the school. The board having gone into the matter considered that, as Mr M'Vicar receives all the annual grant earned by the school, it is not incumbent upon them to appoint salaried temporary monitors, but they are willing to sanction the appointment of such at Mr M'Vicar's own expense." The minutes of 11th December 1888 and 25th February 1890 approved the appointment by Mr M'Vicar of two pupil-teachers at salaries "payable by him."

† The Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 55, provides,—That teachers in office before the passing of the Act "shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained. . . ."

‡ "OPINION.—As originally framed, the summons was brought to try the general question whether the pursuer, who is an 'old schoolmaster,' is entitled to receive the whole of the Government grant. The sum sued for, £157, 2s., was the amount of the Government grant earned between 28th February 1892 and 28th February 1893. The summons does not contain any declaratory conclusions. But, as I have said, the pursuer's original pleas raised the general question.

"On adjustment, however, the following plea was added—'3. In any event, in respect of the agreements condescended on between the School Board and the pursuer relative to the appointment of the pupil-teachers of said school, the pursuer is entitled to decree, as concluded for.' This plea, if well founded, would be sufficient for the decision of the case, although it would not settle the general question. I am of opinion, however, that the arrangement made by the board with the pursuer as to the appointment and remuneration of the two pupil-teachers is too narrow a foundation on which to build a claim for the whole of the Government grant during the currency of those appointments. The board relieved the pursuer of his obligation to pay the pupil-teachers before the commencement of the period during which the Government grant sued for

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The pursuer reclaimed, and argued;—The Lord Ordinary was wrong in repelling the pursuer's third plea in law. The agreement condescended on, and set out in the minutes referred to, was not *ultra vires* of the School Board, who were entitled to contract with a schoolmaster with regard to the Government grant.¹ Even if the minutes did not themselves embody a contract they were clear evidence of an antecedent contract to give the pursuer the whole grant. The actings of the School Board had been up to 1892 in accordance with that understanding, and the pursuer was therefore entitled to a proof to establish the agreement.

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Argued for the defender;—(1) The action was irrelevant, and the Lord Ordinary should have sustained the plea to that effect. It was necessary first to consider the pursuer's right as an "old" teacher, and next his allegation of the defenders' obligations to him. Now, the pursuer had no right to the whole Government grant in virtue of his office as an "old" teacher, and he had made no relevant averment of a contract giving him such a right with either the heritors or the School Board. That clearly distinguished this case from those cited by the pursuer, for these actions were founded upon contract. The Government grant was by the Act of 1872 payable to the board and not to the teacher, and the only right given by that Act to the teacher was that he should not be prejudiced in his emoluments by any new arrangements made by the board after 1872.² It had not been suggested that the pursuer had been so prejudiced. (2) The minutes produced shewed no contract at all that the pursuer was to get the Government grant. They only shewed that while he had it all, the board would direct him to pay assistant teachers, for whom he asked, out of it. That was part of the administration of the fund.

LORD PRESIDENT.—I think that we are in a position to dispose of this action finally now, and I am of opinion that the pursuer's case fails on both the grounds which are stated. I agree with the defenders that the proper order in which to consider the pursuer's case, even for the purpose of estimating the alternative case which he presents in the third plea, is to ascertain first of all what are the original rights which he asserts himself to have possessed. Now, this much is plain, that he has not set out on record any new contract, or any innovation upon his rights during the period of the administration of the School Board, beginning with its formation in 1872 down to the events of 1888 and 1890. He says that in terms of his appointment, and according to the usage of the parish, his emoluments included salary, fees, and the "whole of the ordinary Government grant earned by and payable to said school." Now, these last words seem to contain a fallacy. They certainly cannot represent—he

was earned; and I do not think they are now barred from disputing the pursuer's claim to the whole of the grant. What happened was simply this. The pursuer asked the board to appoint additional teachers. They said, 'We are willing to do so, but, as you are at present drawing the whole of the Government grant, you must pay them.' I do not think that this amounts to a contract between the board and the pursuer, that so long as the appointments of the pupil-teachers continued, he should continue to draw the whole of the Government grant, even if he ceased to pay the salaries. I think that, on the School Board undertaking themselves to pay the pupil-teachers, the question as to the pursuer's right to the Government grant became as open as it was before."

¹ Somers v. School Board of Teviothead, Oct. 31, 1879, 7 R. 121; Smith v. School Board of Inveraray, Dec. 8, 1891, 19 R. 247.

² Grant v. Urquhart, &c. School Board, March 17, 1886, 13 R. 783.

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does not profess to represent—that these are the words of his appointment. I think we must read this as an averment that when he was appointed in 1871 he was entitled to the salary, fees, and the existing Government grant, which, as we know, was voted by Parliament to the schoolmaster of a particular parish. School Boards then came into existence, and from that time onwards down to the period in dispute the course of events, no doubt, was that the board suffered him to receive a grant which was payable in terms of the orders of Parliament, not to him but to them. They allowed a system of administration to go on, about which it is not necessary to say more than that it is not in exact conformity with the relative rights and duties of the School Board and schoolmaster. The schoolmaster was allowed during that period to act as if he was the head of an enterprise school, accountable to them only for the successful administration of the school, which nominally, as they treated it, but really in point of law, was under their control. But the important point, as it seems to me, is the negative one that from the time when the heritors appointed the pursuer down to the period in dispute, the School Board did not enter into any contract with him at all. The only act alleged in this record to have been done by them is the increase of his salary, which has no bearing on the question.

Well then what was the pursuer's position say in 1888? He had no contract with the School Board, but had certain statutory rights secured to him by the Statute of 1872, and these may be stated shortly as the right to receive an equivalent in money of the total emoluments he held at his original appointment. Now certain letters and minutes are referred to, which go no farther than to prove that that state of matters existed *de facto*. This gentleman was receiving the whole of the grant, and the School Board naturally looked to him to bear the burdens effeiring to the person whoever he might be who received the grant. But I cannot discover in these papers anything beyond the recognition of that fact, and cannot discover any act done by the School Board by which that system, which I think was not normal and was scarcely legal, was stereotyped and imposed on them as matter of contract. Then, when we come to the period of 1888, it is important to observe what the pursuer's case on record is. He founds on certain specific minutes which primarily and directly relate to an increase of the staff of the school; and it is only indirectly that they bear on his own rights. Now, if he had said that there was an antecedent contract of which this transaction furnished evidence I could have understood his case, but he says this transaction about the pupil-teachers was itself a contract relating to the future appropriation of this grant. I cannot assent to this view. The situation may be illustrated in this way. Suppose a new school board had come into office the moment after this minute was passed, I think it is quite clear it would have been within their powers, and probably part of their duty, to say,—“We are the recipients,—the statutory recipients,—of this parliamentary grant; it has not been assigned away; it is questionable whether it could be; but we shall from henceforth ourselves receive the grant, make the pupil-teachers take their proper place under us, and we shall be their paymasters, relegating the master to his rights.” Supposing that had been done at the critical period of April 1892, the schoolmaster might have had a grievance which might be represented thus. He would say,—“From February down till now I have been acting on the assumption that the money was to come into my hands.” Well, I think the answer of the Lord Advocate is conclusive, that assuming such a grievance to exist, the remedy for it is not

a claim for payment of the grant, but a claim for compensation, and the only measure of compensation allowed is the difference between what he actually got and the quantum of his emoluments in 1872. Therefore I think the case on the second branch is unsound in fact and in law, and it appears to me that we are in a position to dispose of this case without proof. The parties table the minutes which form the alleged contract which we are asked to enforce, and there are not averments that would extend or develop the scope of inquiry beyond these documents. I therefore think that we should recall the Lord Ordinary's interlocutor, and dismiss the action.

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LORD ADAM.—I am of the same opinion. By the interlocutor under review the Lord Ordinary does two things,—he “repels the third plea in law for the pursuer, in so far as stated as a separate ground of action, and before farther answer, allows the pursuer a proof of his averments, and to the defenders a conjunct probation.” The pursuer objects to the first finding of the Lord Ordinary's interlocutor, and the defenders object to the second finding, so that neither party is agreed on this judgment. I agree with your Lordship that the first question is, whether or no there is anything to go to proof, and I also agree that there is nothing to go to proof. The averments which are supposed to require proof apart from the special agreement founded on in 1888 are these,—“The emoluments of the pursuer in terms of his appointment, and according to the usage of the parish, include, besides house and garden, (1) a fixed salary,” and so on. What is there to go to proof there? There is no averment of agreement or contract at the date of his appointment,—nothing said of such an agreement; and if you look at the pleas in law to elucidate the averments on record, the first plea in law is this,—“The pursuer having right to the whole ordinary Government grant earned by the school in virtue of his appointment, as condescended on.” What does that mean? It means—“In virtue of my appointment, in virtue of my being public schoolmaster, in virtue of my being appointed before 1872, I have certain rights,” and one of these rights, he says, is a right to the ordinary Government grant. Well, as the Lord Advocate said, we would require to know what followed upon the appointment of public schoolmasters before 1872, and we know, as your Lordship has said, that before 1872 these school grants were voted directly to the teachers by Parliament, and that in 1872 this was changed and this grant appropriated by the School Board for School Board purposes. Now, why, or in what manner, in virtue of his appointment as schoolmaster, did this pursuer acquire right, as he says he acquired it, to the ordinary Government grant? I think he had no such right. If that be so, as I think it was, when we come to consider the second part of the case—the alleged special agreement contained in the minutes of 20th August and 11th December 1888 and 25th February 1890,—do we find any agreement here, in which the School Board agreed that during the currency of this appointment, or in all future time, he, the schoolmaster, should have what he never had before, the right to all the ordinary Government grant? I do not think any contract could be spelt out of these minutes and documents. It humbly appears to me that the view of the Lord Advocate is the right view as to the minute of 20th August on which he founds. The whole matter comes to this: the schoolmaster being *de facto* by a voluntary allowance in possession of the whole of the school grant, it is right and proper that if you want assistants you must pay for them. I can spell nothing else out of the minutes

No. 89. and letters than that; and if that is the state of matters, I agree with your Lordship that our course is to dismiss the action.

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LORD M'LAREN.—It appears to me that the foundation of the arguments and of any view which can be taken in this case must be the 55th section of the Education (Scotland) Act of 1872. That section provides that a schoolmaster appointed prior to the passing of the Act shall not in respect of emoluments as by law, contract, or usage secured to or enjoyed by him at the passing of the Act be prejudiced by any of the provisions of the Act. Now, when an Act of Parliament dealing with pecuniary rights states that a person having a vested right shall not be prejudiced by a new arrangement, that would seem to me *prima facie* to mean that his emoluments shall not be cut down, that he shall be entitled to the same sum in money of which he was in receipt before the passing of the Act, neither more nor less. That is the view which was taken of the construction of the statute by the other Division of the Court in the case of *Grant v. Urquhart and Glenmoriston School Board* (13 R. 783), a view with which I entirely agree, and it is confirmed by this other consideration, that as regards the school grant—the Government grant for schools,—the right of the schoolmaster prior to the passing of the Act in 1872 was a right quite different from anything that he can have in the grants voted by Parliament subsequent to that time. Prior to 1872 the grant was a grant in aid of the schoolmaster or teacher payable directly to himself upon a certificate of his exertions in teaching, but the grant now is a grant to the school board to be applied in their discretion and according to the purposes of the Act. One result of this change is that a schoolmaster appointed prior to 1872 can no longer receive as in his own right the grant of which he was previously in the enjoyment. His right is to receive out of the school funds an equivalent of the emoluments of office—a sum equal to what he was receiving previously out of the Government grant, together with all the other elements that make up the emoluments of his office. That being so, I should have thought, apart from decisions, that it would not be a fair administration of school funds that a school board should enter into an agreement with a schoolmaster to pay him the whole Government grant during his life. I shall not readily presume a contract of that kind, because I must say I do not think it would be a fair administration of the money voted by Parliament, that a school board should part with the control of its public fund, and instead of being free to apply it in the appointment and payment of additional teachers when necessary, should be bound down to pay the whole of it to one man for the rest of his life. But that is the hypothesis of the pursuer's action that the defenders undertake to pay him the whole of that public fund. I see no evidence of such a contract, and no relevant averments of such a contract capable of being a proper subject of an order for proof. The averment in condescendence 3 really amounts to no more than this, that since the passing of the Act of 1872 the pursuer has been in receipt of the Government grant by voluntary concession on the part of the School Board. That may have been in their judgment the best thing they could do with the money, but the past payment by no means binds them to continue the arrangement if circumstances have altered, and if they now find it desirable to make a rearrangement of the burdens affecting the school fund.

When we come to the alleged special agreement I agree with the Lord Ordinary that the letters founded on do not amount to an agreement to pay the

schoolmaster the Government grant even for the limited period of four years. No. 89.
 It appears to me that these letters are wanting in the elements of contract between the schoolmaster and the board, and it is consistent with the terms of the letters and the evident intention of parties that the letters meant nothing more than this, that so long as the schoolmaster was in receipt of the Government grant (being the fund out of which pupil-teachers ought to be paid), he undertook to make payment of their salaries. That was the motive of the letters, that was the matter out of which the correspondence originates, and there is nothing in the correspondence tending to shew that the negotiations ever passed into a new phase involving a contract with the schoolmaster, giving him a right to the continuance of the sum he had previously been receiving. Matters seem to have proceeded on the old footing,—that is to say, the payment depended on the pleasure of the School Board, and could be terminated by the board without notice whenever they thought proper in the exercise of their trust to make a different disposal of their fund. I therefore agree that the action should be dismissed.

Jan. 31, 1894.
 M'Vicar v.
 School Board
 of Kiltearn.

LORD KINNEAR.—I am of the same opinion. I think with your Lordship that there is no relevant case on record of any specific contract either with the heritors before the passing of the 1872 Act or with the School Board afterwards which can give the pursuer a claim to the Government grant. The pursuer says that, in terms of his appointment, he was entitled to certain emoluments, the first of which is a fixed salary of £35 a-year. Now, that might of course mean that the heritors agreed to give him a salary which was fixed at that time. If there were any question about his claim for salary I do not suppose that anybody would dispute that; there is a clear and sufficient averment to that effect, although he does not condescend on the specific terms of the agreement which is implied in that statement. But then when he goes on to say that by the terms of his contract, and by usage, he was entitled to the ordinary Government grant in addition to this salary, I think it became incumbent on him to make a much more specific averment of the terms of the contract if he means to allege that it was by contract that he acquired a right of that kind. I do not myself see at present how it could be possible for the heritors to give him an absolute right to a future parliamentary grant, irrespective of the terms of the statute by which it should be conferred. But if it was part of his case that such right had been really vested in him in virtue of his agreement with them, I think it was incumbent on him to make a specific averment to that effect. It might very well happen that when a parish schoolmaster was appointed before the passing of the Act of 1872 the heritors might hold out to him the prospect that his emoluments would include the Government grant; but then the Government grant at the time was voted directly by Parliament to the schoolmaster himself, and as the heritors had no power whatever to procure or administer the grant, such an intimation could not mean anything more than this, that whatever grant Parliament might think fit to give him should be over and above the salary and fees which the heritors undertook he should receive. In short, the contract of the heritors must always have been for a remuneration within their power; and, on the other hand, the schoolmaster's claim to the Government grant depended on the will and pleasure of Parliament, exercised in his own favour personally and individually. Therefore I agree that there is no relevant averment that at the passing of the Act of 1872 this gentleman had an abso-

No. 89. lute right by contract with the heritors to continued payment of any Government grant.

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Well, then, after the Act passed, there is no averment at all of any contract with the School Board by which it can be alleged that they gave him the grant prior to the averment with reference to the arrangement about the pupil-teachers in 1888. When the Act passed there can be no question that it became the right and duty of the School Board to administer the grant, which was no longer made to the schoolmaster himself but paid into the school funds, and the distribution of which is a duty with which they are charged, and therefore it was for them to determine whether the whole of the grant should be paid to the teacher, or, if not, what proportion should be paid to him. The only qualification upon that right which the Act creates in favour of the schoolmaster—I mean in favour of a schoolmaster holding office before the Act came into force—is that his emoluments prior to the Act should not be prejudiced, and therefore if the School Board chose to give him a smaller proportion of the Government Grant than he had been in use to receive previously, without increasing his emoluments in other respects, he would have a claim for compensation under the 55th section of the statute. But it is not alleged that any such claim arises to the pursuer in this action, because the amount of income he is now receiving exceeds his total income prior to the passing of the Act. Now, if there be no contract with the School Board prior to the minutes of 1888, I entirely agree with your Lordships that it is impossible to spell any contract out of these minutes. If the schoolmaster had up to that time an absolute right to the Government grant, then I should have had no difficulty in reading the minutes as meaning this, that he undertook to pay a certain proportion of the grant to which he was entitled to the pupil-teachers, and that the School Board had bargained with him that, in respect of that agreement, they would appoint pupil-teachers as his assistants, and otherwise they would not. But then that agreement depends entirely on his being able to establish that he had that antecedent right, with which the board could not interfere unless he chose, and therefore that he was in a position to make stipulations in regard thereto. As he had no such prior right, the minutes with reference to prior local regulations between these parties, it appears to me, come to nothing more than this, that the School Board assented to his proposal that the pupil-teachers should be appointed, and that inasmuch as he was in receipt of the parliamentary school grant, he must undertake to pay the pupil-teachers out of this sum so received.

I therefore agree with your Lordships that there is no relevant averment to be sent to proof, and that the action should be dismissed.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first plea in law for the defenders, and dismissed the action.

J. & A. HASTIE, Solicitors—COVENTRY & ROBERTSON, W.S.—Agents.

No. 90.

Jan. 31, 1894.
Scott v.
Glasgow
Police Commissioners.

ADAM SCOTT, Pursuer (Appellant).—*Shaw—Sym.*
GLASGOW POLICE COMMISSIONERS, Defenders (Respondents).—*Lees—Ure.*

Reparation—Burgh—Road—Regulation of traffic.—In order to ease the traffic passing up a steep street in Glasgow, there was laid down a stone track which led up on the right hand side of the street for a considerable distance, and then passed diagonally across it. At one point the track was only 18 inches from the pavement, between which and it there was a rough gutter

6 inches below the kerbstone of the pavement, and sloping gently upward to the track, which was about a foot above the gutter. The rule of the road was, according to these arrangements, reversed for traffic going up and down the street. A child of five years old while playing at the point referred to tripped in the gutter, and falling on to the track was run over by a cart and killed. The track had been for a long time in the same condition without accident. In an action of damages by the child's father against the Police Commissioners founded upon the position of the track and condition of the gutter, *held* that no fault was attributable to the defenders.

No. 90.

Jan. 31, 1894.
Scott v.
 Glasgow
 Police Com-
 missioners.

ON 1st June 1891 a child named Annie Scott, five years old, while playing in Forth Street, Port-Dundas, Glasgow, was run over by a cart and killed.

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 Sheriff of
 Lanarkshire.

Adam Scott, her father, raised an action in the Sheriff Court at Glasgow against the Police Commissioners of Glasgow for damages for her death.

He averred that the "accident was caused by the defenders (1) owing to the defective and dangerous formation of said roadway, which caused said child to fall thereon; (2) owing to their having constructed or retained on the wrong side of said street and close to the pavement, so as to endanger the lives of passengers, a track on which they thereby specially invited and instructed vehicles to proceed."

The defenders denied that the accident was caused by their fault.

At a proof the following facts were established:—Forth Street was a steep street with a considerable curve, leading from Port-Dundas Road up to the wharves at Port-Dundas canal. Prior to its being taken over by the Police Commissioners, the then existing road trustees, about forty years before the accident, in order to ease the traffic up the hill, placed a stone cart-track or tram-track on the street. This track began on the south or right-hand side of the street, and after keeping to the outside of the curve on that side sloped diagonally across the street and up the remainder of the hill. At the place where the accident occurred it was about 18 inches from the pavement, between which and it there was a gutter. The foot-pavement was very narrow. The gutter was 6 inches wide and 6 inches below the kerbstone of the pavement, and the cart-track was about a foot above it. The street was causewayed on the track for a short distance, and beyond that it was macadamised for the use of the traffic downhill. According to these arrangements the ordinary rule of the road was reversed, the ascending traffic keeping to the right instead of to the left side of the street, while descending traffic kept the other side. During the day there was a stream of heavy traffic, and while the Police Commissioners when they acquired the street had not altered the existing arrangements, they stationed a policeman at the corner of Port-Dundas Road to regulate the traffic.

On 1st June a carter named Thomas Currie was proceeding up Forth Street along the cart-track towards the canal with two carts, each drawn by one horse, he being in the leading cart to which the second horse and cart were attached, and sitting on the left-hand side of the cart, *i.e.* at the side furthest from the pavement. After the first cart had passed, and when the second cart was opposite a passage a little below Adam Scott's house, his daughter, who had been playing on the pavement with an old tin, suddenly ran off the pavement after the tin. She saw the second cart, and tried to turn back, but her foot catching in the gutter she fell over on the cart-track and was run over and killed by the wheel of the cart. There was no record of any similar accident in the street.

On 2d August 1892, the Sheriff-substitute (Guthrie) pronounced this

No. 90. interlocutor:—"Finds that the pursuer has failed to prove that the accident to the pursuer's daughter, Annie Scott, on 1st June 1891, in Forth Street, Port-Dundas, was due to the faulty formation of the road for which the defenders are responsible; therefore assolizies the defenders."

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missioners.

On appeal the Sheriff (Berry) adhered.

The pursuer appealed, and argued;—As to the position of the tramway, the evidence on both sides shewed that it was dangerously near the foot-path. Anyone who made a false step into the gutter at the place in question was exposed to immediate danger. The skilled evidence shewed that there was no need to have it at that side. But the appellant did not need to go nearly so far, for the evidence shewed that it would have entirely met the defenders' object if it had been a few feet further into the street, which was wide and gave ample room for that to be done. The foot-passenger who slipped would thus have had a chance of escape. But the case was not rested merely on the position of the tramway, but on the circumstance taken along with it, that the gutter was steep and rough, and interposed a sort of trap between the tramway and the pavement. It was not proved, indeed, that other accidents had occurred. But that was quite inconclusive. The case as to the defenders' duty was stronger than the recent case as to the Molendinar Burn.¹ There an accident might rarely happen, in time of flood; here it might happen any day.

Argued for the defenders;—No fault was attributable to them. The rule of the road had to be reversed in order to ease the heavy traffic up a steep hill, and a policeman was stationed specially to regulate the traffic. The street had existed for forty years in its present condition, no accident had previously occurred, and no complaint had ever been made.²

LORD JUSTICE-CLERK.—This is a sad accident, but the question is whether it is attributable to the fault of anyone.

The traffic at the particular place where it happened was for very good reasons specially regulated, and I think that authorities having charge of a street are quite entitled to regulate the traffic along it without regard to the ordinary rule of the road, if they are of opinion that circumstances seem to render this desirable.

Here, owing to the steep gradient, it was thought better in the opinion of the burgh's engineers that there should be a stone tramway, and that it should start from the right side going up, and should gradually curve across the road, thereby to a certain extent easing the gradient, and they also had a constable detailed to be upon the spot to regulate the traffic. That was quite right. Further, I have no difficulty in holding that a vehicle is not in fault because it happens to be on a particular side of a roadway if there is no other traffic to make it a duty that it should be on one particular side for the purpose of passing or crossing another vehicle. Driving on a particular side is a matter entirely within the discretion of the driver, except where he has to pass or meet another vehicle. In that case, of course, he must conform to the rule of the road, either the general rule, or any special rule prescribed by authority. No fault is therefore attributable to the magistrates or other authorities because they specially arranged that this tramway should pass up the hill on the right instead of on the left side of the road.

¹ Gibson v. Glasgow Police Commissioners, March 3, 1893, 20 R. 466.

² Dargie v. Magistrates of Forfar, March 10, 1855, 17 D. 730, per Lord Ivory, 737, 27 Scot. Jur. 311.

It is next said that it was dangerous to have the gutter six inches below the level of the pavement. We have familiar instances, however, of this, and in every town, where unless the depth was six inches the surface water could not be carried away. The drop may be dangerous to persons who are not careful, or to children under no supervision. But the danger is one which must be faced, and as has been often observed in this Court, in the case of children whose parents cannot afford to give them such supervision, the risk must be taken. It is wonderful how soon children in this position learn to appreciate the danger and how few accidents there are. I am of opinion, then, that there was no fault on the defenders' part in having this gutter as it was.

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 missioners.

The only other danger suggested is that the tramway was set at a certain height above the gutter, which necessitated having a slope up to the tramway. It has been in this condition for forty years, and apparently no accident has happened. I do not think that this was a danger against which the magistrates were bound to provide.

On the whole matter, I think we must affirm the judgment appealed against.

LORD YOUNG.—In all towns some streets from their position are attended with more danger to the people using them than others. We are all quite familiar with the existence of such streets, and no instances are more familiar than streets formed on ground sloping upward or sloping to one side. Forth Street seems to be on ground of that kind. The question we have to decide is this—Are the public authorities at fault in allowing this street to be there, because it may be attended with danger to those using it for traffic or to children playing on it? To say so would be ridiculous. No actionable fault or wrong was committed either by private individuals or by the public authorities in allowing such streets to be constructed and used.

If there had been no tramway in Forth Street, as might easily have been the case, and this accident had happened by reason of a carter driving his horses in the same line as the tramway runs, it was not suggested that there would have been any case against the defenders. But because forty years ago it had been thought prudent to put a tramway in this street in order to ease the burden of horses going up the street, and because the Commissioners of Police had not altered the street since they took it over it was said that they were liable. I must say that appears to be a ridiculous proposition.

It was a question for consideration upon which side of the street that tramway might have most efficiently been constructed, and there might be conflicting views as to which was the best side for its position in order that it might ease the traffic, but it did not seem to be suggested that the magistrates had erred in the exercise of their judgment. There were a great many considerations besides the primary one of easing the horses as to the side on which the tramway should be placed. One side might have more houses and shops on it than the other. The middle of the street might seem to some as the best place for the tram lines, but I am not going to determine such a question. I am satisfied that there is no ground whatever for attributing the accident to the fault that the tramway was there.

On the whole matter, and without any doubt, I am satisfied with the findings in fact and law of the Sheriff-substitute.

LORD RUTHERFURD CLARK.—I am satisfied that no blame has been proved against the defenders, and that therefore the defenders should be assoilzied.

No. 90. LORD TRAYNER.—That is my opinion also. I think that no fault at all has been proved against the defenders.

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missioners.

THE COURT dismissed the appeal, found in fact in terms of the interlocutor of the Sheriff-substitute; affirmed the interlocutors appealed against; of new assoilzied the defenders the Lord Provost, Magistrates, and Council of the City and Royal Burgh of Glasgow.

ROBERT STEWART, S.S.C.—CAMPELL & SMITH, S.S.C.—Agents.

No. 91. MRS GRACE GIBSON, Pursuer (Reclaimer).—*D. Dundas—Crabb Watt.*
GEORGE GIBSON, Defender (Respondent).—*Salvesen—Wilton.*

Feb. 1, 1894.
Gibson v.
Gibson.

Husband and Wife—Divorce—Desertion.—In an action at the instance of a wife for divorce on the ground of desertion, it was proved that the husband had treated his wife with cruelty, and when drunk had turned her out of his house, and that for more than four years thereafter the spouses had lived separate. Evidence on which the Court (by a majority of seven Judges, *aff.* judgment of Lord Wellwood, *diss.* Lord Trayner), *refused* to grant decree of divorce, on the ground that the spouses had been living separately of mutual consent.

Observed per Lord Rutherford Clark,—“I am aware that neither remonstrance nor entreaty is required as a solemnity in order to divorce for desertion. But the presence or absence of remonstrance and entreaty are very material in determining whether there was desertion, or whether the separation existed of mutual consent, especially when the spouse who complains of being deserted was the first to separate. In such a case, and in the absence of evidence to the contrary, the continued separation is to be referred to the cause which originally produced it, or, in other words, to the choice of the pursuer to live apart because of the cruelty of her husband.”

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with three
consulted
Judges.
Ld. Wellwood.

In April 1892 Mrs Grace Gibson, New Cumnock, raised an action in the Court of Session, against George Gibson, her husband, concluding, *inter alia*, for divorce on the ground of desertion.

The pursuer and the defender, who was a grocer at Craigbank, New Cumnock, were married on 3d March 1880. One child was born of the marriage.

The pursuer averred that shortly after the marriage the defender became so much addicted to drink that he suffered from attacks of *delirium tremens*, during which he was violent and dangerous in his treatment of the pursuer. She averred a number of acts of cruelty towards her and her child during the years 1880, 1881, and 1882, and particularly she averred that (Cond. 5) “In or about the year 1882, the specific date being unknown to the pursuer, the defender took a knife to bed with him, and hid it under his pillow, for the avowed purpose of doing the pursuer some bodily harm. In or about the month of June 1882 defender put pursuer and her child out of doors, threatened to kill her if she returned, locked and secured the premises, and then proceeded to his father’s house at New Cumnock, and remained there for some time. Immediately before this occasion the defender announced to the pursuer his intention of commencing business as a butcher at New Cumnock. . . . The defender insisted that the pursuer would have to keep the butcher’s shop at New Cumnock. The pursuer, in consequence of weakness, induced by a long course of cruelty and abuse, was physically unable to do so, and said so to the defender, who thereupon got into one of his customary fits of passion. On or about the day before the defender removed to New Cumnock, he came into his house drunk, and objected to pursuer’s sister taking back to her own house a sideboard

which belonged to her. He threatened to smash the sideboard and the pursuer, and became so outrageous and violent in his conduct that the pursuer had to seek refuge from his violence. Furthermore, on or about the day when the defender removed to New Cumnock, the pursuer returned to his house to get some clothing, and with the desire to go with him if he were calm, kind, and reasonable. The defender on seeing her became ungovernable in his passion, swore at her, and threw her into the same state of terror in which he had repeatedly and systematically placed her. She had to call for assistance, and upon hearing the voice of a neighbour the defender desisted from the attack upon her which he threatened. The pursuer escaped from the house, and again took refuge with her sisters. The same day the defender locked the house, and left Craigbank without leaving any message for the pursuer. The pursuer could not get admission to it when she returned. The furniture was removed, and the house of the parties was broken up by the defender. The defender thus deserted the pursuer, and has continued in malicious desertion of her ever since. The only communication he sent her thereafter was the following letter:—‘Ayton Bridgend, New Cumnock, May 23, 1883.—Grace,—If there is any of the furniture you want let me know by return, as I am leaving New Cumnock and going to dispose of everything. Let me know by Friday morning, and I will send them up to you. Hoping little Andrew is keeping well. GEO. GIBSON.’ The defender left the district without informing the pursuer of his address, or as to what he intended doing.”

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The defender denied the cruelties alleged and the fact of the desertion on his part.

The pursuer pleaded, *inter alia*;—(1) The defender having deserted pursuer, and having wilfully and maliciously continued in said desertion for four years, the pursuer is entitled to decree of divorce as craved.

The defender pleaded, *inter alia*;—(2) The pursuer having deserted the defender, is not entitled to maintain this action. (3) The parties having in any event separated from each other by mutual consent, the action is not maintainable. (4) The defender not having been guilty of the wilful and malicious desertion libelled, is entitled to absolvitor.

Proof was allowed, from which it was, in the opinion of the Court, proved that during the years 1880 to 1882 the defender had treated the pursuer with such cruelty as to entitle her to leave him, and that on the day above referred to, June 1882, he had, when drunk, turned her out of doors, and had again acted in the same way when she returned to get her clothes on the following day. With regard to the conduct of parties after that day, it was proved that, after turning his wife out of doors, the defender removed all the furniture from his house to New Cumnock (which was two miles from Craigbank), where he had taken a house and shop. He did not, however, begin business there, but lived in New Cumnock, chiefly with his parents, during the year following June 1882. During that time the pursuer was living with her sister at Craigbank. On 23d May 1883 the defender wrote the letter to his wife quoted in the condescendence.

The pursuer wrote in reply,—“Craigbank, Thursday.—George,—In answer to yours of this morning, I will be very glad if you will send up the sideboard and drawers, also the small tin case, and any books you are not wanting for your own use. You might send my work-boxes and the rocking chair, and any of my clothes you see. I am glad to say Andrew is keeping strong and a good speaker, and believe me, George, I sincerely hope you will get on well wherever you go, and will always be pleased to hear of your wellbeing. I would have liked to have saved

No. 91. the crumb-cloth too, but you know best what you require. They will all be kept for little Andrew. Trusting you are well, I am, yours,
 Feb. 1, 1894. GRACE.”
 Gibson v. Gibson.

The pursuer denied that during the year following June 1882 she ever saw her husband at Craighbank or New Cumnock. The defender, on the other hand, deponed that he had frequently met her but had not spoken to her. In the end of May 1883 the defender left the neighbourhood, and his residence was unknown to his wife till 1891, shortly before the present action was raised. During all that time he never sent any money for the support of his wife and child, neither did he ever make any attempt to get his wife to return to him. The evidence with regard to the willingness of the pursuer to rejoin the defender is given below.*

* The pursuer deponed,—“The night before he went to New Cumnock he was drunk and violent, and ordered both me and my child out. I did not go at first, and he shoved me out. He did not give any reason, except that he was not satisfied with me; he often said he wished I would die and be out of the way altogether. When he had got me and the child out the night before he left, he locked the door and shut up the house. I went to my sister and asked if I would be allowed to stay for a little. I hoped defender would change his mind, and that I would get back. . . . On the morning after defender turned me out, I went round to the house and tried the door, and found it locked. I went back later in the forenoon, and the door was open. I went in. Defender was not there. I saw that he was determined to remove. Some of the things were away. I took a dress and some underclothing, and was going to take them to my sister's. On my way out I met defender coming in. He came forward in a threatening manner, and asked what the hell I was doing there. I shouted to Mr Ross, who was in the shop next door, and Mr Ross replied, but I do not recollect what he said. My husband got me by the shoulders and pushed me out at the door, and said if ever I came back he would kill me. I had gone out the previous night with just the clothes I had on, and I went back in the morning to get some things. After defender put me out I rapped at the door to try and get in again, but the door was locked. I was not back after that. . . . I never said that I would not return to him. I never heard that he was ‘willing and desirous’ that I should return to him until I saw it in the defences to this action.” In cross.—“Though my married life was very miserable, my affection for my husband did not disappear. I continued to like him just as much after the treatment I have described as I did before. When he put me out I always went back when he allowed me. He was sometimes very violent, even when sober. I was not aware that he was given to drink before I married him; I thought he was a perfectly sober man. I would have gone back to him after June 1882 if he had asked me, even though I was afraid. I should have been in danger of my life; but all the same, I would have risked it. . . . I was intending to go to New Cumnock with him. (Q.) What altered your mind? (A.) His treatment in putting me out the night before he began to take the furniture away. His conduct was getting worse, and my health was failing, but I would have accompanied him all the same if he had not put me out, and threatened that if I went back he would kill me. He never asked me to go back after that. He never looked near me. I never sent word to him that I would go back if he would amend his ways. I knew that he was living in New Cumnock a considerable time after he went there. I was informed he was not occupying the house he had taken, but living with his parents. I did not make any communication to him at that time. . . . The letter dated ‘Thursday’ was not written on the footing that I was to continue living apart from my husband. I was always in hopes that he would write for me to go to him. I asked him to send me part of the furniture, because he said he was going to sell off anything I did not wish, and I was anxious to save a few things from the sale. . . . The letter dated ‘Thursday’ is the first request I made for my things. I was afraid to go and ask for my things, because I understood defender was staying

The defender in his evidence deponed that he wrote the letter of May 23d "to induce my wife to come back." * No. 91.

On 22d December 1892 the Lord Ordinary (Wellwood) assoilzied the defender from the conclusions of the summons.† Feb. 1, 1894.
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with his father, and his father had been outrageous to me on one occasion and threatened to thrash me, and I dared not go to the house. I did not send a message to ask for my things, because I did not think any attention would be paid to it. It was not owing to any aversion to having to do with my husband that I did not ask for my clothes. I was afraid both of him and his father, but I would have gone to him if he had asked me. . . . My relatives were angry at my husband for the way he treated me, but if he had treated me anything like the thing, they would have been kind to him. They wanted me not to go back in consequence of the way he had treated me, but I persisted and said I would go back if he would take me." Re-examined.—"The last thing my husband said to me was that if ever I came back he would kill me. He has never spoken to me from that day until now, and has never signified directly or indirectly that he wanted me back, or that he would treat me as a man should treat his wife. I would have incurred the risk of going back to him if he had asked me."

Mrs Hogg, a sister of the pursuer, deponed,—“I told her I was surprised at her being willing to go back considering his treatment of her. She said she would be quite willing to go back.”

Mrs Hyslop, another sister of the pursuer, deponed,—“She expressed herself willing to go back if she saw any sign that he really wanted her. I do not say she was willing to go back at the time she first came to me; I think it was later on that she spoke about her willingness to return.”

* In re-examination, however, he deponed,—“(Q.) Your view has all along been that it was your wife who left you, and not you who left her? (A.) Yes. (Q.) And taking up that view you did not make any overtures to her to go back? (A.) That is so. (Q.) You thought it was her place to ask to come back to you? (A.) Yes.”

† “OPINION.—I am of opinion that the pursuer is not entitled to the remedy she seeks. I have arrived at this conclusion with some reluctance, because I think that during the cohabitation the defender treated the pursuer very badly, and further, I do not see any reasonable hope of the parties coming together again.

“The pursuer has brought a large body of witnesses to prove that the defender was a drunkard, that when he was drunk he was abusive and violent, that he treated the pursuer cruelly, threatened her frequently, and occasionally struck her, although of this there is not so much evidence. On the other hand, whether owing to the want of means or lapse of time, or because such evidence is not to be obtained, no one is brought to say a good word for defender except himself.

“I therefore hold it to be sufficiently established that prior to the separation of the spouses in 1882 the defender treated the pursuer with such cruelty as to entitle her to leave him, and to justify a judicial separation. But unless divorce on the ground of desertion is to be allowed in every case in which the injured party would be entitled to judicial separation, I do not think that the pursuer can get the decree she asks. It does not follow that because one party to a suit is not to be believed in regard to certain points of the case, the other party's evidence is to be accepted on all points. Now, in the present case, as I have said, I believe the pursuer's evidence in the main as to the defender's ill-usage of her, but there are certain points of her evidence material to the case which I cannot accept implicitly. I am not satisfied—I do not believe—that after she left her husband and refused to accompany him to New Cumnock, she had any real desire to join him again. It is practically admitted that she made no effort at reconciliation. She says that she would have been willing to go and live with him if he had asked her. I must say that I do not believe this, because the whole of her actings are inconsistent with it. I think the truth

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is that she was glad, possibly with reason, to be quit of him, and so were her relations with whom she lived; and probably nothing would have been heard of this case if the defender had not recently reappeared in the neighbourhood, his reappearance coinciding with right to certain money opening to the pursuer.

"If the facts of the case are examined, I think they shew that though they afford ample grounds for judicial separation they do not afford sufficient material for divorce. The defender's alleged desertion is thus described on record (condescendence 5). Speaking of the day on which the defender left Craigbank, the pursuer says,—'The same day the defender locked the house, and left Craigbank without leaving any message for the pursuer. The pursuer could not get admission to it when she returned. The furniture was removed, and the house of the parties was broken up by the defender. The defender thus deserted the pursuer, and has continued in malicious desertion of her ever since.' If that is the desertion on which the pursuer relies, it is certainly not substantiated. In June 1882 the defender did not desert the pursuer. He had previously carried on business at Craigbank, but at Whitsunday 1882 he, with the full consent of the pursuer, took a house or premises at New Cumnock, which is about two miles distant from Craigbank. There is no ground for saying that he deserted his wife in leaving Craigbank and going to New Cumnock. He had to go there because he had given up his premises at Craigbank. The fact is the pursuer refused to go with him,—I assume justifiably.

"During the following year the defender was living within two miles of the pursuer. She knew well where he was, and she must have seen him occasionally at Craigbank, but she made no effort whatever at reconciliation, and neither did he. And so things went on until May 1883, when a very important incident occurred. The defender finding that business was not prospering at New Cumnock, owing, as he says, to his wife not coming to assist him, resolved to go elsewhere, and accordingly he wrote the letter, No. 8 of process, to the pursuer,—'May 23d 1883' (quoted on p. 471).

"The defender says he wrote this letter to give his wife an opportunity of proposing to come to him. I do not believe that; I think the letter was written in order to get a bid for the furniture. At the same time the occasion was critical, and gave the pursuer an opportunity of shewing what her real wishes were. Instead of remonstrating with the defender for going away, or proposing to come to him, she replied as follows:—'Craigbank, Thursday' (quoted on p. 471).

"She afterwards wrote the letters, Nos. 12 and 13 of process, in regard to the sideboard. [These were mere notes as to sending the sideboard.]

"Thus the spouses parted, as it seems to me, by mutual consent, and the defender went off with the good wishes of the pursuer, however coldly expressed. He seems to have led a very wretched life, partly, no doubt, due to his bad habits, while the pursuer has, fortunately for her, been living with kind and attentive relatives. This has gone on for ten years, and I do not think it is proved either that the defender has intentionally kept out of the pursuer's way, or that she has made any serious attempt to find him with a view to reconciliation. He has neglected his duties as a husband and a father, but so far as I can see the pursuer's one feeling was relief at his absence.

"The question to be decided is whether these facts justify me in holding that the defender has deserted the pursuer. I think not. Not merely is the balance of authority against the pursuer's contention, but I do not think that any case has been quoted on her behalf which when examined will support her demand.

"The cases mainly relied on for the pursuer were *Muir*, 6 R. 1353; *Winchcombe*, 8 R. 726; *Gow*, 14 R. 443; and *Gould*, 15 R. 229. These cases have been very much discussed recently, especially in the case of *Watson* before the whole Court, 17 R. 736. I do not think that the judgment which I will pro-

Argued for the pursuer;—It was not seriously disputed, and was held No. 91.
by the Lord Ordinary as proved, that the defender's conduct to the pursuer prior to June 1882 was such as to entitle the pursuer to leave her husband's house, and to obtain judicial separation. That being so, the fact of his turning her out of his house in June of that year was the culminating point of his cruelty, and was the beginning of desertion on his part, because he then said that he would not take her back, and would kill her if she came back. The question then was, had he continued in that desertion for four years? He was in the wrong to begin with, and that fact shifted the *onus* of making overtures to return from the pursuer to him, and yet he had never said one word to shew that he had departed from his original desertion.¹ The question then came to be, whether a wife who had been deserted was bound, in order to enable her to obtain divorce, to humble herself by asking her husband to take her back as a condition precedent to bringing her action. There was no authority for saying that remonstrance and an offer to adhere was absolutely necessary. The Court would not insist on remonstrance if the circumstances were such as to shew that that course would be useless; indeed the case of *Watson*² decided that the fact of remonstrance having been made or not made was only a fact to be taken into consideration in deciding whether the deserted spouse had been willing to return to the

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nounce will really conflict with any of them. The ground of decision, especially in the cases of *Winchcombe* and *Gow*, was that it is not a bar to a wife obtaining divorce on the ground of her husband's desertion, that before the desertion began she had left him on account of his cruelty. For instance in *Gow's* case the pursuer, the wife, left her husband on account of his cruelty, and went to live with her father. The husband a few weeks later sold his furniture, left the place where he resided, and, up to the time of the wife instituting the action, had not communicated with or made his address known to his wife. Thus, as Lord McLaren said, he 'made it impossible that overtures of reconciliation should be addressed to him.'

"*Winchcombe's* case was not precisely the same. The husband treated his wife with cruelty deliberately for the purpose of obtaining a separation from her. He then broke up his home, went abroad, and disappeared. Therefore there was here actual desertion by the husband.

"It will be observed that in these cases there was actual and intentional desertion on the part of the husband, although, no doubt, preceded by the wife leaving him on account of his cruel treatment; and in these and the other cases the husband, when sued, was abroad at the time. I may refer to Lord Shand's observations on these cases in *Barrie*, 10 R. 208, 215.

"The great distinction between these cases and the present, and cases like *Barrie* and *Watson*, is that in the latter, the spouse, who is said to have deserted, has been accessible, living within the same town, or within easy reach without any effort being made on the part of the spouse, who complains of being deserted, to effect a reconciliation. In regard to this distinction, I may refer to the opinion of Lord Shand in *Watson's* case (17 R. 743, 744), in which I concurred at the time, and which I think expresses tersely and forcibly the conditions which are requisite as a foundation for an action of divorce on the ground of desertion.

"In the present case there is in addition what practically amounts to a deliberate agreement to live separate, which it seems to me places an insuperable impediment in the way of the pursuer founding upon the subsequent absence of the defender as constituting desertion.

"I have already stated my reasons for regretting that I am driven to this conclusion. It is satisfactory to know that the pursuer's money is settled on herself."

¹ *Mackenzie v. Mackenzie*, March 18, 1893, 20 R. 636.

² *Watson v. Watson*, March 20, 1890, 17 R. 736.

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other. In *Bowman's* case,¹ the wife, unlike the present pursuer, was not willing to return to her husband, and said so in Court, and that was the *ratio decidendi* in the case. It did not decide anything with regard to the necessity of remonstrance. The case of *Chalmers*² was not one of divorce, and only shewed what sort of offer a wife who had justifiably left her husband's house was bound to take notice of. She certainly was not bound to go back unless her personal safety was assured, and it was not in this case. The case of *Winchcombe*³ was the nearest to the present, and ruled it. In that case, though the wife said that she was not willing to return, still divorce was granted. The case of *Barrie*,⁴ where the wife deserted and divorce was refused, was distinguishable in this, that there the spouses parted only because of incompatibility of temper, and that they lived close to each other, and on quite friendly terms, after the separation. The case of *Lilley*⁵ shewed that when the husband was in the wrong in the beginning it was his duty to try to induce his wife to return to him. The case of *Gow*⁶ was in favour of the pursuer, the only distinction being that the parties lived farther apart after they separated than the spouses had in this case. In none of these cases, which were those most in point, was it held that remonstrance and an offer to adhere was necessary to obtaining divorce. It was not necessary to shew that the pursuer wished to adhere; it was only necessary to shew that she was willing to do so if her husband would treat her properly. If the desertion did not begin in 1882 when the defender turned his wife out of doors, it at all events began in 1883, when he left New Cumnock without leaving an address.

Argued for the defender;—The case of *Bowman* was directly in point, and decided that divorce should not be granted in such a case as the present. Assuming that the pursuer was entitled to leave her husband in 1882, and to obtain decree of separation, that did not entitle her to divorce on the ground of desertion. The pursuer must prove that during the whole four years she wished to return to her husband, and the proof shewed that that had not been her position during any part of the time. When she left her husband's house she conveyed the impression that she did not wish to live with him any longer, and if she did she was bound to do something to remove that impression. Now, on the contrary, she had lived practically in the same village with him for a year, and had written at least one perfectly friendly letter to him, and yet she had never said a word as to coming back to him. That brought the case within the rule of *Barrie*.⁴ It was not enough for the pursuer to say that she was willing to go back conditionally, her offer must be unconditional, and such as to shew that she really wished to return. Although *Watson's* case decided that remonstrance was not absolutely essential where it would clearly be unavailing, it decided that it must be made wherever it was possible that it might be successful. There must, in short, be a disposition towards reunion shewed in some clear way, otherwise the deserted spouse would be barred from obtaining divorce. No such disposition had been shewn here. This case was distinguishable from *Gow's* case in this,

¹ *Bowman v. Bowman*, Feb. 7, 1866, 4 Macph. 384, 38 Scot. Jur. 194.

² *Chalmers v. Chalmers*, March 4, 1868, 6 Macph. 547, 40 Scot. Jur. 284; *Gould v. Gould*, Dec. 22, 1887, 15 R. 229; *Muir v. Muir*, July 19, 1879, 6 R. 1353.

³ *Winchcombe v. Winchcombe*, May 26, 1881, 8 R. 726.

⁴ *Barrie v. Barrie*, Nov. 23, 1882, 10 R. 208.

⁵ *Lilley v. Lilley*, Nov. 15, 1884, 12 R. 145.

⁶ *Gow v. Gow*, Jan. 29, 1887, 14 R. 443.

that there it was impossible for the deserted spouse to attempt reconciliation, as she did not, and could not, know where her husband was during the years of desertion. The parting here had been of consent, and had been persevered in of consent until the date of the action.

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At advising,—

LORD JUSTICE-CLERK.—I am of opinion that the pursuer is not entitled to decree of divorce. The evidence satisfies me that the parties have been living apart with the consent of the pursuer, and that she has not been willing to adhere during the period which has elapsed since cohabitation ceased. It is not a case in which the pursuer had not opportunity for using means to endeavour to re-establish the family life. The defender and pursuer were living near one another for a long time after the separation; they were in communication by writing after they ceased to meet, and there has never been a suggestion on the part of the pursuer of a desire to resume cohabitation. On the contrary, it is her own case that she could not live with the defender, that he had been unkind and brutal to her, so that she was justified in separating herself from his society. This may be so, but if that was her position, and if it was in a state of mind which resulted from it that she tacitly consented to the breaking up of the conjugal home, as on the evidence I am satisfied she did, I can see no ground in that for holding that she is entitled to decree upon the plea that she has been wilfully and maliciously deserted by her husband. If she could not live with her husband because of his cruelty, and desired to be supported by him, her remedy was an action for separation and aliment. I cannot hold that where spouses live apart it is a sufficient cause for granting a decree of divorce for desertion that the ground on which the wife who is suing did nothing to re-establish the family life was that she could not live with the defender because of his cruelty. Wilful and malicious desertion can only be held proved at the instance of a spouse who was willing to cohabit. If there is unwillingness to cohabit because of the other spouse's cruelty, the law provides the remedy of separation and aliment, on the ground that the pursuer is justified in refusal to cohabit. It does not provide any remedy by divorce because of cruelty. If the separation is caused by cruelty, it is a separation which the injured spouse justifies by alleging a right to leave the other spouse's society. But such a separation is from the very nature of it a separation consented to by the injured spouse, and no duration of such a separation by itself can, in my opinion, be ground for a decree of divorce for desertion. In this case there is nothing else. I am therefore in favour of adhering to the interlocutor of the Lord Ordinary.

LORD YOUNG.—I understand from what passed at consultation that all your Lordships are of opinion that no desertion has been proved to begin with, and if there was none, there could be no malicious persistence in desertion for four years. The Lord Justice-Clerk says he is of opinion—and the Lord Ordinary seems to be of the same opinion—that the spouses separated of consent. If that is the result of the evidence, there is no room for any question of law. From that opinion I am not prepared to dissent. If the desertion is not proved, and if there was no malicious persistence in the desertion, there is no room for legal opinion, and I express none.

LORD RUTHERFURD CLARK.—In this case the pursuer separated herself from the society of the defender on account of his cruelty. She did so for good

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cause, and I am not surprised that she did not return. She had a very reasonable fear that his violence would be repeated. She has lived apart since 1882, and except for two letters which passed in 1883, there has been no communication between them. For most of the time the defender was resident in Glasgow, and it is certain that he contributed nothing to the maintenance of his wife or child.

The question is, whether the defender was in desertion, or whether the spouses were living separately of mutual consent? I answer it according to the latter alternative. I think that the pursuer was glad to be rid of her husband, and that in order to secure that end she was willing to take the burden of maintaining herself and her child.

The remarkable fact is that she made no effort to resume cohabitation. She says that she was willing to live with her husband provided that she saw any prospect of his amendment. I doubt whether any such idea was ever seriously entertained, and I cannot take her statement as proof of the fact. Her conduct is, to my mind, conclusive to the contrary. In a case like the present it is, I think, idle to speak of being willing to resume cohabitation when there was no effort to resume it. Nor is there, in my judgment, a surer proof that the pursuer released her husband from all his marital duties and desired to live alone than the fact that she never asked him to contribute to her support and to the support of his child. She tries to give another colour to her conduct by saying that she did not know her husband's address. There was no difficulty in obtaining it. She knew his mother, who was living in her neighbourhood, and could easily have procured the address of her son. It is not said that he was absconding.

I am aware that neither remonstrance nor entreaty is required as a solemnity in order to divorce for desertion. But the presence or absence of remonstrance and entreaty are very material in determining whether there was desertion, or whether the separation existed of mutual consent, especially when the spouse who complains of being deserted was the first to separate. In such a case, and in the absence of evidence to the contrary, the continued separation is to be referred to the cause which originally produced it, or, in other words, to the choice of the pursuer to live apart because of the cruelty of her husband.

It is said that the defender put the pursuer out of the house, and that this act was the beginning of his desertion. We cannot judge by the act alone irrespective of the intention. Cruelty and threats of cruelty which lead to a separation cannot be equivalent to desertion unless they are used for producing and maintaining a separation. No such case is before us. The defender may have turned his wife out of doors, but it was the act of a drunken man. It cannot be regarded as having been done in order that he might separate himself from the society of his wife. The pursuer says that in their last interview he threatened that if "I ever came back he would kill me." I cannot hold it to be proved that he made this statement. There is no evidence for it other than the evidence of the pursuer. Still less can I hold such language to be proof of a settled purpose on the part of the defender to separate himself from his wife. It seems to have been uttered in drunkenness, and when I consider that for many years the pursuer lived separately from her husband without complaint or effort after reconciliation, I should require very strong proof before I could hold that the separation was due to the defender's refusal to receive her. We have no such proof. She says,—“If he had promised to live a decent life

I would have gone back." This can only mean that she would not go back if she thought she was to be exposed to the same cruelty as before. She so acted, and with complete justification. But in that case is she deserted? I think not, because she was not willing to adhere. The condition which she attached to her return seems to be conclusive against her. It shews that she preferred to live apart from a fear of her husband's violence. She used the remedies which belong to a wife who is treated cruelly. She cannot at the same time claim the remedies which are given for desertion. No. 91.
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I do not consider the case where the violence is used and the threats of violence are made for the purpose of producing and maintaining a separation, or that where the husband turns his wife out of the house and keeps it closed against her. It does not arise on the evidence, and I reserve my judgment on it. We are dealing with the case of a drunken husband who made his house intolerable to his wife. I do not think that his conduct had any purpose in it. It was the outcome of intemperate habits which destroyed his sense of duty and manhood. It may be hard that a woman must remain united to one who used her so ill. But cruelty is not desertion. A wife is bound to submit to such usage as she receives from her husband, or else to withdraw from his society. And if she chooses the latter alternative, she has, to my mind, shewn in the most emphatic manner that she is not willing to cohabit with him. She acts in the exercise of a legal right which may be declared by a decree of judicial separation. It is immaterial whether the decree be pronounced or not. Her right depends on the cruel treatment, and is only ascertained by the decree. So long as she acts in the exercise of that right she cannot be deserted, just as I think that no woman could be deserted if she were living apart from her husband under the authority of a decree of separation. In either case the separation is due to her own act, though justified by her husband's cruelty. I do not mean to say that a woman who has separated herself from her husband by reason of his cruelty may not thereafter be deserted. But it is, I think, a condition of the possibility of desertion that she abandons her position and is willing to resume cohabitation. So long as she maintains it, she is excluding her husband from her society.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD ADAM.—The parties in this case were married in March 1880, separated in June 1882, and have never lived together since. The question is, whether the pursuer has proved that this rupture of their conjugal relations was caused by the wilful and malicious desertion of her by the defender.

It appears from the evidence that the defender was a man of dissipated habits, that he sometimes came home at night the worse of drink; that when in that state he was apt to be quarrelsome and violent; and it is alleged that the pursuer had frequently on these occasions to leave the house at night and take refuge with her sisters, who lived a few doors off, or remained in a shed in the neighbourhood. It is not suggested that the defender conducted himself as he did with the intention of inducing or compelling the pursuer to separate from him. In fact she always returned, after a shorter or longer time, to her husband's house, and resumed cohabitation with him. Whether the defender's conduct would have justified the pursuer in separating herself permanently from him, we need not inquire. Separation *a mensa et thoro* is the remedy provided by

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the law of Scotland to an injured spouse in respect of conduct such as is alleged against the defender, and not divorce *a vinculo matrimonii*, such as is sought here. Whether it is a satisfactory or sufficient remedy it is not for us to say.

It further appears that the defender intended to leave Craigbank, where he had been residing, and had in April preceding, as the pursuer knew, taken a house and shop in the neighbouring village of New Cumnock for the purpose of carrying on business there—a step which the pursuer tells us she did not approve of. It was while the defender was about to leave Craigbank and to remove to New Cumnock that the incidents occurred which led to the separation.

The pursuer's account of the matter is this—(His Lordship quoted the pursuer's evidence as given at p. 472).

Now, it is right to point out that the pursuer gives an essentially different account of the matter on record. The account there given is—(His Lordship quoted the passage from the pursuer's condescendence, see p. 471).

Now, it will be observed that there is nothing said on record about the pursuer and her child being locked out of the house and taking refuge with her sister the night before the defender removed to New Cumnock, or about his threatening at the meeting next day to kill her if she went back, and which she swears altered her mind as to going to New Cumnock with him. The two accounts are quite inconsistent, but in my view it is immaterial to consider which of these two accounts, if either, is to be taken as correct, because neither, in my opinion, leads to the conclusion that the pursuer is entitled to divorce. I may, however, be permitted to remark that I am not disposed to place implicit reliance on the evidence of a party who makes such diverse statements in so material a part of her case.

It appears to me upon the evidence that there is no proof that the defender deserted the pursuer—that is, that he separated from her with the intent of putting an end to the conjugal cohabitation; on the contrary, I think that she deserted him. She may or may not have had good reason for doing so, but that is not the question.

It is no doubt true that the defender removed the furniture from Craigbank, and, as the pursuer phrases it, broke up the house there. But that is of no materiality in this case. The defender had, as the pursuer knew, taken a house and shop in the neighbouring village of New Cumnock for the purpose of carrying on business there, and to which he had removed. This was not done by the defender with the view of breaking up the matrimonial establishment and of withdrawing himself from the pursuer's society. He and his house were just as accessible to the pursuer there as if he had continued to reside at Craigbank. The pursuer had often, she tells us, returned to her husband in somewhat similar circumstances before, and it may be permissible to doubt whether her reason for not doing so on this occasion was not that she did not wish to remove from the immediate vicinity of her sister's house, and possibly from the protection which that afforded her.

It is true also that the defender did not open a shop in New Cumnock, and that he broke up his establishment there at the end of a year. He says that his reason for doing so was because he could not carry on a shop without the assistance of his wife, and that at the end of the year he had lost hope that she would rejoin him. I see no reason to doubt the truth of that statement. We have the correspondence which passed between them when he gave up his house in New Cumnock, and I think that the terms of that correspondence,

and the fact that he voluntarily returned to her the furniture and other articles which she desired shew that he entertained no feeling of ill-will towards her. In my opinion, if she had ever proposed to return to him he would have been ready and willing to receive her.

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Assuming, however, that the pursuer is to be treated as the deserted party, I think the result is the same, whether she was willing or unwilling to return to him. If it be that she was unwilling to return to her husband, then she acquiesced in the separation, and cannot complain—*Volenti non fit injuria*. In that case the parties were living apart by mutual consent.

She professes, however, that she was all along willing to return to him "if he had asked her." I confess that if her statement as to his treatment of her while they lived together is to be taken as literally correct, I doubt, with the Lord Ordinary, whether it is true that she was willing to return to him. But be that as it may, the fact remains that she never approached her husband in any way with a view to putting an end to the state of separation. That being so, I think the case falls within the principle of the case of *Watson*, 17 R. 736. If she desired to resume cohabitation it was her duty to take the initiative, and to have communicated with her husband. There could have been no difficulty in her doing so, but that she never did.

If we are to believe the statements of the parties, both were willing to resume cohabitation, but neither would take the first step in that direction.

On the whole matter, I think the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR.—I have come to the same conclusion, for the reasons stated by Lord Rutherford Clark, and have nothing to add.

LORD TRAYNER.—I hold it proved in this case that the defender in the month of June 1882 turned his wife and child out of his house, locked the door, and left the house; that on the following day, finding his wife at the house, he again turned her out, and said that if she came back he would kill her; that he immediately thereafter removed the whole furniture from that house to a house in a neighbouring village two miles distant—New Cumnock; that he lived at New Cumnock for about a year, and thereafter left New Cumnock without communicating to the pursuer where he was going; and that from the time he turned the pursuer and her child out of doors in June 1882 he has never asked the pursuer to return to live with him, communicated with her in any way, or done anything towards the support and maintenance of the pursuer and her child. These facts being proved, I am of opinion that they amount in law to wilful and malicious desertion, which, having been persisted in for more than four years, entitles the pursuer to decree of divorce in respect of such desertion.

If the pursuer had agreed to live apart from her husband I need scarcely say that she would not have been entitled to the remedy of divorce, nor would she have been entitled to divorce if all she could allege and establish was ill-usage, however gross. For that state of matters the law provides a different remedy. But if desertion is established, as I think it is here, then the fact that the injured wife did not desire to return to her husband at any time or during the whole time of his desertion does not thereby deprive her of her right to a divorce. If he had *bona fide* invited her to his house, and offered to renew conjugal cohabitation at any time during the four years, then his desertion would have ceased. But if the desertion is maliciously persisted in by one spouse for the period of four

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years, in my opinion the state of mind of the other spouse during that period is immaterial, provided always that the conduct of that spouse does not establish that the living separate is agreed to. In short, in my view the injured spouse is not bound to do anything to bring the desertion to an end. In the present case (although in the view I have expressed it is not material to this decision) I hold it is proved that the pursuer was willing to return to her husband, the defender, if he had asked her.

I think, differing from the Lord Ordinary, that the pursuer should have decree as concluded for.

LORD PRESIDENT.—I agree in the opinion of Lord Rutherford Clark.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—THOMAS M'NAUGHT, S.S.C.—Agents.

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THOMAS PHILP (John Philp's Executor), Pursuer (Reclaimers).—
Sol.-Gen. Asher—C. J. Guthrie—T. B. Morison.
MATTHEW MARTIN (Mrs Philp's Executor), Defender (Respondent).—
Murray—D. Dundas—A. S. D. Thomson.

Public-house—Transfer of certificate—Goodwill—Profits—Heir and executor.
—A wine and spirit-merchant, who carried on business in a public-house, of which he was proprietor, died intestate on 7th December 1891. His widow entered into possession of the business, and on 16th February 1892 she succeeded in obtaining from the licensing magistrates, in competition with her husband's executor, a transfer of his certificate. The widow died on 23d February, and her executor then entered into possession of the business, stock, and fittings, and carried on the business till 16th May, when he sold the goodwill, stock in trade, &c., to a purchaser for £1500. The widow's executor had prior to this sale made and carried out an arrangement with the husband's heir-at-law, whereby the latter agreed to grant to the purchaser of the goodwill a new lease of the premises for seven years, in consideration of a sum of £250 paid by the widow's executor.

In an action of accounting raised by the husband's executor against the widow's executor, held by a Court of seven Judges (*disc.* Lord Justice-Clerk and Lord Trayner) (1) that the defender was not bound to account for any profits made after the widow obtained a transfer of the certificate; and (2) that the defender was not bound to account for any part of the price received for the goodwill of the business sold by him.

2D DIVISION,
with three
consulted
Judges.
Ld. Kyllachy.

JOHN HENDERSON PHILP died intestate and childless on 7th December 1891. He was survived by his widow and also by his mother, three brothers, and one sister.

He carried on business as a publican in a public-house of which he was proprietor, of the value of £45 a-year, and at his death there were in the premises fittings and stock in trade of the value of £102, 9s.

His brother Arthur Philp was his heir, and Thomas, another brother, was decerned his executor *qua* next of kin.

After his death his widow carried on the business (which had before her marriage belonged to her), using for that purpose the stock, shop-fittings, &c. On 16th February 1892 she applied to the magistrates for a transfer of the existing licence into her own name. She was opposed in this by her husband's executor, who made a competing claim to have the licence transferred to himself. The magistrates preferred her claim, and from that time the business was conducted under a licence in her own name.

She died on 23d February, and thereafter the business was carried on, No. 92.
and the profits thereof retained till 16th May, the date of the expiry of
the transferred licence, by Matthew Martin, her brother, whom she had
by her settlement appointed her sole executor and universal legatee. At
that date her executor sold the goodwill of the business, including the
stock and fittings, to Thomas Logan for £1536, 6s. 2d. in terms of an
agreement, dated 26th March 1892, by which the heir-at-law had agreed
to grant Logan a lease of the premises for seven years at a rent of £45,
in consideration of a sum of £250 to be paid to him by Martin on the
signing of the lease.

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On 19th July Thomas Philp raised an action of accounting against
Martin of the whole intromissions with the estate of the deceased had
(1) by Mrs Philp during her lifetime; and (2) by the defender as her
executor.

The pursuer maintained that the defender was indebted as executor
in, *inter alia*, (2) the sum of £126, as the profits of the business from 7th
December 1891 till 16th May 1892, at the rate of £6 per week, twenty-
one weeks; (3) £1536, 6s. 2d., as the price realised by the sale of the
goodwill, stock in trade, and fittings of said wine and spirit business.

The defender, *inter alia*, pleaded;—(2) The goodwill of the said busi-
ness having belonged to Mrs Philp at the date of her death, the defender
is not bound to account for the value of the same to the pursuer.

On 21st January 1893 the Lord Ordinary (Kyllachy) pronounced this
interlocutor:—"Finds (1) that the defender is bound to account for the
profits of the business mentioned on record, from the death of the late
John Henderson Philp to the date of the transfer of the licence to his
widow, under deduction of the sum of 30s. per week as remuneration for
the widow's personal services; (2) that the defender is not bound to
account for any further profits; and (3) that he is not bound to account
for any part of the sum received by him for the goodwill of the business
sold by him in May 1892: With these findings, appoints the case to be
put to the roll for further procedure."*

* "OPINION.—This is an action of accounting brought by the executor of the
late John Henderson Philp, wine and spirit-merchant in Glasgow, against the
executor of his (Mr Philp's) widow. There are various items in the accounting
which appear to admit of adjustment, and with which I need not at present
deal. But there are two points on which I heard argument the other day, and
which it is necessary to decide. The first point is as to the profits of the
deceased's business between his death on 7th December 1891 and the transfer
of the licence obtained by his widow on or about 16th February 1892. During
that period the widow,—who had all along, it appears, managed the business,—
continued to manage it as before, using for that purpose the stock, shop fittings,
&c., which were undoubtedly part of the husband's moveable estate. The
question is, whether besides accounting for the stock and shop fittings, she
is bound to account for the profits which she made during that period.

"I am of opinion that the profits in question belong to the deceased's executry
estate, subject, of course, to a reasonable allowance to the widow for her personal
services. The widow had, at this time, no title of her own to which to ascribe
her possession. The business was conducted by her in the deceased's name;
and the profits having been earned by the employment of the deceased's stock
in trade and other moveable property, I see no reason why she, or rather her
executor, should not account for these profits.

"The other question is as to the goodwill of the business, which is said to
have been appropriated by the widow, and to have been sold for a large price
by the defender as her executor. The facts as to this matter, which do not
seem to be disputed, are these:—The husband died intestate, as I have said, on
7th December 1891. The widow died on 23d February following. A few

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On 18th March 1893 the Lord Ordinary pronounced an interlocutor, finding that the parties were agreed with respect to the sum payable to the pursuer on the footing of the preceding interlocutor, and that the sum agreed on had been paid, and therefore assolizied the defender.

The pursuer reclaimed.

On 15th July 1893 the Second Division appointed the cause to be argued before the Judges of that Division and three Judges of the First Division.

Argued for the pursuer;—Although the business, with the stock in trade, was originally the widow's, it passed on her marriage to her husband *jure mariti*, and formed part of his moveable estate at his death. The Lord Ordinary had then rightly held that, at all events until the licence was transferred to the widow, the defender had no right whatever to the profits of the business made up to that period. But the Lord Ordinary was in error in holding that the transfer of the licence had the effect of investing the widow with the business. It was clear that the purpose of the Act of 9 Geo. IV. c. 58,* under which the magistrates had acted was merely to continue temporarily the business in order to keep available the assets of the estate of the deceased. Under the transferred licence then the widow occupied purely as an administrator or manager for her husband's executor. In this view the business, with the profits, must be regarded as still forming part of the executry of the husband, and as falling to the pursuer. The pursuer had also right to participate in the sum derived from the goodwill of the business. It was entirely

days before her death she, having hitherto managed the business (which, before her marriage, had been her own), applied for a transfer of the licence into her own name. She was opposed by the present pursuer (her husband's executor), who made a competing claim to have the licence transferred to himself. The magistrates, rightly or wrongly, preferred the claim of the widow, and from that time the business was conducted in her name, and under a licence which she held as an individual. After her death, and down to May 1892, the business was carried on by the defender as her executor. It was then sold,—realising, along with the stock and fittings, a sum of about £1500. Of this sum, £250 was paid to the heir-at-law, the owner of the shop, as his share of the goodwill. The remainder is retained by the defender as part of the widow's estate.

"I am of opinion that the pursuer has no claim to participate in the sum derived by the defender from the goodwill of the business. The defender did not sell on pursuer's behalf, and stands in no fiduciary relation to the pursuer. Any goodwill which existed at the husband's death was necessarily extinguished when the widow, not on behalf of the pursuer, but in competition with him, obtained a transfer of the licence to herself. From that time, in my opinion, the business, with the profits and goodwill, so far as not attached to the premises and belonging to the heir, belonged to the widow or her estate; and it was the business thus acquired by the widow, and not the husband's business, which was eventually sold by the defender."

* The Home Drummond Act, 1828 (9 Geo. IV. c. 58), provides,—“Sec. 19.—Provided always, and be it enacted, that if any person duly authorised to keep a common inn, alehouse, or victualling house as aforesaid, shall die before the expiration of the certificate to him or her in that behalf granted, it shall be lawful for any two or more Justices of the Peace or magistrates of the county or royal burgh respectively in which such house or premises are situated to grant to the executors, representatives, or disponees of the person so dying and who shall be possessed of such house or premises, a transfer of the certificate to keep or continue such house or premises as a common inn, alehouse, or victualling house, as before such death, until next general or district meeting to be held under the authority of this Act.”

personal,¹ affecting the business and not the premises. Even if it could be held to belong to the heir, the pursuer did not admit the defender's averment that he had arranged with the heir to sell the goodwill; if necessary, this question must be remitted to probation.

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Argued for the defender;—It was admitted that up to the date of the transfer of the licence the pursuer was entitled to the profits of the business, but the defender was entitled to them from that date till the widow's death. The effect of the statutory transfer of 16th February was to operate a new licence investing the widow with all the rights to the business. The magistrates had rightly made the transfer, for in the words of the statute she was "possessed" of the house at her husband's death, which the pursuer was not. She certainly was no manager for the pursuer, for he had unsuccessfully competed with her for the licence. As regarded the goodwill of the business, the term was elastic and difficult of definition, but the cases would seem to shew that where applicable to a public-house, goodwill was a thing attaching to the premises,² rather than to the person managing the business. Being then heritable, the goodwill passed with the house, and belonged to the heir, who had agreed to allow the defender to sell it.

At advising,—

LORD YOUNG.—John Philp died intestate and childless on 7th December 1891 survived by a widow, his mother, three brothers, and one sister. Arthur, his eldest brother is his heir, and a younger brother, Thomas (the pursuer), his executor. John (the deceased) was at his death proprietor of a public-house of the value of £45 a-year. He was in the personal occupation of this house, in which he carried on the business of a publican. At his death there were in the premises fittings and stock in trade of the value of £102, 9s. per inventory and valuation, the accuracy of which is, I understand, admitted. The widow, on her husband's death, arranged with his heir for permission to occupy the premises, and carry on the publican business therein at a rent, as I gather from the accounts, of £40 a-year. It is immaterial that the arrangement with the heir was made subsequent to the discovery that the will in the widow's favour had been revoked. She occupied accordingly (as we must hold with the landlord's permission), and carried on the business till her death on 23d February 1892, after which her brother and executor (the defender) continued the occupation and the business till the following Whitsunday. On 26th March 1892 the defender entered into the agreement with the landlord of the premises, the import of which is that the latter should grant a lease thereof for seven years at a rent of £45 to Mr Thomas Logan, a tenant of the defender's selection, the defender paying £250 to the landlord as a consideration for the agreement. This agreement was implemented, and Logan has accordingly been in occupation of the premises as tenant since Whitsunday 1892. The defender's transaction

¹ Bain v. Munro, &c., Jan. 10, 1878, 5 R. 416.

² Hughes v. Assessor for Stirling, March 2, 1892, 19 R. 840; Drummond, &c., v. Assessor for Leith, Feb. 5, 1886, 13 R. 540; Bell's Trustee v. Bell, &c., Nov. 8, 1884, 12 R. 85; *Ex parte Punnett in re Kitchin*, 1880, L. R., 16 Ch. Div. 226, per Sir Geo. Jessel, M. of Rolls, p. 233; M'Farlane & Dailly v. Assessor for Dundee, March 10, 1891, 18 R. 939; Cooper v. Metropolitan Board of Works, 1883, L. R., 25 Ch. Div. 472, Lord Justice Cotton, 479; Ginesi v. Cooper & Co., 1880, L. R., 14 Ch. Div. 596; Crutwell v. Lye, 1810, 17 Vesey Ch. Rep. 335, per Ld. Ch. Eldon, p. 346.

No. 92. with the landlord for Logan's behoof was obviously and of course in pursuance of a prior understanding or bargain between Logan and himself, which was to the effect that Logan should pay him £1400 for the goodwill of the business, together with the stock and fittings as existing at Whitsunday 1892.

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This action of count and reckoning was raised on 19th July 1892, and the first request for an accounting, so far as appears, was made on 21st June. No demand was ever made for possession of the shop-fittings or the stock in trade left by the deceased, or claim intimated in respect of them prior to 21st June. The explanation of this delay, and the misapprehension of both parties for a time, may be something connected with the destruction or cancellation of the will which the deceased Philp had certainly made in favour of his widow. This topic need not be pursued, as we must take the case on the footing that the deceased died intestate, and that his executor is entitled to an accounting accordingly. Nor to the account which has been judicially given on that footing is there any objection by the pursuer, except with respect to (first) the profits of the publican business carried on by the widow and the defender between the date of Philp's death and the following Whitsunday; and (second) the sum which the defender received under his bargain with Logan in excess of (1) the value of the shop-fittings and stock in trade; and (2) the sum of £250 paid by the defender to the landlord.

The case is the simple one of a man dying intestate while carrying on the business of a publican in premises which were his own property. The title to the premises, with the right of immediate occupation, passed to the heir, while the executor had right to any personal property therein, with a title and duty to realise it, and dispose of it as intestate estate of the deceased. The nature, amount, and value of such personal property here was ascertained by an inventory and valuation made at the time, and the accuracy of which is, as I have stated, admitted. That the executor had no right to carry on business in the premises, or indeed to occupy them for any purpose, is clear. Then had he any right except a right to demand the personal property which was therein at the death of the deceased owner? In other words, would his right have been satisfied by handing over to him this personal property—that is, the fittings and stock specified in the inventory, or paying him their value if *bona fide* consumed?

The pursuer on the one hand contends that “the business,” or the “goodwill” of the business, which the deceased had been carrying on down to his death was part of his executry estate, and that if his widow or any other carried it on thereafter the profits must, as an accessory, be part of that estate, and also the price thereof if ultimately sold. The defender, on the other hand, disputes this contention and maintains that the pursuer had no right or title by himself or another to carry on business in the premises, which had passed to the deceased's heir, or to hinder the heir himself or any other, whether the widow of the deceased or a stranger, from doing so. The heir's right was, he contends, indisputable not only to carry on the business of a publican in the premises which had become his property, but to confer such right upon anyone he pleased, whether the widow of the deceased proprietor, or a stranger—the executor of the deceased having no right or interest in the matter entitling him to interfere beyond demanding possession of any property in the premises belonging to the executry estate, and to prevent, if he thought fit, the use of the deceased's name. He further maintains that the occupation and particular use of the premises—that is as a public-house—by the widow till her death, and thereafter by him—

self, cannot be questioned by the pursuer, who had no right to any occupation or use thereof. With respect to his bargain or transaction with Mr Logan, the defender maintains that the import of it was that he should for a consideration agreed on between them successfully use his influence with the landlord of the premises to procure for Mr Logan a seven years' lease at a rent of £45, and hand over to him the fittings and stock which were on the premises at his entry or the date of the bargain. This, he says, did not on the one hand affect his obligation to account to the pursuer for the fittings and stock as ascertained to exist at Mr Philp's death, or on the other give the pursuer any right or interest in his bargain with Mr Logan, to which he was no party.

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And first, with respect to the pursuer's claim for the profits. It is not averred, and we have no ground for assuming it to be the fact, that the widow in carrying on the business after her husband's death used the name of her deceased husband. She obtained a licence in her own name as soon as practicable, and there is no suggestion of any objection by the pursuer to the name in which the business was carried on either by the widow or the defender during the brief period that they carried it on. He was resident in the place and certainly had an eye on the premises where the business was carried on, for he opposed the widow's application for a licence and tried to procure one for himself. The incident is immaterial otherwise than as tending to shew (1) that the pursuer was cognisant of all that the widow did about the business, and (2) that so far from aiding her by goodwill he did what he could to hinder her. He could not fail to know that the widow believed that she was carrying on the business on her own account and not for him, and if he thought the belief erroneous he neither said nor did anything to undeceive her. Nor if her deceased husband's name was on the sign and allowed to remain unaltered (which we have no reason to believe), did he signify in any way that this was an invasion of his right or involved any liability to him. The business was originally hers, and if her husband's name was ever substituted for hers on the shop sign, I do not doubt that after his death she would on an intimation that the pursuer thought its continuance an invasion of his goodwill have restored her own. The notion that its continuance was any benefit to her on the one hand or detriment to the executry estate on the other does not commend itself to my mind. The pursuer's first communication regarding the business was in June after the widow's death, and when the premises and the business were in the hands of Mr Logan, who, I assume, used his own name in carrying it on. There is no averment to the contrary. I have therefore no occasion to consider whether or not the pursuer was entitled to object to the widow or any other using the name of the deceased. It was not used, so far as we know, and certainly no objection on this head was ever stated. But assuming that it was used in violation of the pursuer's right, I cannot hold that his remedy lies in a demand for the profits of the business. He might have put a stop to the use, and possibly claimed damages if he sustained any, but to stand by without objection or communication of any kind, and then after a lapse of time claim the profits on the footing that the business was being carried on for him, is a view of his right which I cannot assent to. Nor, in my opinion, can this claim to profits be supported by the fact that use was made of the fittings and stock specified in the inventory. The use was without title, but the things themselves were quite lawfully in the widow's custody and possession at her husband's death. We have no reason to impugn the integrity and good faith of her conduct on a

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doubt of the statement that she was ignorant of the destruction of the will in her favour, and without the will she had, *jure relictae*, the substantial beneficial interest in them to the extent of one half. The executor made no claim till after her death, and I have no difficulty in rejecting the proposition that his remedy for the use without title is a claim to the profits of the business. The only legal and equitable claim which he can make is that the things themselves or their value, as to which there is no dispute, shall be accounted for and made forthcoming. On this first head therefore—the claim to profits—my opinion is in favour of the defender.

Second, with respect to the pursuer's claim upon the bargain which the defender made with Mr Logan. The pursuer's case on this head is that he was in right of "the goodwill" of the business of the deceased John Philp; that he was at liberty to withhold or confer it on whom he pleased and on such terms as he pleased; and that the defender, having sold it to Mr Logan and so conferred it on him, must be assumed to have done so on his, the pursuer's, behalf, and so be liable to account to him for the price. The defender answers that the goodwill which he sold to Logan was the goodwill of the business which he succeeded to and took possession of as executor and universal legatee of the widow who was carrying it on at her death under a licence in her own name; that the substance and reality of his bargain with Logan was that he should procure from the landlord a lease of the premises to him for seven years at a rent of £45, Logan paying him £1400 if his influence and efforts to that end were successful; that he was not acting for or in communication with the pursuer, and did not bestow on Logan (which indeed he could not do) any right which the pursuer could give or withhold.

On this head also my opinion is in favour of the defender and against the pursuer. In the first place, I think it clear that the only goodwill which the pursuer had to dispose of was liberty to use the name of the deceased John Philp in carrying on the business of a publican. He might have sold his liberty to anyone who was willing to buy it, or had he found anyone who was willing to pay him for his influence and efforts to procure a lease of the premises from the landlord he might have transacted with him just as any other might whose services in such a matter were appreciated and sought for. But the only goodwill which as executor he was or is at liberty to dispose of is, as I have said, the right to carry on the publican business under the name of the deceased John Philp. It does not appear that hitherto anyone has thought this liberty worth buying, but if any such person shall hereafter turn up he must apply to the pursuer as the only one who can sell it.

I may add, in conclusion, that with respect to the pursuer's claim for profits the case would in my opinion have been the same had the widow, immediately on her husband's death, obtained a lease from the landlord for seven years from 7th December 1891 (the date of the death) at a given rent, and remained alive and carried on the business during the seven years, for no limit to the time during which the pursuer might have delayed his demand for an accounting on that footing occurs to me consistently with the view which he urges of his right, and the widow's liability as in legal estimation manager for him, although she had no intention of occupying that position or thought that she did. Again, suppose that towards the end of the seven years, or say after the lapse of two, three, or four years, she sold the goodwill of what both she and the purchaser from her honestly believed to be her own business, together with

her successful influence with the landlord to procure for the purchaser a transference and prolongation of the lease in his favour, I am unable to see why the pursuer would not have been entitled to the price as on a sale of his property made by the widow as acting for him, if the arguments on which he rests his demands on the defender are well founded. Nor is there any speciality of importance in the fact of widowhood, for the case would obviously have been the same had a stranger to the deceased obtained a lease of the premises from the landlord, and carried on the business of a publican therein, or had the landlord himself entered on the occupation and taken up the business of a publican. The view of being, in the estimation of law, manager or agent of the executor, and liable accordingly, cannot be dependent on the circumstance of widowhood, or, so far as I am able to see, on the circumstance of the time that has elapsed before interposition by the executor being six months or six years.

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LORD RUTHERFURD CLARK.—The pursuer is the executor of the deceased J. H. Philp, who carried on within his own premises the business of a wine and spirit-merchant. He died intestate on 7th December 1891. He was succeeded in his heritage by his brother Arthur Philp.

On the death of Philp his widow carried on the business in the same premises till her death on 23d February 1892. Notwithstanding the opposition of the pursuer, the licence which her husband held was transferred to her, and the heir allowed her to continue in the occupation of the premises. After her death the defender, as her executor, carried on the business till 16th May 1892, when he sold the goodwill for £1400. He sold it in the belief that it belonged to him as the executor of Mrs Philp. He had no other title, and he sold in that capacity. But at the same time he undertook to obtain, and did obtain, for the purchaser a seven years' lease of the premises.

The pursuer says that the goodwill was a valuable part of Philp's executory estate, and he claims the benefit of the sale made by the defender. In other words, he claims the price, less £250, which was paid to the heir for the lease.

In my opinion the proposition of the pursuer is not true in fact. I do not think that he had any goodwill to sell, and if he had a right to anything which could be described by that name, I am satisfied that it had no value. We have high authority for saying that the goodwill of such a business goes with the house—(*Ex parte Punnett*, November 18, 1880, 16 Ch. Div. 226; *Cooper v. Metropolitan Board of Works*, November 24, 1883, 25 Ch. Div. 472). It is not what is called a personal goodwill; it is, as Lord Eldon said, "the chance that customers will continue to resort to the same place." The pursuer had no right to the house, and could give none. Indeed, he was not entitled to enter it save for the purpose of removing the effects of the deceased. He had not even a licence of which a purchaser might have got the benefit. I do not enter into the question whether the magistrates did right in preferring the claim of the widow. It is enough that he had no licence. In these circumstances I cannot see that the pursuer had anything to sell, or that he could assign a purchaser into any right.

In the course of the discussion the pursuer did not attach much or any value to the right which he claims. He relied chiefly on the fact that a sale of the goodwill was made by the defender, and he contended that as the business was his, he was entitled to adopt the sale to the effect of requiring the defender to account for the price.

I have already pointed out that the defender did not profess to sell anything

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that belonged to the pursuer. He sold the goodwill under his title as executor, and therefore as part of the executry of the widow. In other words, he sold the goodwill, if it formed part of that executry estate. He did nothing more. I doubt if he had anything to sell unless it might be his undertaking to obtain a lease from the heir, though the fact that the widow had been in possession of the licence might be of some value to the purchaser.

If this be so, I do not see how I can sustain the claim of the pursuer. I see no ground on which he has a right to adopt the sale. The defender sold what he believed to be his own, and he sold nothing unless the goodwill, which he professed to sell as part of Mrs Philp's executry estate. The pursuer cannot, I think, take benefit by the sale, which in the case supposed would be a sale of nothing.

The pursuer might have a claim if he could shew that he was injured by what the defender had done. He could appeal to the maxim, *Nemo debet esse locupletior damno alterius*. But he was in no sense injured. Nothing was taken from him. No right belonging to him was diminished or affected. He remained exactly as he had been, with the same power of sale, and with the same power of making the sale effectual if he had anything to sell. Consequently he is not seeking to recover a loss, but to make a gain, to which in my opinion he has no title.

I have been hitherto assuming that the business carried on by the widow was the business of her husband, and that the goodwill of that business fell into his executry. But I concur with the Lord Ordinary in holding that not later than the transference of the licence the business was the business of the widow. The business of J. H. Philp necessarily perished because it could not be carried on by his executor, and the executor could not carry it on because he had no licence and no right to the premises. The widow in no sense represented her husband, and did not carry on the business on account of his executry estate. On the contrary, she opposed the pursuer's claim for a transference of the licence for the obvious purpose of excluding the pursuer and making the business her own. The proprietor allowed her to occupy the premises, and in the absence of any allegation to the contrary, I must hold that this permission was given to her for her own benefit. There is nothing to suggest that it was given to her as the servant of the pursuer, or for the benefit of her husband's executry estate. The pursuer could not have prevented the widow from carrying on the business on her own account. He could have withdrawn the stock in trade and fittings which belonged to her husband. But he could do nothing more. It is true that she made use of the stock, but that is of no importance except in so far as it may affect her obligation to account.

I am therefore of opinion that the business which existed at the widow's death was her own, and that any goodwill which attached to it formed part of her executry estate.

For these reasons, I hold that the interlocutor of the Lord Ordinary should be affirmed.

LORD ADAM and LORD KINNEAR concurred in Lord Rutherford Clark's opinion.

LORD TRAYNER.—The interlocutor of the Lord Ordinary prefixed to this reclaiming note only expresses the result of the application of findings pro-

nounced by him in his interlocutor of 21st January 1893. It is these findings which are now brought under review. No. 92.

The case before us is this—The late John Henderson Philp at the time of his death (7th December 1891) carried on business as a wine and spirit-merchant. He died intestate, and the pursuer is his executor *qua* next of kin. Mr Philp was survived by his widow, who immediately entered on possession of the premises occupied by her husband, and carried on the business which had been her husband's until her death on 23d February 1892 without any title, but having obtained a transfer of the licence granted to her husband to her own name about a week before, namely, on 16th February 1892. Mrs Philp left a settlement by which she appointed the defender her executor and universal legatee, who in that character sold the business and goodwill thereof. The questions now are—(1) To whom belong the profits derived from the business from the date of Mr Philp's death till it was sold; and (2) to whom does the sum received for goodwill belong?

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On the first of these questions the Lord Ordinary is of opinion that the profits derived from the business, as carried on between the date of Mr Philp's death and the 16th February 1892, when the licence was transferred to the name of the widow, belong to the pursuer, but that beyond that date the profits belong to the widow, and the defender as her executor. The ground on which the Lord Ordinary proceeds is, that after her husband's death, and until the licence was transferred, the widow had no title to which to ascribe her possession: that the business was her deceased husband's business, and that the profits were earned by the employment of the deceased husband's stock in trade and other moveable property. I agree with the views so expressed by the Lord Ordinary, but I think on these grounds that the pursuer is entitled to more than the Lord Ordinary has awarded him. The transfer of the licence did not transfer the business: it gave the widow authority to deal in excisable liquors, but nothing more. Accordingly, what she did deal in after the transfer of the licence was nothing more nor less than what she had been dealing with before the transfer, and that was her husband's business, "stock in trade, and other moveable property," all then belonging and due to the pursuer as the husband's executor. In my opinion the whole profits derived from the business from the date of Mr Philp's death until the time when it was sold are due to the pursuer, having been derived solely from the employment of the late Mr Philp's estate. These profits are, of course, to be ascertained after making due allowance to the widow or others for services rendered in the business.

With regard to the second point, the disposal of the sums obtained for goodwill, I differ from the Lord Ordinary. I do not consider it necessary here to inquire whether the goodwill of a business falls to the heir-at-law or the executor, for that question does not really arise here. The heir-at-law has been settled with; he claims no more than he has got, and the pursuer does not question the heir's right to keep what he has got. But after the heir-at-law has been paid what is or is supposed to be his share of the goodwill, what becomes of the balance? The Lord Ordinary awards it to the defender as executor of Mrs Philp, because (1) he, the defender, in selling the business, did not sell on the pursuer's behalf; and (2) because on the transfer of the licence to the name of the widow, any goodwill which existed at the husband's death was necessarily extinguished. I do not think these reasons warrant the Lord Ordinary's conclusion. First, it is immaterial whether the defender in selling

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the business sold it for the pursuer or not. The question is, whose property did he sell, not on whose instructions or authority did he sell it. If the business stock and fittings were the property of the deceased Mr Philp or his executor, then Mr Philp's executor is entitled to the price realised by the sale. The result is not affected by any consideration as to the seller's right or authority to sell. Now, that the stock and fittings were the property of the pursuer when sold is not, in my opinion, open to the slightest doubt. They were part of Mr Philp's estate admittedly at the date of his death—they never were transferred to or acquired by his widow—they remained therefore part of Mr Philp's executry claimable by the pursuer. The actual stock in the shop when Mr Philp died was of course different from that in the shop when sold. But the latter was the equivalent of the former, and was all bought and paid for out of the proceeds of the business. As to the goodwill, it attached either to the premises or to the business carried on in the premises, or partly to both. So far as it attached to the premises, the heir-at-law, the owner of the premises, has received it—what remains must attach to the business, for it was not an independent and separate right or asset in itself. Then if it was attached to the business, and went with the business, the price paid for it must go, just like the price of the stock and fittings, to the person to whom it belonged. The buyer of the business paid somewhere about £1500 for business, goodwill, stock, and fittings. Of that a certain proportion has been paid to the owner of the premises—rightly or wrongly. The balance, it appears to me, can belong to nobody but the person *in titulo* to the business, goodwill, stock, &c., and that is the pursuer. The transfer of the licence to the widow, whether granted to her in competition with the pursuer or not, could not diminish the estate of Mr Philp nor extinguish the goodwill any more than it could extinguish the business itself, nor could it transfer to her any asset belonging to her deceased husband. It did not make the business or the goodwill; it only enabled the widow to carry on lawfully the business her husband had left. I think, therefore, the pursuer is entitled to the amount realised by the sale of the business, including the goodwill, less the amount paid to the heir-at-law, and less the value of anything sold and included in the price (if there was any) which the widow had purchased after her husband's death out of her own funds.

LORD JUSTICE-CLERK.—I concur entirely in Lord Trayner's opinion.

LORD PRESIDENT.—I agree with Lord Young and Lord Rutherford Clark.

THE COURT adhered.

P. MORISON, S.S.C.—GILL & PRINGLE, W.S.—Agents.

No. 93. WILLIAM CARRUTHERS (David Carruthers's Trustee), Pursuer (Respondent).

—D. Dundas—Craigie.

FRANCIS EELES, Defender (Reclaimer).—Ure—Clyde.

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Succession—Vesting—Express clause of vesting—Testament—Construction—Repugnancy.—A testator, by his trust-disposition and settlement, directed his trustees, after the death of the survivor of himself and his wife, to "set apart as a debt the sum which they shall judge necessary" for the maintenance and education of such of his children as should then be in minority until they should reach majority, "and the trustees shall pay over and divide the

* Decided Jan. 30, 1894

free proceeds of my moveable or personal estate and arrears or accumulations, if any, of the whole income of the trust-estate, to and among, and shall dispose, assign, and convey my whole heritable or real estate to and in favour of" his children, "equally share and share alike, and the survivors and survivor equally, and that at the term of Whitsunday or Martinmas immediately following the death of the survivor of my said wife and me, or the majority of my youngest child, whichever of these events shall last happen, on the following conditions: the share of the premises of each child shall be a vested right at majority, though not payable till the youngest child reach majority; if any of my said children die before the said period of division leaving lawful issue, the latter shall succeed equally to the share of their parent."

In a competition between the trustee of the testator's eldest son, who survived his father and attained majority, but predeceased his mother, and the only child of the eldest son, *held (diss. Lord Rutherford Clark)* that on a sound construction of the trust-disposition and settlement, the shares of the testator's children vested in them as they respectively attained majority, although their mother might then be alive.

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THE REV. WILLIAM CARRUTHERS, South Queensferry, died on 23d June 1854, leaving a trust-disposition and settlement, dated 10th March 1846, by which he conveyed his whole estates, heritable and moveable, to trustees, in the second place, to pay the income to his wife, if she should survive him, and so long as she should remain a widow, she being bound to maintain and educate the children of the marriage while unable to provide for themselves. In the third place, in the event of his widow entering into a second marriage, the trustees were directed to apply part, or if necessary the whole of the income of the trust-estate in the maintenance and education of the children during their respective minorities, and while unable to provide for themselves. The trust-disposition then contained this clause,—“In the fourth place, after the death of the survivor of me and my said wife, the trustees shall set apart as a debt the sum which they shall judge necessary to pay the education and maintenance of such of my children as shall then be under twenty-one years of age, until each respectively reach that age, or if daughters, shall be married, and the trustees shall pay over and divide the free proceeds of my moveable or personal estate and arrears or accumulation, if any, of the whole income of the trust-estate, to and among, and shall dispose, assign, and convey my whole heritable or real estate to and in favour of the said David Carruthers, Margaret Carruthers, James Smith Carruthers, and William Carruthers, being my whole children, and any other child or children who may be born of my body, equally, share and share alike, and the survivors and survivor equally, and that at the term of Whitsunday or Martinmas immediately following the death of the survivor of my said wife and me, or the majority of my youngest child, whichever of these events shall last happen, on the following conditions: the share of the premises of each child shall be a vested right at majority, though not payable till the youngest reach majority; if any of my said children die before the said period of division leaving lawful issue, the latter shall succeed equally to the share of their parent.”

2D DIVISION.
Ld. Kyllachy.

The testator was survived by his widow and by the four children named in the deed, of whom the youngest, William, attained majority on 11th January 1866.

The widow died on 25th March 1885, predeceased by the eldest son David, who had died 7th April 1879, survived by an only child Margaret. David left a trust-disposition and settlement giving his daughter a life-rent of his whole estates, and the fee to her children, with an ulterior destination.

At the time of his death the Rev. Mr Carruthers was heritable pro-

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prietor of and duly infeft in the *pro indiviso* one-third share of the lands of South Cobbinshaw, Midlothian. On 22d December 1888, Margaret Carruthers, David's daughter, made up a title by notarial instrument to one-fourth part of this *pro indiviso* third share, on the footing that her father, having predeceased his mother, had taken no vested right under his father's settlement, and consequently that one-fourth part of the one-third share of the said lands had vested in her. Margaret Carruthers thereafter granted a bond and disposition in security for £200 in favour of Francis Eeles over that one-fourth part of the one-third share.

On 7th March 1893 David Carruthers's trustee, who held a disposition to the one-fourth part of the one-third share, granted by the surviving trustee of the Rev. Mr Carruthers, brought an action against Margaret Carruthers and against Eeles for reduction of the notarial instrument and of the bond and disposition in security, on the ground that on a sound construction of the Rev. Mr Carruthers's settlement, David's share of his father's estate vested in him when he attained majority, and consequently that the one-fourth part of the one-third share of the lands of South Cobbinshaw had vested in him and passed to the pursuer as his trustee.

Eeles alone lodged defences.

On 28th June 1893 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"In respect the defender, Francis Eeles, has produced the notarial instrument and the bond and disposition in security, dated, &c., for the sum of £200, granted by Margaret Carruthers in his favour, of consent holds the production so far as the said Francis Eeles is concerned, satisfied: Of consent also holds the preliminary defences lodged for the said Francis Eeles as defences on the merits: And having heard counsel on the closed record and considered the cause, sustains the reasons of reduction, and reduces, decerns, and declares, conform to the conclusions of the libel as against the said Francis Eeles: . . . Finds and declares in terms of the declaratory conclusions of the summons, and decerns: Finds the defender, the said Francis Eeles, liable in expenses to the pursuer."*

* "OPINION.—This case takes the form of an action of reduction of certain titles made up on behalf of the defender, Miss Margaret Carruthers, but the only question which I require to decide seems to be this,—whether the share of the trust-estate of the late Rev. W. Carruthers, bequeathed to his son, the late David Carruthers, vested in the latter at majority? It appears that David Carruthers survived his majority, but died before his mother, the truster's widow. The question is, whether, upon the just construction of his father's settlement, vesting was postponed until the widow's death?

"There is undoubtedly some force in the view that the whole clause of bequest proceeds on the hypothesis that the truster and his wife have both died; or to put it otherwise, that there is no gift expressed except upon the condition that the donee shall survive both husband and wife. The clause certainly begins thus,—‘After the death of the survivor of me and my said wife, the trustees shall set apart,’ &c., &c. And Mr Clyde forcibly argued that these introductory words govern the whole clause; and that although the clause goes on to provide that vesting shall take place upon majority, that only means this, that assuming the widow to have predeceased, vesting shall not be postponed beyond majority by reason of the non-arrival of the period of payment, viz., the majority of the youngest child.

"I cannot say that I regard this reading of the settlement as necessarily inadmissible, but on the other hand I have to consider that the clause or trust purpose referred to contains an express provision to the effect that ‘the share of the premises of each child shall be a vested right at majority, though not payable till the youngest child reach majority.’ I have not, I confess, seen my way to qualify this express provision by implications, which, although plausible, cannot be said to be necessary. It may be that the truster intended that quali-

The defender reclaimed. The arguments sufficiently appear from the opinions.¹ No. 93.

At advising,—

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LORD YOUNG.—The Rev. William Carruthers by his trust-settlement directed his trustees to give a liferent of his whole estate, heritable and moveable, to his wife, and on her death and the majority of his youngest child to pay and convey the fee and capital to all his children and the survivors equally, with a declaration, probably superfluous, that the issue of predeceasers should take their parent's share. By the law, as it has now for about thirty years been held to be settled and fixed, this imports vesting in the children (or the issue of predeceasers) existing at the date of distribution. This Court had erroneously thought and decided otherwise, but the error was corrected by a judgment of the House of Lords about twenty years subsequent to the date of the settlement of Mr Carruthers, which was in 1846, and about ten years subsequent to his death, which occurred in 1854.

It is by the fourth article of Mr Carruthers's settlement that the trustees are directed as I have stated. It, however, contains this clause, which I have not yet noticed,—“The share of the premises of each child shall be a vested right at majority, though not payable till the youngest reach majority; if any of my said children die before the said period of division leaving lawful issue, the latter shall succeed equally to the share of their parent.”

The question, and only question, which was argued to us is, what is the legal import of this clause? Assuming that without it (*i.e.*, had it not occurred) the vesting would have been at the period of distribution, and of course in the children then surviving and the issue of predeceasers, what is the meaning and legal effect of this clause? It is not contended by either party that it is meaningless or inoperative, but they are in conflict as to its true meaning and operation. The defender (for only one has appeared) contends that it refers and applies only to such of the testator's children as may happen to survive the liferentrix (their mother), and must be read and have effect exactly as if the words had been,—“The share of the premises of each child who may survive the liferentrix shall be a vested right at majority,” the reason which he assigns being that this is the reasonable and just inference from the words “though not payable till the youngest reach majority,” and that had this inference and limitation not been intended, these words would either have been omitted or enlarged so as to read, “though not payable till the youngest reach majority and the death of the liferentrix.” The pursuer disputes this construction, and the reasoning in support of it, on grounds which, whether sound and conclusive or not, are sufficiently obvious. He says that the primary and leading words are too plain to admit of construction; that the testator's object manifestly was to enable each child after attaining majority to deal with his prospective estate

fying words should be read in, drawn from the general scheme of the clause. But I think that if that were his meaning, he could easily have expressed it. On the whole, I prefer to construe the settlement literally, and I therefore propose to find that the share of the late David Carruthers vested in him prior to his death and passed to the pursuer as his trustee. I suppose it follows that I should pronounce decree of reduction in terms of the summons.”

¹ *Authorities*.—*Bowes' Trustees*, March 18, 1870, 42 Scot. Jur. 382; *Cunningham v. Cunningham*, Nov. 30, 1889, 17 R. 218; *Henderson's Trustees v. Henderson*, Jan. 8, 1876, 3 R. 321.

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as a vested right, so that those who came in his place at the time of distribution (if he did not survive) should take it, as he would himself have done, subject to his debts and deeds incurred or made after majority; that the words "though not payable till the youngest attain majority" are superfluous, meaning only "though not then payable." The Lord Ordinary favours the view of the pursuer, rejecting that of the defender, and I agree with him.

The facts of the particular case as they have occurred illustrate the pursuer's contention as to the true sense and meaning of the clause in question, and the purpose which the truster intended thereby to effect. He was survived by his widow for thirty years, and she survived the majority of the youngest child for nineteen years. That child was born some years before the father's death, and was over forty when the mother died. The eldest child (David)—the validity of whose deed is in question—had a daughter (Margaret) born to him in his mother's lifetime, and in 1877 he executed a trust-disposition and settlement primarily in her favour, but with trusts for her protection and an ulterior destination. He died in 1879, when the youngest child of his father was thirty-four years old, and he (the eldest) necessarily older. Now, it seems to me that the intelligible, legitimate, and indeed obvious purpose of the truster (the Rev. William Carruthers) in inserting the clause in question in his settlement was that such a deed as his eldest son executed after majority should have validity and effect upon his "share of the premises." I can conceive no other, and no other was suggested. But this purpose has no apparent connection with the accident whether the payment shall in the result be delayed beyond the time of a child's share becoming "a vested right" by the continuing minority of the youngest child or the prolonged survivance of the widow: It must of necessity, by the terms of the deed, be delayed till both events shall have occurred, and which of them shall first happen seems immaterial to the only purpose and intention which can reasonably be imputed to the testator.

I am therefore of opinion that David's "share of the premises" was "a vested right" in him at the time of his death, and that his deed must have effect upon it accordingly.

LORD RUTHERFURD CLARK.—The question is whether under the residuary clause of Mr Carruthers's trust-disposition the benefit given to his children vested as they severally attained majority, or whether the vesting was postponed till the death of the widow.

The truster directed his trustees to divide his moveable and heritable estate among his whole children in equal shares, "and the survivors or survivor equally, and that at the term of Whitsunday or Martinmas immediately following the death of the survivor of my said wife and me, or the majority of my youngest child, whichever of these events shall last happen." The parties did not dispute that if the question had to be decided by this clause alone, no interest could vest till the death of the widow. The reason is obvious. Nothing is given except through the division which the trustees are directed to make, and they can make no division until the death of the widow. And as it is settled that the survivorship clause must be construed by reference to the period of distribution, the meaning of the truster necessarily is that the trustees are to divide the residue among such of his children as survive that period. Under such a clause no other children could take benefit.

But the division was to be made on the following conditions:—"The share

of each child shall be a vested right at majority though not payable till the youngest reach majority," &c. It is said that this declaration is absolute and unqualified, and that by virtue thereof the share of each child must vest when he attains majority. Such a reading is an abrogation of the survivorship clause. If we adopt it, we must hold that under a direction to divide a vested interest is conferred on a legatee who is not one of the persons among whom the division can be made.

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It is our duty, if we can, to give a meaning to every clause of the deed. It may happen that there is an absolute inconsistency, and in that case the latest clause would prevail. But if the different clauses may fairly bear a construction which will give consistency to the whole deed, we must adopt that construction. Or if this be impossible, we must endeavour to reduce the inconsistency to its lowest limits.

There are two periods at which the division may take place, viz., the death of the widow or the majority of the youngest child. In stating the conditions the truster contemplates the latter only, but I think that he contemplates it as a period of division, or, in other words, he is referring to a time at which his wife is dead. For it is only on the supposition that that event has occurred that the period which he mentions is a period of division. I am disposed, therefore, to read the condition as merely accelerating the date of vesting after the death of the widow, but as doing nothing more.

I am aware that this construction does not give consistency to the whole deed. For the division is directed to be made on the occurrence of the last of two events, and a vested interest is given to a child who may not survive both. We must, however, give effect to the express declaration of the truster. I follow the rule of which I have previously spoken, and I do not carry the inconsistency further than the language of the deed necessarily requires.

LORD TRAYNER.—I am not prepared to adopt the view that the opening words of the clause under construction, viz., "after the death of the survivor of me and my said wife," &c., govern the whole clause. Fairly read along with the context, these words appear to me to be limited in their application to the first matter with which the clause in question deals. By the second trust purpose of the late Mr Carruthers's settlement his trustees are directed to give to his widow the liferent and free yearly income of his whole estate, out of which she is taken bound to educate and maintain the children of the marriage, with a declaration that in the event of the widow entering into a second marriage her liferent shall cease. The third purpose provides that, in the event of the widow entering into a second marriage, the trustees shall apply a part, or, if necessary, the whole of the annual produce of the estate in the maintenance of the children during minority or while unable to provide for themselves; and the fourth purpose (set forth in the clause in question) provides, that "after the death of the survivor of me and my said wife the trustees shall set apart as a debt the sum which they shall judge necessary to pay the education and maintenance of such of my children as shall then be under twenty-one years of age," until they reach that age or be married. Now, observe what these clauses come to: They are, so far as the children are concerned, provisions for three different sets of circumstances. First, if the widow does not enter into a second marriage she gets the liferent of the whole estate under burden of maintaining and educating the children of the marriage. Second, if the widow enters into a second

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marriage, she loses her liferent, and the children are to be provided for by the trustees. The position and necessities of the children are thus provided for during their mother's survivance, whether she enters into a second marriage or not. But another contingency had to be provided against, namely, the decease of the widow, and with regard to that the trustor provided (third) that after the death of himself and his widow the trustees shall provide for the children in minority or unable to support themselves in a certain way. This third contingency is, in my opinion, what the opening words of the fourth trust purpose refer to, and nothing else. The rest of the fourth purpose, although in form a continuation of the clause, is really a new provision relating to a totally different matter, namely, the vesting and distribution of the fee of the estate after the liferent for the widow or maintenance of children have been provided for, and need no longer be considered. I think therefore we proceed to the construction of the clause in question unembarrassed by the words with which it commences, and looking at the clause in that view, I reach the same conclusion as the Lord Ordinary. The period of payment of the children's provisions is postponed until after the death of the widow and until the youngest child has attained majority, because the liferent of the one and the maintenance of the other render such postponement necessary. But postponement of the terms of payment does not *per se* postpone the period of vesting. Here the trustor has fixed the period of vesting, for he expressly declares that the benefits conferred on his children by his settlement are conferred "on the following conditions:—The share of the premises of each child shall be a vested right at majority, though not payable till the youngest reach majority," &c. It is pointed out to us that this assumes (although it is not expressed) that the widow must be dead when the youngest child attains majority, because until the widow's death the existence of her liferent would prevent the division of the estate. I agree that this must be so. Before payment to any child of his share of the estate the widow must be dead and the youngest child major. But the vesting is declared to take place as each child attains majority, and the vesting therefore, according to the trustor's express declaration, is not postponed until the period of payment. I do not think it admissible to fix a period of vesting as a result of mere construction different from that which the testator has fixed in precise and unambiguous language. I am therefore of opinion that the share of the late David Carruthers vested in him when he became major, and was consequently carried by his settlement to the pursuer.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

MACKENZIE & BLACK, W.S.—A. C. D. VERT, S.S.C.—Agents.

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MRS EUPHEMIA BAILLIE, Pursuer (Reclaiming).—*Jameson*—*N. J. Kennedy*.
JAMES HUTTON (Shearer's Judicial Factor), Defender (Respondent).—
John Wilson—*Constable*.

Road—Burgh—Reparation.—*Held* (by a majority of seven Judges, *dis. Lord Young*) that the proprietor of a house in a public street within burgh, whose titles include the *solum* of the pavement in front of the house, is not relieved from the duty of maintaining the pavement in a safe condition for foot-passengers by the mere fact that the street is under the control and management of a public body, and that he will be liable in damages to foot-passengers who are injured through his neglect to fulfil this duty.

Road—Burgh—Reparation—Glasgow Police Act, 1866 (29 and 30 Vict. cap. No. 94. clxxiii.), secs. 289, 317, 326.—The Glasgow Police Act, 1866, sec. 289, enacts, —“Every public street, for the objects and purposes thereof, and of this Act, and the public sewers, . . . shall vest in the board, but it shall be lawful for the proprietors of lands and heritages adjoining any such street to construct cellars or vaults under the foot-pavement opposite such lands and heritages, where by their titles they have a right so to do.” Feb. 1, 1894. Baillie v. Shearer's Judicial Factor.

Sec. 310 enacts,—“Subject to the obligations hereinafter imposed on the proprietors of lands and heritages, the board shall make provision for maintaining . . . the public streets in a suitable manner. . . .”

Sec. 317 enacts that the Master of Works may, by notice given, require “any proprietor of a land or heritage adjoining . . . any public street . . . to form” . . . and from time to time to alter, repair, or renew to his entire satisfaction foot-pavements in such street opposite to such land or heritage as respects such proprietor, “except where the foot-pavements have been taken over by the board.”

Sec. 326 enacts that the board may direct defective pavements to be renewed by the Master of Works, “and the expense thereof” “shall be payable by the parties liable to maintain such foot-pavements, and be recoverable by the board as damages, and thereafter all such foot-pavements shall be maintained by the board as part of the public streets of the city.”

Held (diss. Lord Young and Lord Adam) that the owner of the *solum* of a pavement adjoining his house in a public street is liable in damages for an accident caused to a member of the public by the defective state of the pavement, unless the pavement had been taken over by the board of police in terms of sec. 326.

Right in security—Mails and duties—Reparation.—*Held* (by a majority of seven Judges, *dub. Lord Trayner*) that the creditor under a bond and disposition in security entering into possession of the security subjects under a decree of mails and duties and conducting himself as owner thereof, to the exclusion of the true owner, incurs the liabilities of an owner in questions with the public.

IN January 1893 Mrs Euphemia Baillie, widow of James Baillie, 2D DIVISION, engineer, Glasgow, brought an action of damages for personal injuries with three con- against James Hutton, C.A., Glasgow, judicial factor on the trust-estate Lord Kin- of James Shearer, wine and spirit-merchant there, conform to appoint- cairney. ment, dated 7th December 1892.

The pursuer averred that (cond. 1) the trust-estate upon which the defender was judicial factor included a postponed bond and disposition in security over property in Shamrock Street, Glasgow, including No. 11 Shamrock Street. “The defender, as judicial factor foressaid, is a heritable creditor in possession of said property by virtue of a decree of mails and duties by the Sheriff of Lanarkshire, obtained on the 19th December 1882 at the instance of his predecessors, the said trustees of the late James Shearer. Under said decree of mails and duties Mr Shearer's trustees, and since 7th December 1892 the defender, as judicial factor, have, through house-factors appointed by them, taken and kept exclusive possession of said property, and continued to draw the whole rents and profits thereof, have carried out certain repairs, and have generally attended to said property and conducted themselves as proprietors, or at least as possessors thereof, to the exclusion of everyone else.” (Cond. 2) “About six o'clock on the evening of Sunday, 11th December 1892, while the pursuer was passing along Shamrock Street . . . at a point almost exactly opposite No. 11 Shamrock Street, . . . she was tripped up by a loose flagstone, and fell heavily to the ground.” (Cond. 3) “The said portion of pavement in front of No. 11 Shamrock Street had been out of repair for some time, and was, at the date of said accident to the pursuer, in an improper and dangerous condition, and not safe for the use of persons passing along said street. . . . The police twice reported to

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the house-factors, representing the said trustees and the defender, that the said portion of pavement was out of repair. . . . Apart from such notice, it was the defender's duty to have and keep the said pavement in a safe condition for foot-passengers."

The defender admitted that under the decree of maills and duties founded on by the pursuer Shearer's trustees had, through factors appointed by them, drawn the rents of the property under obligation to account to the prior bondholder and to the proprietor; but he denied that either he or Shearer's trustees had conducted themselves as proprietors of No. 11 Shamrock Street, or excluded the proprietor or anyone else from the possession or management of the same.

The defender further founded on the Glasgow Police Act, 1866, particularly sections 289 and 317,* and averred,—(Stat. 9) "Both at common law, which is incorporated with the above statute, and under the express

* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 279, enacts,—“It shall be the duty of the Master of Works to enforce the provisions of this Act with respect to the formation, improvement, and maintenance of streets, courts, and foot-pavements. . . .”

Sec. 289 enacts,—“Every public street, for the objects and purposes thereof, and of this Act, and the public sewers for the drainage thereof, shall vest in the board, but it shall be lawful for the proprietors of lands and heritages adjoining any such street to construct cellars or vaults under the foot-pavement opposite such lands and heritages, where by their titles they have a right so to do.”

Sec. 298 enacts,—“The board may, upon such terms as they think fit, convey any portion of a public street to the proprietor of any land or heritage adjoining it, for the purpose of obtaining a uniform line of frontage and of improving such street.”

Sec. 310 enacts,—“Subject to the obligations hereinafter imposed on the proprietors of lands and heritages, the board shall make provision for maintaining, and, so far as thought expedient, causewaying the public streets in a suitable manner, and for altering, repairing, and renewing the said causeway.”

Sec. 317 enacts,—“The Master of Works may, by notice given in manner hereinafter provided, require the trustees of any bridge or of any turnpike road on which there is a bridge, or any proprietor of a land or heritage adjoining any other turnpike road within the city, or any public street, so far as not already done, to form in a suitable manner, with openings at convenient distances for fire-plugs, and from time to time to alter, repair, or renew to his entire satisfaction foot-pavements on such bridge as respects such trustees, or in such road or street opposite to such land or heritage as respects such proprietor, except where the foot-pavements have been taken over by the board.”

Sec. 321 states the particulars which are to be given in the notices, and sec. 322 provides for the disposal of objections to the notice by the proprietor.

Sec. 325 enacts that in case of failure to comply with the requisition contained in the notice, the Procurator-fiscal may apply to the Dean of Guild for a warrant to execute the work, and on the Dean of Guild fixing the cost thereof, obtain decree against the proprietor or proprietors for the amount of such cost.

Sec. 326 enacts,—“On a report by the Master of Works that the foot-pavement of any street, or of the streets within any district of the city, are in a defective and unsatisfactory state, the board may, after such examination or inquiry as they think fit, direct the foot-pavement of such street, or of the streets in such district, to be renewed by the Master of Works, of such width, and using such description and quality of pavement as they may fix, except in the principal thoroughfares of the city, where they shall be bound to use the best quality of Arbroath or Caithness pavement, with granite kerb-stones, and the expense thereof, as certified by the Master of Works, shall be payable by the parties liable to maintain such foot-pavements, and be recoverable by the board as damages, and thereafter, all such foot-pavements shall be maintained by the board as part of the public streets of the city.”

provisions of the said statute, the Board of Police of Glasgow are vested with the property, or at anyrate with the sole and exclusive right and duty of administration and control of the street, and of the pavement in question, including the right and duty of lighting, watering, cleaning, maintaining, and generally regulating the same, subject to such obligation as is imposed by section 317, above referred to, on the proprietors of adjoining land or heritage in a question with and on the express instructions of the board. The defender has neither right nor duty, except on requisition by the Master of Works, to interfere with the said pavement, and has no duty to the public with regard thereto."

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With reference to the question under the Glasgow Police Act, it was at the bar admitted by the pursuer that Shamrock Street was a public street in the sense of the Act, and by the defender that the pavement of Shamrock Street had not been taken over by the Board of Police under section 326 of the Act.

It was further admitted by the defender, at the bar in the Inner-House, that the *solum* of the pavement in front of No. 11 Shamrock Street was within his titles.

The pursuer pleaded;—(1) The pursuer, having suffered loss, injury, and damage, by or through the fault or negligence of the defender, or those for whom he is responsible, is entitled to reparation as concluded for, with expenses. (2) The defender having ousted the proprietor of the property after mentioned from all management of or interference therewith, and having taken the exclusive possession and management of the said property, of which No. 11 Shamrock Street, and the pavement in front of the same, forms part, it was his duty to keep and maintain the same in proper order for safe use by the public. (3) Under and in virtue of the 'Glasgow Police Act, 1866,' the defender is responsible for the repair and maintenance of said foot-pavement in a safe and proper condition for the use of the public.

The defender pleaded;—(1) The action is irrelevantly and incompetently laid against the present defender. (2) The defender, as holder under a postponed bond of a decree of mails and duties with respect to the property in question, and intromitter with the rents derived therefrom, under obligation to account as set forth in the record, is not liable to the pursuer for the condition of the property. (4) The defender not being responsible for the condition of the pavement mentioned on record, is entitled to be assolizied.

On 31st May 1893 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Sustains the first and fourth pleas in law for the defender, and assolizies him from the conclusions of the action, and decerns: Finds the defender entitled to expenses," &c.*

* "OPINION.— . . . The question is whether in these circumstances the defender, as heritable creditor in actual possession of No. 11 Shamrock Street, was under an obligation to keep the pavement opposite that house in a safe condition for the use of members of the public passing along it. The question seems novel; at least no authority affording much assistance was referred to. The pursuer maintained that at common law an heritable creditor in actual possession of property covered by his bond, under a decree of mails and duties, incurred all the obligations and duties of the proprietor, whose place he assumed, and was under the same liability as an owner would be, if a member of the public, with right of access, suffered injury through the dangerous condition of his property. An owner would be liable in damages for such an injury in a certain limited class of cases, of which there are many examples in the books, such, for example, as *Black v. Cadell*, 9th February 1804, M. 13,905; *Cleghorn v. Taylor*, 27th February 1856, 18 D. 664; *Mack v. Simpson*, 17th February 1832,

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After a hearing the Court appointed the cause to be heard before seven Judges.

Argued for the pursuer;—(1) At common law the proprietor of landed

10 S. 349, where a judicial factor on the estate was held so liable. The defender contended that in such circumstances an heritable creditor would not be liable. No case has been quoted in which such an action has been sustained against an heritable creditor in possession, but the pursuer referred to an early case, *Hay v. Littlejohn*, 16th February 1666, M. 13,974, where an action of damages for injury, caused by the insecure condition of a tenement, was sustained against an appriser of a liferenter's right, apparently because he was in possession. I am inclined to think that one who assumes the sole possession and management of a house or property, as the defender is alleged to have done, may be held also to assume the responsibility attaching to the condition of the tenement or property, and that, if it becomes unsafe through want of necessary repairs, he may be held liable in the consequences, especially if he be a creditor lawfully in possession, and if the repairs be such as he would be entitled to make and charge against the rents, and if I could think that this case depended on the principles of common law, I could not have sustained the defender's plea without inquiry. But I am of opinion that the decision of the case does not depend on common law, but on the provisions of the Glasgow Police Act, and that the rights and obligations of the owner of a house opposite a public street in Glasgow, in reference to the street or pavement, are not common law rights and obligations, but such as are expressed in and depend on the Police Act.

"In considering the case as depending on the Police Act, I assume, as I have said, first, that Shamrock Street is a public street, and secondly, that the pavement has not been taken over by the board. I think with the pursuer, that under the interpretation clause, the word 'proprietor,' as used in the Act, includes one in the position of the defender as being 'in the actual enjoyment of the rents and profits of the lands' in question. But it appears to me that the defender is not in that sense proprietor of the street and pavement, but that the ownership of the street and pavement as such has been transferred to the board by the 289th section of the statute. That section provides that [quotes]. I think that the exception or proviso in this clause shews that the word 'street' as here used includes the pavement as well as the causeway, and in the statute generally the word 'street' is used as including both causeway and pavement where there is a pavement. The causeway and the pavement are in some respects differently dealt with, but each of them is regarded as part of the street. I think that in respect of that section the adjoining proprietor lost his control over the street.

"Section 298 empowers the board to convey a portion of a public street to the proprietor adjoining, a provision which assumes that the street—at least its surface—had been vested in the board. It is not in the least necessary to determine whether the rights of the proprietor in the subsoil below the site of the public sewers and gas and water pipes are affected. The Lord President in *The Glasgow Coal Company v. The Glasgow City and District Railway Company*, 20th July 1882, 10 R. 1291, expressed a clear opinion that they were not.

"Now, if a public street—both causeway and pavement—be vested in the board, the rights and duties of the proprietor of the land adjoining, over the surface, at common law must cease, and his rights and duties in regard to the causeway and pavement must be those conferred and imposed by the Police Act. The provisions of the statute in regard to the maintenance of streets and courts are contained in sections 310 to 327 inclusive. Section 310 provides for the maintenance of public streets by the board, and I read it as referring to pavements as well as causeways. The obligation imposed on the board is said to be 'subject to the obligations hereinafter imposed on the proprietors of lands and heritages.' Sections 315 and 316 regard the causeways of the streets and the release of proprietors of adjoining lands from liability for the future maintenance or renewal of the causeway. Had this accident happened through defect of the causeway it is quite clear that the defender would not have been liable.

or house property, in possession of the property and drawing the rents, was bound to maintain it in a safe condition, and if in consequence of its unsafe condition, through the proprietor's negligence, anyone having a legitimate interest to be on the property was injured, the proprietor would be liable to such person.¹ But the mere fact of proprietorship would not infer liability, if the proprietor had been practically ejected from his position of proprietor by someone having a title to do so, the bare radical right of property alone remaining in him, for in such case there could be no negligence on his part.² Such was the position of the owner of this property, for the defender (or at least his authors, for whose actings as judicial factor he was responsible³) had entered into possession of the property, drawn the whole rents, accounted therefor to the parties

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The pavements are treated somewhat differently, and they are dealt with in the 317th and following sections, and chiefly in section 317 and 326, and it appears to me that the obligations of the defender must be found in these two sections.

"Section 317 is clumsily expressed, but so far as it relates to the pavements of streets, it provides as follows

"The provision here is that notice is to be given to form pavements, and also that notice is to be given to alter, repair, or renew them, and the defender contends that his obligation to repair arises only when he has received a notice from the Master of Works requiring him to do so. The exception at the end of the clause means only that when the pavements are taken over by the board the proprietors shall not be subject to any such notice or requirement. . . .

"Section 326 provides that foot-pavements may, after certain procedure, be assumed by the board, 'and thereafter all such foot-pavements shall be maintained by the board as part of the public streets of the city.'

"It has not been contended by the defender that section 326 applies to Shamrock Street. If it had applied, the pavement would have been precisely in the position of a completed causeway, and the proprietors would have been no longer liable to be called on to repair it. If section 326 had applied to Shamrock Street there could have been no case against the defender. But the only difference between a pavement to which section 317 applies, and a pavement to which section 326 applies, is that in the former case the proprietors are liable to execute or pay for such work as the Master of Works requires, and in the latter case they are not liable to pay anything, but the whole expense of repair is thrown on the rates. But section 317 imposes no duty on the proprietor except what the notice of the Master of Works imposes, and if, as I think, the proprietor was under no antecedent duty, I do not see from what his duty to repair the pavement can be deduced. *Prima facie*, a mere adjoining owner would not have right to renew or alter the pavement at his own hand, and I do not see that he has the right or the duty to exercise his discretion in repairing it. . . .

"I am therefore of opinion that the contention of the defender is well founded, and that in the absence of any notice by the Master of Works the defender had no duty to repair this pavement, and has therefore incurred no liability on account of its defective condition. . . .

"I have not in this case to consider whether the magistrates would be liable or not, and it would not be right to indicate any view on that subject.

"With regard to the liability of magistrates to keep the streets of a burgh in repair, reference was made to the following cases:—*Innes v. Magistrates of Edinburgh*, 1798, M. 13,189; *Threshie v. Magistrates of Annan*, 11th December 1845, 8 D. 276; *Dargie v. Magistrates of Forfar*, 10th March 1855, 17 D. 730; *Stephen v. Magistrates of Thurso*, 3d March 1876, 3 R. 535; *Harris v. Magistrates of Leith*, 11th March 1881, 8 R. 613."

¹ *M'Ewan v. Lowden*, Oct. 26, 1881, 19 S. L. R. 22.

² *Campbell v. Kennedy*, Nov. 25, 1864, 3 Macph. 121, 37 Scot. Jur. 62.

³ *Mack v. Simpson*, Feb. 17, 1832, 10 S. 349.

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severally interested therein, made repairs on the property, as he was entitled to do,¹ and generally conducted himself as owner to the exclusion of his debtor, the true owner. If, then, the defender was not liable, no one was, unless, indeed, a case of liability against the magistrates could be established; but at common law, at anyrate, the magistrates were not liable, the *solum* of the pavement being, as was admitted, the property of the defender's debtor and within his bond. But (2) a heritable creditor in the position of the defender was liable, if through his negligence in the management of the property of which he had assumed the rights of owner another was injured.² (3) The last question was, Had the Glasgow Police Act removed this liability? It had not. The vesting clause, sec. 289, of the Act had not done so. That section merely vested streets in the Board of Police "for the objects and purposes of the Act"; and of the objects and purposes relating to pavements the most important were to be found in section 326. That section shewed that until a pavement had been taken over by the board the liability of the owners of houses remained.

Argued for the defender;—(1) At common law the magistrates of a burgh, as custodiers of the public streets within the burgh, had the duty to the public of seeing that the streets were kept in proper repair, and were liable in damages if a member of the public was injured through neglect to keep a street in repair.³ (2) In any case, the defender, as heritable creditor in possession, was not, as in the present question, in the position of owner of the subjects. He was owner as in a question with the tenants, so as to give him right to collect the rents, but *quoad ultra* he was not owner.⁴ (3) In any event, under the Glasgow Police Act, 1866, the defender was not liable. Shamrock Street was a public street, and under section 289 of the Act all public streets were vested in the Board of Police, upon whom, under sections 279 and 310, lay the duty of seeing to the maintenance of such streets, subject only to "the obligations hereinafter imposed on the proprietors of lands and heritages." These obligations in regard to pavements were to be found in sections 317 and 326; and the sound construction of these sections was, that until a pavement was taken over the adjoining proprietor was under certain pecuniary obligations, on receiving notice from the Master of Works, to see that the pavement was maintained in a proper state of repair. But until he received such a notice the proprietor had neither the right nor the duty to interfere with the pavement. The Board of Police, being charged with the duty of seeing that the pavement was properly maintained, were alone liable, as in a question with the public, for the safety of the pavement.

At advising,—

LORD PRESIDENT.—This is an action of damages for personal injuries from a fall on the pavement in Shamrock Street, Glasgow. The pursuer alleges that the fall was caused by the pavement being in a condition dangerous to foot-passengers. She says that the defender is liable because the pavement in ques-

¹ Titles to Lands Consolidation Act, 1868 (31 and 32 Vict. cap. 101), sec. 119; Juridical Styles (1st edn.), vol. i. p. 211.

² Hay v. Littlejohn, 1666, M. 13,974; Duff's Feudal Conveyancing, p. 274.

³ Innes v. Magistrates of Edinburgh, Feb. 6, 1798, M. 13,189; Dargie v. Magistrates of Forfar, March 10, 1855, 17 D. 730, 27 Scot. Jur. 311; Ritchie v. Dundee Police Commissioners, June 4, 1886, 13 R. (Just. Cases) 63.

⁴ Henderson v. Wallace, Jan. 7, 1875, 2 R. 272; Bell's Lect. on Conveyancing (3d edn.), vol. ii. p. 1168.

tion forms part of a property, in relation to which the defender had, at the time of the accident, the duties and liabilities of proprietor. That relation was that the defender, being a bondholder, had in virtue of his bond entered into possession, to the exclusion of the owner, and was exercising all the rights of proprietor. Proceeding, as she does, at common law, the pursuer alleges that the ordinary liabilities of a proprietor are incumbent on a person so acting, not of course by reason of the bond but by reason of the exercise of rights under the bond. The liability alleged is for damages owing to the defender having neglected to keep the footway in safe condition for foot-passengers, who admittedly had a right to go over it.

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So viewed, I consider the case of the pursuer to be well laid, and the question seriously in dispute is whether the Glasgow Police Act of 1866 has not relieved the proprietors of all ground now forming part of the pavement of any public street in Glasgow of liability for its dangerous condition as a footway. This depends on the terms of the statute. It may be freely conceded to the defender that it would have been a natural enough thing for the statute to have done what they say it does,—that it would be much simpler to have the municipality liable for all pavements, rather than only for some, especially where the alternative obligants may be a number of proprietors. On the other hand it is of course clear that, unless the statute effects a transfer of liability, the common law liability remains.

The section which at first sight supports the defender's argument is the 289th—the vesting clause. But this section bears at the outset the qualifying words “for the objects and purposes thereof” (which must mean of the street) “and of this Act,” and, especially in relation to roads and streets, such words are not too readily to be assumed to effect a transfer of all the rights or liabilities of property. Their effect seems rather to be to give so much of a title to the board as is necessary to get over legal difficulties which might otherwise arise in the way of their effectuating the powers specifically conferred upon them.

The section which most directly treats of the subject in dispute is the 326th, and I consider it to be practically decisive. It deals with pavements in public streets—which is exactly what we have to do with in this case. If any such pavement is in bad order, the board is authorised to put it in thorough good order; the cost of this work is to be recovered from the parties liable to maintain such pavement; and, once this is done, the pavement is to be maintained by the board as part of the public streets of the city.

Now, two things are here made clear,—first that, where the pavement in a public street is bad, the liability to repair it is (apart from the procedure here contemplated) on certain parties, other than the board; second that, after the prescribed procedure, the pavement, which theretofore had been repairable by those parties, is to be maintained by the board. The implication of the latter part of the section confirms (had that been needful) the assertion of the first part; and the result is that the board are not liable until the prescribed procedure has been adopted, and that until the board so becomes liable, the liability remains where it was originally.

Applying the clause to the case in hand, when the accident occurred, this street had not been renewed by the board, and therefore the event had not occurred after which the board is declared liable to maintain it; the duty of maintaining was therefore not on the board but on the “parties” referred to in the section, and no other party can be suggested as liable but the proprietor.

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I am, therefore, of opinion that the defence on the Glasgow Police Act fails, and that the pursuer has a good case to go to trial.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG.—This is an action of damages, based on alleged culpable neglect by the defender of his duty to repair the foot-pavement of a street in Glasgow called Shamrock Street, in consequence of which the pursuer, while walking on it, was tripped by a loose flagstone, fell, and was hurt. The position of the defender inferring the duty which he is thus sued for neglecting, to the pursuer's damage, is, that he was at the time of the accident, and had been for about four days before it, judicial factor on a trust (the trustees having failed); that an item of the trust property consisted of a debt of £4500 secured by a bond and disposition in security over a tenement in Shamrock Street adjoining the defective pavement; and that the creditor in the debt and holder of the security having entered on possession (many years ago), the tenement was occupied by tenants under him and his successors—trustees or judicial factors—the defender being such factor at the date of the accident.

The defender says in his defence that Shamrock Street is a public street, vested by the Glasgow Police Act, 1866, in the Board of Police, to whom and their subordinates is committed the duty of seeing that it is kept in proper repair, and thus safe for public traffic. He admits that, under the provisions of the Police Act, the board might have required him, at any time after his appointment as judicial factor, to execute such repairs on the pavement opposite the tenement as they pointed out and specified in their notice as necessary or proper in their judgment, and that neglect to obey such requisition would have been neglect of duty on his part, involving responsibility for the consequences, including liability in a penalty under the Act. But he maintains that it was the duty of the Board of Police, and their officers appointed for the purpose of performing it in the public interest, to observe the effects of the constant tear and wear of the street, and of damage that might from time to time be done to it, whether accidentally or mischievously, and to judge when repairs were necessary or proper to be executed; what these were, and at what times (with due regard to the convenience of the public traffic) they might be executed; that it was not his duty to give his attention to the condition of the street, or to employ others for that purpose; or to judge when repairs were needed, what they were, and when it was proper to execute them. He maintains that there was no common law duty upon him to repair the pavement in question, and that no statutory duty to do so existed except on a requisition by the board, or its proper officer, which admittedly was not made.

The Lord Ordinary took this view of the defender's position, and the consequent absence of any duty on his part, without notice and requisition by the police officials; and in his opinion to this effect, with the reasons given for it in his note, I concur.

I have not collected from the judgments just delivered by your Lordship in the chair and the Lord Justice-Clerk that you are of opinion that any duty to repair is imposed by the statute (the Glasgow Police Act, 1866), on the defender or any other who is, by the definition clause of the Act, to be regarded as a proprietor of lands and tenements adjoining a public street, in the absence of notice and requisition by the police authority. Your Lordships' opinion, as I understand it, is, that by the common law, irrespective of the Act, a duty to keep in

a safe state of repair the foot-pavement of a public street is upon anyone who is infest in the *solum* thereof, whether as proprietor or in security of debt, if, in the latter case, he has entered into possession on his security, and that the statute has not removed this common law duty, or affected the common law liability for neglecting it. And if such duty exists at the common law, I should not differ from your Lordships in holding that it is not removed by an enactment in the statute that the police authority may, in case of neglect, require it to be performed. But I know of no authority for the proposition that it exists. The statutory duty to repair, on notice and requisition from the public authority in charge of the street, is not imposed on the proprietors of the *solum* of the street or pavement, but on the proprietors of the lands and houses "adjoining," whether they are proprietors of the *solum* of the street or not. Indeed, the language of the statute shews clearly enough that private property in the *solum* of the street itself is not a thing which was contemplated, or, if of possible existence (which I doubt), regarded as a matter of any account or materiality. Nor is this surprising when the fact is considered that the streets dealt with are public streets, of which private proprietors (if such exist) of the *solum* could make no use whatever except as members of the public, and in common with all other members of the public.

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As I understand the opinion of common law duty and liability, which I am now examining, the property which is regarded as the foundation of that duty is property in the *solum* of the public street, which may not be in the proprietor of the adjoining lands and tenements, and frequently is not. When it is not, would the proprietor of the adjoining tenements, executing repairs on the requisition of the police authority, or paying for them, have relief from the proprietor of the *solum* of the street or pavement, on the ground that he was liable at the common law, and his liability not affected by the Act? Or supposing the repairs so executed, according to the specification and under the supervision of the police authority, were inadequate, and left the pavement in an unsafe condition, would the party with *sasine* in the *solum* be liable at the common law for the consequences?

But is it a true proposition that the proprietor infest in the *solum* of a public road or street vested in, and in charge of, a public body, possibly not as property, but as a public road or street, is under a duty at the common law to keep it in repair, and, in the public interest, to give attention to its condition? That a private owner shall be obliged, at the common law, to see to the state of his property, and to take care that it shall not fall into dilapidation, by which the safety of those who are legitimately on it or in its neighbourhood shall be endangered, is a true and reasonable proposition; but that it applies to anyone who has an infestment in the *solum* of a public road or street in charge of a public authority is, in my opinion, unreasonable and untrue.

I should, but for the opinions of your Lordships, have thought it clear that the public streets of Glasgow, when vested in the Board of Police, were entirely removed from the possession of all private persons, whatever their feudal title in the *solum*, assuming that any such title could for any practical purpose survive the statutory vesting in the board. Such proprietors could thereafter exercise no proprietary right in the *solum* of the street, or take any possession or use of it other than was enjoyed by the public at large. The streets, whether foot-pavement or causeway, thus stand in marked contrast to the lands and tenements adjoining, which are not vested in the board, and remain in the

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possession, for use and occupation and all purposes, of the private owners exactly as before. The Police Act seems to take account of this when it puts the duty of obeying the board's orders for repairs and alterations, and paying the cost of them, not on the owners of the *solum* of the streets to be altered and repaired, but on the owners of the adjoining lands and tenements, who, as such, are certainly under no common law duty in the matter.

What I have said regarding the impossibility of private possession of public streets, or any possession of them other than use by the general public, is, I think, usefully illustrated by the case before us. The defender is judicial factor on the estate of a creditor for lent money secured by a bond and disposition in security on property situated in a public street. Now, it is admitted, and clear without admission, that a creditor with heritable security incurs no liability with respect to the subject of the security unless he shall enter upon the actual possession and occupation of it. The creditor here, or those in his right, did enter upon the possession and occupation of the tenement of houses, which they let to tenants, and so incurred liability accordingly with respect to it. But did they enter upon the possession and occupation of the public street, whether pavement or causeway? I assume that the title and infeftment of the debtor who granted the security extended over the *solum* of the street which his tenement adjoined, but he was either never in possession of the street itself, or was deprived of it so soon as it was vested in the Police Board as a public street, and so could give no right to his creditor to take possession of it. Now, what did the creditor, or anyone in his right, do in the matter of entering upon possession of the subjects of the security which was not according to his right, whether or not his debtor's title and infeftment included the *solum* of the street, and whether or not the security extended to that *solum*? Nothing whatever, for to enter upon the possession and occupation of that *solum* was impossible. The proposition, then, regarding the common law duty and liability in question in the case of a creditor who accepts a security over a house in a public street seems to be this, that he will incur that duty and liability if his security extends over the *solum* of the street, and otherwise not, so that he may avoid it without any diminution of or prejudice to his security if his man of business is wary enough to see that it does not, which is, of course, easily enough done. The proposition that the incurring or avoiding of a very serious responsibility and liability depends upon a conveyancing technicality of the flimsiest character, I cannot assent to.

I had, I confess, thought that all highways in this country, including public streets in burghs (which are highways), are vested in public bodies on behalf of the public, to the exclusion of all proprietary rights therein, so long as they continue to be highways. I do not refer to the possibility of underground rights, and indeed have no occasion to notice them. A proprietor of adjoining land, built on or not, may think, and justly, that the road or street opposite his ground is in a dangerous condition, but he can do nothing more, as of right, than call the attention of the proper public authority to the matter, and possibly take legal proceedings to compel such authority, if negligent, to do its duty. Such proprietor has, I think, clearly not only no duty, but no right, at his own hand to meddle with the road or street. He may, no doubt, do so in the confident belief that the public authority will make no objection to what he does, but this is not right or duty.

It was argued to us that there is a distinction between pavements which have

been "taken over" by the Board of Police, and those which have not, and there is a distinction no doubt, but, I think, clearly not with respect to the question I am considering. Any public board charged with the duty of seeing that streets are kept in good repair for public traffic must be furnished with the means of executing that duty, and whether this is done by giving them the power to command the requisite work and labour without payment, or to raise money to pay for it has no bearing that I can see on the common law duty and obligation of persons having *sasine* in the *solum*. To the public body is committed the duty of attending to the condition of the street, and seeing that such repairs as they judge to be needful are executed, whether by their own contractors or those whose work and labour they are authorised by the Act to command. The circumstance of being taken over or not does not affect the character of the streets and pavements as vested in them on behalf of the public and devoted to public traffic, to the exclusion of every private proprietary right, as I think, and certainly to the exclusion of any conceivable exercise of such right. Who may be called upon to execute or pay for the work which they specify as in their judgment proper to be executed, is matter of statutory enactment, and is independent of any rule of the common law.

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The action is, as I have pointed out, laid upon culpable neglect of duty by the defender, and must go to trial, if we sustain the relevancy, upon an issue of such culpable neglect of duty. His only duty was as a judicial factor appointed by this Court. He belongs to a profession from which we generally or frequently select persons for such an appointment, and the neglect of duty attributed to him is, that, unwarrantably relying upon the watchfulness and judgment of the Board of Police and their subordinates, and that they would duly inform him whenever the pavement in question needed repair, and they thought proper to sanction operations on it (which they alone could do), he failed, immediately on his appointment, to satisfy himself that it was in good repair, and to call the attention of the board to the fact that it was in disrepair if he found it to be so, and to request their authority to repair it. This seems, on the statement of it, to be a practical enough and commonplace enough matter, and I doubt if any sensible and experienced member of the defender's profession would on that statement impute neglect of duty to him. Should a jury, under the direction of a Judge, think otherwise, and find that he did culpably neglect his duty, and so must pay damages to a sufferer from his neglect, I more than doubt whether he would not have to bear the consequences himself. I do not, at least at present, see how damages paid by a factor for actionable neglect of his duty could be sustained as a fair and proper charge in his factorial account. To sustain the relevancy of the action, and send it for trial on some other ground than neglect of duty by the defender, seems to me impossible. The estate which this Court has entrusted to the management and administration of the defender may be liable to make good the consequences of the misconduct or neglect of some other than himself, as, for instance, the owners of that estate. But no such case is averred. It is well settled that the mere fact of ownership without violation or neglect of an owner's duty will not support an action of damages. Again, the estate in the defender's hands may be liable for some actionable neglect or wrong by persons properly employed by him in its management, say, house factors. But such a case would require to be distinctly averred. House factors may possibly be regarded as carrying on a distinct independent business, as much so as, say, cattle-drivers, so that they, and not

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their employers, are responsible for their misconduct or neglect in the course of their business. Nor could I countenance the notion that house factors employed to collect rents and attend to the condition of house property are to be held as undertaking to see to the condition of the public streets in which the houses stand, and to take care that they are kept in repair, so as to be safe for public traffic. They may be, and I think are, bound to receive and pay due attention to notices and requisitions from the public authorities under the Police Act, but this is by statute, and not by the common law.

I think the action, if the pursuer has a good ground of claim, which possibly she has, is directed against the wrong party, and that the Lord Ordinary's judgment dismissing it ought to be affirmed.

LORD RUTHERFURD CLARK.—I agree with your Lordship in the chair.

I do not attribute any importance to the fact that the defender was appointed only a few days before the accident. It was not alluded to in the argument from the bar, and I am not surprised. The defender represents his predecessors the trustees, and up to the value of the factory estate he incurs the same liabilities.

I need hardly say that I assume that the footway is within the title of the defender. If it be not there is an end of the case. But I understood from the bar that they were satisfied of the fact, and that their argument proceeded on the assumption of its truth. I concur with your Lordship in holding that the trustees and the defender as their representative were bound by the common law to keep the footway in such a condition as should be safe for those who used it.

LORD ADAM.—I understand that it is not disputed that the street in question in which the accident happened is a public street in the sense of the Glasgow Police Act of 1866.

Now, it is provided by the 289th section of that Act that every public street, for the object and purposes thereof, and of that Act, shall vest in the board, that is, on the passing of the Act.

It appears to me that one of the objects and purposes of the Act was the maintenance of the public streets by the board, and accordingly the Act provides for the appointment of an officer, the Master of Works, whose duty under the 279th section of the Act is, *inter alia*, to enforce the provisions of the Act with respect to the maintenance of the streets, including foot-pavements, and that, no doubt, includes the duty of seeing that the streets are kept in proper repair.

I do not doubt that, prior to the passing of the Act, the duty of maintaining the foot-pavements in proper repair lay upon the adjoining proprietors, and if any accident happened in consequence of their failure to perform that duty, they would have been liable in damages to the person injured. But if, as I think, the Act has vested the duty of maintaining the streets in the board, I think the effect of that is to divest the adjoining proprietors of that duty. I do not think that it was the intention of the Act that the board and the adjoining proprietors should both be charged with the same duty.

I think, therefore, that but for the subsequent clauses of the Act, the proprietors would have been, after the passing of the Act, under no obligation or duty to maintain or repair the foot-pavements adjoining their lands.

Having thus, as I think, laid the duty of maintaining the streets upon the board, the Act, section 310, provides that, subject to the obligations thereafter

imposed upon the proprietors of lands and heritages, the board shall make provision for maintaining the public streets in a suitable manner.

The Act, therefore, lays upon the board the duty of maintaining the streets in a suitable manner, subject only to certain statutory obligations imposed upon the proprietors.

The first of these is to be found in the 317th section of the statute, which enacts that the Master of Works may, by notice given as therein provided, require any proprietor of land or heritage adjoining any public street from time to time to alter, repair, or renew to his entire satisfaction foot-pavements in such street opposite to such land or heritage, except where the foot-pavements have been taken over by the board; and the second of these obligations is to be found in the 326th section, which enacts that on a report by the Master of Works that the foot-pavement of any street is in a defective and unsatisfactory state, the board may direct that the foot-pavement of such street be renewed by the Master of Works, and that the expense thereof should be payable by the parties liable to maintain such pavements, and be recoverable by the board as damages, and that thereafter all such pavements be maintained by the board as part of the public streets.

The result, in my opinion, is this, that after the passing of the Act, the duty of maintaining the streets in a suitable manner,—that is in a proper state of repair,—was imposed upon the board; and that the only duty or obligation which thereafter lay upon the adjoining proprietors was the statutory duty of from time to time altering, repairing, or renewing, or, in other words, maintaining the foot-pavements when called upon by the board, and of paying the cost of renewing the foot-pavements when the street was finally taken over by the board.

I am, therefore, of opinion that the interlocutor of the Lord Ordinary should be adhered to.

But if I am wrong in my view of the statute, then I think that the defender is liable at common law.

LORD KINNEAR.—There were only two questions which we were asked to consider in the argument before us, in which the relevancy of the action was challenged on two grounds. In the first place, it is said that as the defender represents heritable creditors he is not liable for this accident as being the proprietor of this pavement, assuming that as proprietor he would have been liable. Then, secondly, it is said that any liability which might have attached at common law has been dissolved, or has been transferred to the Glasgow Board of Works, by the operation of the Glasgow Police Act. In considering these questions, I assume that the pavement on which the accident happened is part of the property held by the defender under his title. I understood that that assumption was conceded in the discussion of the case before us.

I do not understand that any claim is made against the defender personally in respect of any neglect committed by him after the date of his appointment as judicial factor. The date of the appointment was 7th December 1892, and the accident took place only a few days afterwards on the 11th December, and it is not suggested that anything done or omitted to be done by him during that interval contributed to the accident. But the argument of the pursuer is founded on the averment that the trustees whom the defender represents were in possession of the subjects under a decree of maills and duties since June 1882. If that be so, I do not think that the fact that the defender possessed

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as a heritable creditor affects his liability, if the liability of the owner is well founded otherwise. The liability of the owner of property to maintain the property in a safe condition does not, in my opinion, depend on his mere title as owner, but on his possession of the property on the footing of an owner, and, accordingly, I think that a heritable creditor is not put in the position of being liable to maintain the subjects disposed to him in security merely by recording his bond. But the case with which we have here to deal is that of a heritable creditor who in virtue of a decree of mails and duties is in possession of the subjects, and is in the enjoyment of the rents and produce to the exclusion of the titular owner. I think therefore that the defender is liable on the footing of being the owner of these subjects.

The next question is, whether, if the owner of the property is liable at common law to maintain it in safe repair that liability is determined or transferred by the operation of the Glasgow Police Act. On this question I agree with your Lordship. It does not appear to me that the vesting clause of the Act either determines the liability previously existing on the owner or transfers that liability to the Board of Police. It does not transfer the pavements or streets, so far as they are private property, to the board; it transfers to the board all rights and powers which are required for the due execution of the purposes of the Act, and accordingly it is necessary to see what are the purposes of the Act and the duties which it imposes on the Board of Police. In order to determine this I think that we must look at the subsequent sections of the Act which settle what are the duties of the Board of Police, and also those which fix the conditions on which liability is transferred.

Now, the 317th section certainly does impose a duty on the Police Board of seeing that the owners of property maintain the foot-pavements opposite their property in a proper state of repair. But we must here assume that the person who is thus under the duty of repairing the pavement is already subject to a common law liability to keep that pavement in repair. I do not question that there may be owners of property who are not under such a liability, because their titles may not include the pavement. But the question here is whether the Act, by conferring a title on the Board of Police to see that the owners of property keep the pavement in repair, has the effect of relieving the owners from their common law liability in damages to persons who have been injured through neglect to keep the pavement in repair. Now, I cannot see that an active title in a public body to compel a person to perform his duty is inconsistent with the continuance of liability in that person to those who may have been injured through the neglect of that duty. On the contrary, the coexistence of the two rights appears to me to be perfectly consistent.

Therefore, in order to see whether the Act determines the liability of owners to persons injured at common law or transfers it to the Police Board, I think that we must go further, viz., to the section which prescribes the conditions on which liability to keep a pavement in repair is to be transferred to the board. That section is the 326th. It provides—(His Lordship read the section). It appears to me that that clause expresses two things, and that with very reasonable clearness. The first, that liability to maintain a pavement is transferred to the board after the pavement has been put into a state of proper repair in accordance with the terms of the clause, but not sooner; and secondly, the clause assumes a liability attaching to the owners to keep the pavement in repair previous to the date at which the pavement is taken over in terms of the Act. It appears

to me, therefore, that, as the pavement in question was not put into repair in the sense of the 326th section, it has not been taken over by the Board of Police, and consequently that the defender has not been relieved of his common law liability to maintain the pavement in repair, or of his liability to damages to the pursuer if she has been injured in consequence of his neglect to perform his duty of keeping the pavement in repair.

LORD TRAYNER.—The difficulty I have felt in this case arises from the defender's peculiar relation to the property in question. I hesitate to affirm that a heritable creditor lawfully entering into possession of his debtor's subjects, in pursuance of his rights as heritable creditor, thereby renders himself liable in a proprietor's obligation *quoad* the subjects possessed. I take it for granted that the mere obtaining of a decree of mails and duties, and exercising the rights which such a decree confers, would not impose on the heritable creditor the owner's obligations. It is said the defender here has done more—that he has extruded the owner and taken entire possession of the subjects as if they were his own. But if the defender in this case has done more in the way of possessing or managing the property than he could or should have done under his decree of mails and duties, he may be responsible to account therefor to the owner of the subjects. I doubt whether he incurs any other responsibility. I do not, however, on account of the doubt which I entertain, dissent from the result which your Lordship in the chair has reached.

On the import and effect of the clauses in the Glasgow Police Act as bearing upon the question at issue, I concur in the opinion of your Lordship.

THE COURT recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to proceed.

J. M. BOW, W.S.—J. H. DIXSON, W.S.—Agents.

ALEXANDER CROSS & SONS, Pursuers and Nominal Raisers.
NORTH-WESTERN BANK, LIMITED, Real Raisers and Claimants
(Appellants).—*Dickson—Ure.*

POYNTER, SON, & MACDONALDS, Claimants (Respondents).—*Johnston—Salvesen.*

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Right in security—Pledge—Agent and Principal—Ship—Bill of lading.—Page & Company obtained an advance from a bank, upon the security, by way of pledge, of certain merchandise then afloat, and handed the bill of lading to the bank, blank indorsed, it being agreed that the bank should have immediate and absolute power of sale of the merchandise. Subsequently the bank returned the bill of lading to Page & Company (without further indorsation or other marking to shew that the bank had any interest in the bill), with a letter bearing that the bank transferred to Page & Company, as trustees for the bank, the bill of lading, and authorising Page & Company to obtain delivery of the merchandise on arrival and to sell it on the bank's behalf. Page & Company sold the merchandise upon a contract in their own name to Cross & Company, and handed them the bill of lading. Cross & Company having paid part of the price, Poynter & Company, creditors of Page & Company, arrested the balance in the hands of Cross & Company upon the dependence of an action against Page & Company in which decree in absence was ultimately pronounced.

In a competition between the bank and Poynter & Company for the balance of the price, *held (diss. Lord Young)* that the bank by retransferring the bill of lading to Page & Company, the owners of the merchandise, lost their real security over the merchandise, which thus became the unburdened pro-

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perty of Page & Company ; and consequently that Poynter & Company having arrested the balance of the price for a debt due to them by Page & Company, were entitled to be preferred.

ON 1st April 1892 Charles Page & Company, merchants, Liverpool, applied to the North-Western Bank, Limited, Liverpool, for an advance of £5000 "upon security by way of pledge of 3455 tons phosphate rock" then on board the ships "Cyprus" and "Storra Lee," and represented to be of the nett value of £6733.

The bank agreed to make the advance upon the following conditions, as embodied in a letter by them to Page & Company, dated 4th April :—
"We now beg to put in writing the conditions on which we advance to you the sum of £5000, say five thousand pounds, repayable by you on or before 1st June, on the security of the undermentioned merchandise [the two cargoes], which you pledge to us and warehouse in our name.

"It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise, on our behalf, in the ordinary course of business, and we expressly direct you to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you, to be applied towards payment of the said advance, interest, commission, and all charges.

"You are at any time at our request to give to us full authority to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf.

"You are to insure the merchandise against all fire risks on our behalf, and you undertake to keep it fully covered, to hold the policy in trust on our account, and in case of loss, to collect and pay the insurance money to us in the same manner as proceeds of sale."

Page & Company assented to these conditions, and in pursuance of the agreement thus concluded sent the bills of lading for the phosphate rock to the bank blank indorsed.

The "Cyprus" (to which alone the action to be mentioned related) was destined for Glasgow as her port of delivery, and was expected to arrive there on or about 12th April.

On 12th April the bank wrote to Page & Company,—
"In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified, we transfer to you, as trustees for us, the bill of lading, &c., for 1629 tons phosphate rock per 'Cyprus,' marked , which we now hold as security for payment of the advance specified at foot, and we request you to obtain delivery on our account of the merchandise referred to in such bill of lading, and warehouse the same in our name, you paying the freight and expenses of discharge. We further authorise and empower you to enter into contracts for the sale of the merchandise on our behalf, in the ordinary course of business, and we expressly direct you to pay the proceeds of all such sales from time to time to us immediately on receipt thereof, in order to be applied towards retirement of such advance." The letter then concluded in terms identical with those of the two last paragraphs of the letter of 4th April above quoted.

Page & Company on the same day replied,—
"We have sold for you 1629 tons phosphate rock *ex* 'Cyprus' in your name, and held by you by way of pledge for phosphate advance No. 7, for £5000, and for which b/lading has been handed to us for the purpose of enabling us to complete the sale which we have contracted for on your behalf with Messrs A. Cross & Sons, Glasgow ; and in consideration thereof we hereby undertake to pay to you the proceeds of said sale, payment expected about 5th

May, immediately and specifically as received, in accordance with the directions contained in your letter of April 4th." No. 95.

Some months prior to the arrangements with the bank for the advance Page & Company had sold to A. Cross & Sons, mentioned in the preceding letter, about 1600 tons of phosphate rock, almost the same quantity as that on board the "Cyprus" (1629 tons). This sale was effected through John Poynter, Son, & Macdonalds, who had for several years been Page & Company's agents in Glasgow. The sale-notes, which were dated 23d September and 19th November 1891, and did not specify any particular lot of phosphate rock, bore that the sale was a sale to Cross & Sons by Page & Company "per John Poynter, Son, & Macdonalds."

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Immediately on receiving the bill of lading for the "Cyprus" cargo back from the bank Page & Company forwarded it to Poynter, Son, & Macdonalds, with instructions to hand it to Cross & Sons on arrival of the vessel. This Poynter, Son, & Macdonalds did; and on the bill of lading and their contract of sale with Page & Company, Cross & Company took delivery of the cargo, and by cheque dated 13th April in favour of Page & Company, they paid £1000 to account of the price.

On 3d May Poynter, Son, & Macdonalds arrested the balance of the price (£1039, 7s. 5d.) in the hands of Cross & Sons, on the dependence of an action by Poynter, Son, & Macdonalds against Page & Company, in which decree in absence for £2011, 10s. was subsequently pronounced.

On the same day, but after the arrestments had been laid on, the bank intimated to Cross & Sons that they claimed payment of the balance of the price, on the ground that the phosphate rock had before the sale been their property, and had been sold on their behalf.

The bank then raised a multiplepoinding in name of Cross & Sons in the Sheriff Court, Glasgow, the fund *in medio* being the balance of the price.

The bank and Poynter, Son, & Macdonalds each claimed the whole fund *in medio*.

The bank pleaded;—(1) The sale to Messrs Alexander Cross & Sons having been made by Messrs Charles Page & Company on behalf of the claimants, the claimants are entitled to be preferred in terms of their claim. (4) The transfer of the bill of lading to the claimants, the North-Western Bank, having operated a conveyance *ex facie* absolute to these claimants, they were entitled to retain the goods represented by the bill of lading till repayment of all advances by them to the common debtors at the date of the transfer of the bill of lading and subsequent thereto, and they are entitled to be preferred to the fund *in medio* as a surrogatum for said goods.

The bill of lading, as redelivered by the bank to Page & Company, bore no indication that the bank had any interest in it, and neither Cross & Sons nor Poynter, Son, & Macdonalds knew anything about the connection of the bank with the bill of lading until after the arrestment.

On 18th April 1893 the Sheriff-substitute (Guthrie), after a proof, which was mainly directed to points in the case not now reported, ranked and preferred Poynter, Son, & Macdonalds to the fund *in medio*.*

* "NOTE.— . . . The effect of Poynter, Son, & Macdonalds' arrestment is the only remaining question, and here the case is very similar to *Tod & Son v. Merchant Banking Company*, 1883, 10 R. 1009. It differs perhaps in so far as the nature of the transaction on which the bank founds is here defined *ab ante* by the bank's letters of 1st and 4th April, but I doubt whether that is a material difference. Now these letters give the bank right to do that very thing which, according to the opinions in *Tod's* case, would have

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The bank appealed, and argued ;—The transfer of the bill of lading by Page & Company to the bank transferred the property in the phosphate rock to the bank.¹ If, then, the bank, in the exercise of the power of sale which their contract with Page & Company gave them, had handed

given the Merchant Bank a preference over the arresting creditor, namely, to require buyers of the hypothecated goods to pay the price to the bank. Lord Shand says (page 1020) 'The bank had their security in such a shape that they might have refused to allow delivery of the goods till they got bills or other obligations for the price. . . . Having waived this right they were simply in the position of having parted with their security over the goods which had been sold by the owners,' &c. These words are applicable, *mutatis mutandis*, to this transaction in phosphate rock. Page & Company were the owners of it in any view which can be taken, for, on the face of it, the bank's right is just a security. The bank no doubt was *ex figura verborum* their principal, as a pledgee with an immediate power of sale, and they were in the same way agents for the bank. I do not understand, whatever may be the effects of the documents devised for the protection of the bank, that Page & Company were agents in selling for the bank in the sense intended by the Lord President in the case cited (p. 1018), when it is clear that agents selling for a principal having an absolute property title are intended. Nor is it clear from the opinions what the result would have been if Messrs Bryant had stood in such a position to their creditor.

"The difference between property and security titles in questions of this kind is very important. You may have the possession separated from the property, so that the possessor has a subordinate title flowing from the proprietor, *e.g.*, there may be a *bona fide* sale to A B, who may lease the thing sold to the possessor. The right of property remains in A B. But you cannot have a security over moveables constituted by a written contract without delivery. The higher right of property may be vindicated although possession has been given to a hirer or lessee ; but the lower security title cannot be maintained without possession. There is no pledge without possession. If a pledgee delivers up the goods and titles to the owner his security ceases, and no written agreement validates such a security without possession. If the owner being in possession of goods, and/or titles, sells in his own name, then, although he may be bound to account to the security-holder, the price is due by the buyer to the owner, and not to the security-holder. The latter cannot, as in the case of a true principal and agent, disclose himself and claim the price in a question with the owner's creditors.

"Whatever may be the effect of the pledge or hypothecation to the bank, it is a pledge of the phosphates, and no attempt has been made in argument to maintain that it affects the price. Indeed the power reserved to the bank to require payment of the price direct to itself indicates that they knew that that was necessary to their complete security, just as was held in *Tod v. Merchant Banking Company*. They therefore fail to prove that Messrs Cross & Sons at the date of the arrestment were debtors, not to Page & Company, the common debtors, but to them. The money was due to Page & Company, and was subject to no lien or burden in favour of the bank, Messrs Cross & Sons not having undertaken and not being called upon or bound to pay to the bank. If in truth and reality, or even in title, the bank had been owners of the phosphate cargo, I do not doubt that they could have demanded payment from Messrs Cross & Sons direct, subject to any equities which they as buyers might have against Page & Company. But an arrester in the hands of Cross & Sons has no greater right than Page & Company themselves. He stands in their shoes, and can succeed only by shewing that they and not the bank are true creditors of Cross & Sons. That I think Messrs Poynter, Son, & Macdonalds have done."

¹ *Lickbarrow v. Mason*, 1 Smith's Leading Cases, 737 ; *Barber v. Meyerstein*, 1870, L. R., 4 Eng. and Ir. App. 317 ; *Young v. Aktiebolaget Ofverums Bruk*, Nov. 27, 1890, 18 R. 163 ; *Bell's Comm.* i. 213.

the bill of lading to an independent agent, empowering him to sell the goods, it was clear that they could have vindicated the price, even although at the date of the sale they were undisclosed principals.¹ It made no difference that the bank employed Page & Company as their agents instead of an independent person. The contract under which Page & Company got redelivery of the bill of lading and effected the sale was a perfectly legal contract of trust or agency, and would have been effectual had the question arisen with a trustee in bankruptcy of Page & Company under the Act 1696, cap. 5.² There was no principle upon which a pledgee, making the pledgor his agent to sell the goods,—handing them to him for that purpose,—must be held to have thereby lost the benefit of his pledge. Page & Company's only title to receive the money was their contract of agency with the bank, and having thus got the bill of lading and received the money for a specific purpose, the money was distinguishable from their own private funds, and was not open to the diligence of their creditors.³ *Tod v. The Merchant Banking Company* was distinguishable. In that case Bryant, Ridley, & Company, who corresponded to Page & Company here, did not, like Page & Company, occupy the position of agents of the pledgees, and the case of their being such agents was distinguished from the actual case before the Court.⁴ If *Tod's* case was intended to rule the case in which the pledgor received back the subject of the pledge as the agent of the pledgee, then the decision ought to be reconsidered.

Argued for Poynter, Son, and Macdonalds;—The contract of pledge depended on the possession, actual or constructive, of the goods pledged, and if the pledgee parted with the goods to the pledgor, his real right of pledge determined, and his remedy, if he had any, was a personal right of action against the pledgor.⁵ Therefore, by retransferring the indorsed bill of lading to Page & Company the bank parted with their possession of the goods to the pledgors, and so lost their right of pledge. It was said, however, that the transfer of the bill of lading to the bank by Page & Company passed the property in the goods to the bank. If that were so, then the retransfer by the bank to Page & Company must have retransferred the property to Page & Company. But it was a mistake to say that the transfer of a bill of lading passed the property in the goods represented by it. The authorities which were founded on to shew that it did were English authorities, and meant no more than that the "special property," as it was called, passed. It was clear that the transferee of a bill of lading did not become proprietor of the goods to all intents and purposes; he was not, merely as transferee, liable in an action by the shipowner for freight.⁶ [LORD TRAYNER referred to *Craig & Rose v. Delargy*, July 15, 1879, 6 R. 1269, and observed that it was a case of doubtful authority.] It depended on the contract upon which the bill of lading was transferred whether the property in the goods in the full sense passed. If it was sale it did. Here it was pledge. The transfer of the bill consequently merely transferred such possession to the bank as was necessary to sustain their right of pledge; and the retransfer of the bill of lading terminated that possession, and with it the right of pledge. When, then, Page & Company sold to Cross & Sons they sold

¹ Bennett v. Inveresk Paper Co., June 19, 1891, 18 R. 975.

² Lindsay v. Adamson & Ronaldson, July 2, 1890, 17 R. 1036.

³ Macadam v. Martin's Trustee, Nov. 5, 1872, 11 Macph. 33, 45 Scot. Jur. 31.

⁴ *Tod v. The Merchant Banking Company of London, Limited*, June 21, 1883, 10 R. 1009, per Lord President Inglis, at p. 1018.

⁵ Bell's Comm., 7th ed., ii. p. 19.

⁶ Sewell v. Burdick, 1884, L. R., 10 App. Cases, 74.

No. 95. their own unburdened property, and the price, consequently, was open to the diligence of their creditors.

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At advising,—

LORD JUSTICE-CLERK.—Charles Page & Company in April 1892 obtained a loan from the North-Western Bank, Liverpool, giving by way of pledge two cargoes of phosphate rock then on the sea, one in a vessel the “Cyprus,” which alone is in question here. Page & Company handed the bill of lading blank indorsed to the bank. The bank stipulated for absolute power of sale, and authorised Page & Company to sell the pledged goods on behalf of the bank. About a fortnight after the transaction the bank transferred the bill of lading for the “Cyprus” cargo back to Page & Company, “as trustees for us,” in consideration of their undertaking to deal with the merchandise as stipulated, the stipulation being that Page & Company were to sell “on our behalf,” and that the bank should have the same rights to the price obtained as under the previous letter.

Page & Company forwarded the bill of lading to Poynter & Company, who were their regular agents in Glasgow. These gentlemen had some months before sold for Page & Company 1600 tons of phosphate rock, being just about the “Cyprus” cargo. On Page & Company receiving the bill of lading from the bank they forwarded it to Poynter & Company to be handed to Cross & Company on the arrival of the “Cyprus.” Cross & Company took delivery of the cargo. Page & Company were largely indebted to Poynter & Company, and Poynter raised an action, and on the dependence arrested a sum due by Cross for the cargo of the “Cyprus.” Both the companies of Poynter and Cross were ignorant of Page’s transaction with the bank.

The competition here is between the bank and Poynter & Company. The bank maintain that the bill of lading, being indorsed and delivered, constituted a deposition of the goods, and that is so. But it is so only to the effect contained in the contract between the parties. The bank did not become owners of the goods, but only pledgees, stipulating that they should have power of sale, and that Page & Company should in selling sell for them and pay them the proceeds. The bank’s case is that they were in the ownership of the goods, and that Page & Company in selling were only their agents selling to Cross & Company. But this can only be maintained if the written contract is ignored. Its express words indicate that the bank receive the bill of lading as a security only for an advance. The property therefore remained with the pledger, and was only burdened with the bank’s right under their contract. The real question is, what is the effect of the bank parting with the bill of lading, as the symbol of the goods afloat, to Page & Company the owners? Did they or did they not thereby part with the security they had received? I think they did, and I do not think it matters that they did so on the statement that Page & Company received “in trust.” It was the bank’s pledge that they parted with, and Page & Company, the owners, having sold to a third party, I hold that Page & Company sold their own property, and did not in doing so act as agents for the bank. The bank therefore cannot claim the fund *in medio* as being part of the price of their property sold to Cross & Company. They had a security only, and they parted with that security. They had ceased to have possession to validate their security. They therefore are not in a position to shew that at the date of Poynter’s arrestment Cross & Company, the buyers, were debtors to them

and not to Page & Company. Not having possession, they are therefore just in the same position as other creditors of Page & Company, and Poynter & Company having secured a preferable right by arrestment of this balance of the price of Page's goods, are entitled to prevail. I consider it clear that this question has already been conclusively decided. I am quite unable to distinguish this case from that of *Tod* (10 R. 1009), and I am therefore in favour of sustaining the interlocutor of the Sheriff-substitute.

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LORD YOUNG.—The fund *in medio* consists of the unpaid balance of the price of certain quantities of phosphate rock sold by Page & Company of Liverpool to Cross & Sons of Glasgow, the nominal raisers of the multiplepounding. The sales were made on 23d September and 19th November 1891 before the goods were shipped from abroad to this country, and so were not at first sales of specific goods. They were eventually shipped per "Cyprus," and the bill of lading was sent by Page & Company to Cross & Company on 12th April 1892, and delivery thus made to the buyers, who thereafter paid the price except the balance of £1039, which is the fund *in medio* and the subject of competition.

The competitors are the North-Western Bank, Liverpool, and Poynter & Company, Glasgow. The claim of the former (the bank) is based on a transaction between them and Page & Company on 1st and 4th April 1892, before the arrival of the "Cyprus," but when the bill of lading was in Page & Company's hands, the terms of which are fully and distinctly stated in their condescendence and claim. The truth in point of fact of the statement is not disputed, nor I think disputable, on the documents which are produced and printed in the appendix. The import of the transaction is twofold, viz., first, that the goods specified in the bill of lading were pledged to the bank for a present advance of £5000 by delivery of the bill of lading; and second, that the bank appointed Page & Company to be their agents for the sale of the goods, and delivered the goods to them as such agents by delivering to them (handing back) the bill of lading with instructions, which they undertook to execute, to sell on their account and pay them the price.

In pursuance of this second head of the transaction Page & Company sent the bill of lading to Cross & Company in implement of the general sales of September and November preceding which I have already noticed, of the same date writing to the bank the letter informing them of the fact. The price, except the balance now *in medio*, was paid by Cross & Company to Page & Company, and remitted by them to the bank according to their undertaking. They subsequently became embarrassed and made a settlement with their creditors—all we know of the settlement being that it does not affect the competition for the fund now *in medio*.

The North-Western Bank claim it as the price of goods pledged to them and sold on their account by their agents for sale.

Poynter & Company, on the other hand, claim it as assets of their debtors Page & Company, attached by them by the arrestment of 3d May 1892, proceeding on a depending action in which they obtained decree on 21st June 1892.

There is no fact in dispute between the parties, the competition between them depending on the legal question whether the unpaid balance of price in the hands of Cross & Company is estate and assets of Page & Company, available for the payment of their general debts, and attachable by their creditors

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accordingly. If it is, then Poynter & Company, whose debt and arrestment are admitted facts, must prevail, and otherwise not.

This, the only question in the case, turns upon the legal validity of the contract between Page & Company and the North-Western Bank. As to the original validity of the first part of it, viz., that by which the goods were pledged to the bank with delivery and power of sale, there is I understand no dispute, and certainly, in my opinion, no room for dispute. But it is maintained by Poynter & Company that this was destroyed, and the pledge thereby constituted annihilated by the second head of the contract and what followed upon it, viz., the redelivery of the goods to Page & Company as the bank's agents for sale. It is contended that Page & Company were thereby restored to their original position of owners in possession, freed of the pledge, which could not survive after the pledgees parted with possession. The conclusion of course is that the second, the agency part of the contract, is invalid and inoperative except only as effecting utter destruction of the first, and so leaving the parties exactly as if there had never been any contract between them regarding these goods.

The Sheriff adopts this view as sound in law. He says,—“There is no pledge without possession. If a pledgee delivers up the goods and titles to the owner his security ceases, and no written agreement validates such security without possession. If the owner being in possession of goods or titles sells in his own name, then, although he may be bound to account to the security-holder, the price is due by the buyer to the owner, and not to the security-holder. The latter cannot, as in the case of a true principal and agent, disclose himself and claim the price in a question with the owner's creditors.”

These observations assume, or rather perhaps assert, as a true proposition in law, that a pledgee cannot legally appoint the pledger his agent for the sale of the subject of the pledge, or at least not with the same effect and consequences as he may a stranger. Is this a true proposition? If it be, it is certainly important that it should be authoritatively announced, for the occasions must be of frequent occurrence in which it is expedient to select the pledger as such agent. What is the objection to it in principle or expediency? So far as the parties who agree to it and so contract are concerned, there is plainly none. Nor, so far as I see, can it possibly concern the purchaser whether the agent who sells to him and gives him delivery is the pledger or a stranger. He gets all he can claim equally in either case, and incurs no liability or risk in the one case more than the other. The only other parties who can be suggested as possibly interested are the pledger's general creditors. But it does not occur to me how they can be prejudiced by the pledgee selling the goods and making delivery to a purchaser through the pledger rather than through a third party acting as his agent. The goods immediately in question would have been sold and delivered to Cross & Company through a stranger agent employed by the North-Western Bank just as they were by Page & Company. How are the creditors prejudiced by the employment of Page & Company for this purpose so that the law should, from regard to their interests, deny (to the prejudice of the bank) the ordinary consequences and effects which would have attached to a similar employment of a stranger to do precisely the same thing, and doing precisely the same thing?

I must therefore reject the view that a pledgee with possession and power of sale is hindered by any rule of the common law from selecting and employing the pledger as his agent for sale with the same safety to his own interests as if

he so employed a stranger. The common law has on the one hand such regard for the legitimate interests of general creditors that it will not sanction any contract or proceeding to their prejudice, but will not I think, on the other, favour a subtle argument against a fair and reasonable transaction only to give them an advantage by reason of its not being made in another form. Here the North-Western Bank are seeking nothing which they might not admittedly have attained by employing a stranger agent, and as the creditors of the pledger to them suffered nothing and were exposed to no risk whatever, by their so employing the pledger, I can find no reason—none in the fair interest of the creditors—for denying the ordinary legal effect to that employment and what was done under it. I am therefore of opinion that the contract between the North-Western Bank and Page & Company ought to have effect according to its terms, which are clear and, I think, reasonable, and involving no prejudice whatever to others.

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The result of these views, if sound, is that the unpaid price of the goods in question is not estate or assets of Page & Company. It is of course true that an agent for sale entrusted with possession of the goods or document of title, whether so appointed and entrusted by the owner or by a pledgee, is thereby put in a position to dispose of the goods exactly as if he were himself the owner, and so to give a good title to a third party dealing with him onerously and *in bona fide* as the owner, and such third party will not be prejudicially affected by the fact of the terms of the agency of which he is ignorant. Such agent with possession may, and I rather think generally does, transact with third parties in his own name just as if he were owner and principal. But the notion that goods so delivered to an agent at once become estate and assets of his, which will as such pass to his trustee in bankruptcy for behoof of his creditors, or be subject as such to the diligence of individual creditors, is, in my opinion, unfounded. Again, if he sell and deliver to a purchaser, it follows, I think, clearly, that the price is not estate and assets of his any more than the goods themselves were before the sale. The buyer is in safety to pay the price to him, and he may possibly appropriate it unwarrantably to his own use to the prejudice of his principal. But with a written contract of agency under which he admittedly received and disposed of the goods, it is impossible to say that he had no principal and was not an agent. The case before us does not involve any question of the buyer's right to withhold payment of the price on a claim of retention, or otherwise on the footing that he had dealt with the seller as a principal holding the document of title, and was not to be prejudiced by the subsequently disclosed fact that he was only an agent. No question of that character can arise with a trustee in bankruptcy or an individual arresting creditor.

Here it is not doubtful that Page & Company meant to act under their contract of agency with the bank, and did so in fact and avowedly—remitting the price so far as paid to their principals. Suppose that the balance (now *in medio*) had been paid to them also, and that, abstaining from the wicked and indeed criminal act of appropriating the money to their own use, and from the irregular and reprehensible act of mixing it with their own funds, they had paid it into an account in bank opened by them for the reception of the price of goods sold by them as agents for the North-Western Bank, in that case would the money in this account have been regarded as their estate and assets, and so open to the diligence of their general creditors? But in the hands of Cross &

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The Sheriff has decided the case upon the footing that there is nothing in the position of Poynter & Company to distinguish them from any other general creditor of Page & Company, and giving them an interest in the fund in question, and right to arrest it, not possessed by the others, and in this I entirely concur with him. The case was, I think, properly argued on that footing. Poynter & Company had no contract or dealing with Page & Company regarding the goods sold, except only acting as their brokers in the sales and delivery to Cross & Company. As regards their debt, for which they used arrestment, these goods have no other part in it than this—that their charge for brokerage or commission for the sale of them is an item, and a trifling one, in the general account on which it stands.

I appreciate the difficulty which the Sheriff expresses of distinguishing this case from that of *Tod & Son* (10 R. 1009)—although the circumstances in *Tod's* case are not so clear and simple as those here. But I am unable to regard that decision as a conclusive authority either for the general proposition that a pledgee cannot deliver the subject of the pledge to the pledger on any lawful special contract without the destruction of the pledge—or for the more limited proposition that such delivery on a special contract of agency for sale will operate such destruction. A contract of agency for sale is in itself as lawful as any other—as lawful for example as a contract for use, such as hire or lease, or the execution of repairs or other work, or a contract for carriage. There are settled rules of law, founded on sound principles, for the protection of third parties dealing onerously and *in bona fide* as to property with the party in possession of it, although he may be only an agent or trustee, and to these I have sufficiently adverted. A pledgee will be exposed, just as an owner will, to all the risks which these rules may bring upon him, but I see no ground for thinking that the risks are greater in his case, and indeed no reason for thinking so has been suggested, except the assumption that he cannot give possession to the owner upon any contract however lawful without the destruction of the pledge, and this, holding the opinion which I have expressed, I must reject.

LORD TRAYNER.—This is an action of multiplepounding raised by Cross & Sons, the fund *in medio* in which consists of a sum slightly exceeding £1000. There are two claimants for this fund—The North-Western Bank, Limited, Liverpool, and John Poynter, Son, & Macdonalds, of Glasgow. The question debated before us, and the only question to be now determined is, which of the claimants is entitled to be preferred to the fund *in medio*. The material facts out of which the question arises are not in dispute.

On 1st April 1892 Charles Page & Company, of Liverpool, applied to the North-Western Bank for an advance of £5000 “upon security by way of pledge” of two cargoes of phosphate rock belonging to them, and then afloat, represented to be of the nett value of £6700. One of these cargoes was on board the ship “Cyprus,” and it is with it only that we are here concerned. The bank agreed, by letter dated 4th April 1892, to make the advance required, on these conditions,—that the advance was to be repayable on or before 1st June; that it was made “on the security” of, *inter alia*, the cargo on board the “Cyprus” “which you pledge to us,” and that the bank should have immediate and absolute power of sale. In respect of that power the bank by the same letter authorised Page &

Company to enter into contracts for the sale of the pledged goods "on our behalf," and directed them "to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you to be applied towards payment of the said advance," &c. The bank further stipulated that Page & Company should at any time on being required give the bank full authority to receive all sums due or to become due from any person in respect of any such sale. No such request was ever made.

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In pursuance of the arrangement thus made between the bank and Page & Company, the latter delivered to the former the bill of lading blank indorsed for the cargo on board the "Cyprus."

Some months prior to the date of the arrangement with the bank for the advance of £5000 Page & Company had sold to Cross & Company, of Glasgow, about 1600 tons of phosphate rock, which was as nearly as possible the quantity of the cargo on board the "Cyprus." This sale was effected through Poynter, Son, & Macdonalds, who were then, as for years previously they had been, the agents in Glasgow for Page & Company, and the sale-notes bore that the sale to Cross & Company was a sale by Page & Company, "per Messrs John Poynter, Son, & Macdonalds." The "Cyprus" was destined for Glasgow as her port of delivery, and was expected to arrive there on or about 12th April 1892. On that date the bank wrote to Page & Son in the following terms:—"In consideration of your undertaking to deal with the merchandise in the manner after specified, we transfer to you as trustees for us the bill of lading, &c., for 1629 tons phosphate rock per 'Cyprus,' which we now hold as security for payment of the advance specified at foot," i.e., the advance of £5000. The letter goes on to authorise Page & Company to sell the cargo "on our behalf," and makes the same stipulations as to their right to the price, &c., as expressed in the letter of 4th April to which I have already referred. The bill of lading thus returned by the bank to Page & Company was immediately forwarded by them to Poynter & Company, with instructions to hand it "to Cross on arrival of the vessel." Poynter & Company did so, and on that bill of lading and their contract of sale before mentioned Cross & Company took delivery of the cargo. They paid part of the price by cheque dated 13th April 1892 drawn in favour of Page & Company. The balance of the price forms the fund *in medio*.

Page & Company being largely indebted to Poynter & Company, the latter (having reason to doubt the pecuniary position of Page & Company) raised an action against Page & Company, and obtained decree against them for a debt of over £2000. On the dependence of this action they arrested the balance of the price of the "Cyprus" cargo in the hands of Cross & Company on 3d May 1892. It only remains to be noted that at no time prior to the date of the arrestment had Poynter & Company or Cross & Company any knowledge of the transaction between Page & Company and the bank, or of the pledging of the cargo to the latter in security of their advances to Page & Company. The bill of lading sent by Page & Company and delivered through Poynter & Company to Cross bore no indication of the bank having interest therein.

In this state of the facts the legal question arises, whether the bank, as pledgee of the cargo, or the arresting creditor of the pledgor is to be preferred in competition to the balance of the price of the cargo still in the buyer's hands. The answer to this question seems to me to depend in a great measure upon the view which is taken of the bank's rights in or to the cargo of the "Cyprus." If the property in that cargo was vested in the bank, and that cargo was sold

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for them by their agent to Cross, the bank must prevail. The fund *in medio* is in that case part of the price of the bank's property. If the property of the cargo was not in the bank it was in Page & Company (it could only be in one or other of them), and the fund *in medio* due to Page & Company was well attached by the arrestment of their creditors. Accordingly, the first thing to be considered is, what right in the cargo in question was conferred on the bank by the transaction between it and Page & Company? Now, there is no room for doubt as to what the contract between the bank and Page & Company was. It was an advance of money on the security of a pledge. "We advance to you," wrote the bank on 4th April 1892 to Page & Company, "the sum of £5000 repayable by you on or before 1st June on the security of the undermentioned merchandise which you pledge to us." To make the right of the bank effectual "the merchandise" had to be delivered to them, which could not actually be done, the merchandise being then afloat. But the bill of lading for the goods was indorsed and delivered, and that was equivalent to the delivery or depositation of the goods which it represented. It was maintained in argument before us that the indorsation and delivery of a bill of lading transferred in all cases the property in the goods to the indorsee. But this is clearly not so. The delivery of an indorsed bill of lading is in all cases equivalent to delivery of the cargo or goods to which it refers, but the right conferred by such delivery depends upon the contract under which it is delivered. Accordingly, if one buys a cargo afloat, the indorsation and delivery of the bill of lading is equivalent to delivery of the goods sold, and passes the property therein to the buyer. If the contract, however, be pledge, not sale, then the delivery of the indorsed bill of lading completes the contract just as if the goods themselves had been deposited with the pledgee, but gives the pledgee no greater or higher right to the goods than delivery of the subject of pledge to the pledgee gives him. That being so, the right which the bank acquired by the indorsation and delivery of the bill of lading in question was the right of a pledgee and nothing more. According to the law of England, as I read the authorities, the delivery of goods in pledge confers on the pledgee what is called a special property therein, while the general property remains in the pledgor. We have no such distinction in Scotland, at least in terms, but the rights of a pledgee in the subject of the pledge seem to be very much the same in the two countries. In both the contract of pledge can only be completed by delivery of the subject of the pledge to the pledgee; the pledgee's right is to hold that subject against all concerned until the advance or debt, of which it is the security, shall have been paid, but the property of the thing pledged (in the proper sense) remains in the pledgor. That the property of the pledge remains vested in the pledgor is clear from this fact, among others which might be mentioned, that he may sell the pledge to anyone he pleases, and on any terms, subject to the burden of the pledgee's right. The pledgee cannot prevent or object to such a sale. Nor can the pledgee sell the pledge (at least in Scotland) at his own hand. The subject is not his, it is the pledgor's, and therefore the pledgee cannot exercise the right of an owner by selling; to sell the pledge he must have judicial authority. The right of the bank therefore was not a right of ownership. It was only a burden on the owner's right. It follows that the bank cannot claim to be preferred to the fund *in medio* on the ground that it is the price of the bank's property.

Does the bank's right as pledgee entitle them to be preferred? is the next question. I have already pointed out the character and extent of the pledgee's

right, and have now to consider how that right is preserved or lost. On this question the Sheriff-substitute in the judgment under review says,—“ There is no pledge without possession. If a pledgee delivers up the goods and titles to the owner his security ceases, and no written agreement validates such a security without possession.” I agree with that statement of the law. It is in strict accordance, I think, both with the law laid down in our text writers and in our decisions. Of the former I may cite Erskine, iii. 1, 33, and Bell’s Comm. (7th ed.) ii. 22, and of the latter the case of *Tod & Son*, 10 R. 1009. The question was raised in the course of the debate before us, whether the pledgee could not part with the subject of the pledge temporarily for any necessary purpose, or put it into the hands of some other person for safe custody, without the loss of his right, and if so whether the pledgee in this case had lost his right by handing over the pledge to the owners in order to its realisation and consequent repayment of the advance due to the pledgee. I do not find this question attended with any difficulty. That a pledgee may part with the pledge temporarily for a necessary purpose or for safe custody without the loss of his right may be admitted, provided he has not so parted with it to the owner. If he parts with it to a third party, the temporary possession of the latter is possession for the pledgee; he has no right in or to the subject except that which the pledgee gave him and which the pledgee may at any time take away. But if the pledgee parts with the pledge to the owner the result is that the owner resumes possession of his own property freed from the security burden; the owner acquires no new right, but the pledgee’s right as a real right flies off, leaving him only his personal right against his debtor. This distinction between the delivery of the subject of pledge to a third party and to the owner is recognised in the passage in Bell’s Commentaries which I have already cited.

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I do not think it really affects the case to say that the bank gave back the subject of pledge to Page & Company “ in trust ” for the bank. The bank could only give in trust what it had to give. It had no right of property or ownership to give “ in trust.” It could only make Page & Company its trustees for the security right. But when Page & Company sold the cargo they sold their own property, under an obligation no doubt—a personal obligation—to account to the bank for the security right or its value in cash. But having sold what was their own the price was theirs, and if theirs then subject to the diligence of all their creditors, the bank included. In like manner I can see no ground for recognising Page & Company as the mere agents of the bank in the sale of the cargo. An agent sells for his principal the property of the principal. But here the alleged principal had no property to sell. His only right, after parting with his real right, was a personal claim for debt. The supposed agent did not sell either the one right or the other. To support the claim of the bank in this case would really be to recognise a security over moveables, the possession of which was with the debtor. Such a mode of security our law does not recognise as effectual.

The case therefore comes to this : The bank had no right of ownership or property in the cargo in question, and therefore cannot claim the fund *in medio* as the price of their property ; they lost their real right of pledge by giving up the subject of the pledge to the owner of it ; by surrendering their real security they retained only their personal right to demand payment of their advances from their debtor or his estate, but other personal creditors (namely, Poynter &

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For these reasons I am of opinion that the judgment appealed against should be affirmed.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—"Find in fact (1) that by sale-notes dated 23d September and 19th November 1891 Charles Page & Company, Liverpool, sold to Alexander Cross & Sons, Glasgow, a cargo of phosphate rock on the terms therein mentioned; (2) that the said cargo, or part thereof, was shipped on board the s.s. 'Cyprus,' and that a bill of lading was granted by the master of said steamer therefor, and that the same was held by the said Charles Page & Company; (3) that on 1st April 1892 Charles Page & Company applied for an advance of £5000 from the North-Western Bank, Limited, on the security by way of pledge of, *inter alia*, the cargo per the 'Cyprus,' and that on 4th April the said bank agreed to give, and did give, the advance asked for in the terms contained in the letter; (4) that the said Charles Page & Company delivered said bill of lading to the North-Western Bank, Limited, blank indorsed, and thereby pledged the said cargo to the said bank; (5) that on 12th April 1892 the said bank redelivered the said bill of lading to Charles Page & Company without any indorsation by the bank by the letter No. 13/5 of process, and that on same date Charles Page & Company forwarded said bill of lading to the claimants John Poynter, Son, & Macdonalds, for delivery to the buyers, Alexander Cross & Sons, on arrival of the 'Cyprus'; (6) that the said Alexander Cross & Son duly received said bill of lading and took delivery of said cargo, and made payments to account thereof, and that the balance of the price due by them amounted, as at 3d May 1892, to £1039, 7s. 5d., being the fund *in medio*; (7) that on 3d May 1892 the said sum of £1039, 7s. 5d. was validly arrested in the hands of the said Alexander Cross & Sons by the claimants John Poynter, Son, & Macdonalds, who were lawful creditors of the said Charles Page & Company to the amount of £2011, 10s., with interest and expenses, conform to decree in their favour; and (8) that at the date of said arrestment John Poynter, Son, & Macdonalds were ignorant of the transaction between Page & Company and the bank above mentioned: Find in law that at the date of said arrestment the said sum of £1039, 7s. 5d. was a debt due by Alexander Cross & Son to the said Charles Page & Company, and was therefore liable to the diligence of the lawful creditors of the latter, and that the claimants, the North-Western Bank, Limited, by delivery of said bill of lading on said 12th April 1892, lost their rights as pledgees of said cargo, and had no preferable right of property therein entitling them to payment of said sum as in competition with the arresting creditors, the said John Poynter, Son, & Macdonalds: Therefore dismiss the appeal, and affirm the interlocutor appealed against," &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—CAMPBELL FAILL, S.S.C.—Agents.

G. H. WILLS & COMPANY, Pursuers (Respondents).—*Murray—*

C. J. Guthrie.

BURRELL & SON, Defenders (Appellants).—*Sol.-Gen. Asher—Dickson.*

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Burrell & Son.

Ship—Charter-party—Charterer's right to freight earned for deck cargo.—Where a charter-party binds the shipowners to carry a full and complete cargo for a lump sum, the charterer is not entitled to any freight which the ship may earn by goods stored on deck.

ON 1st February 1893, by a charter-party, of which the material portions are quoted below,* G. H. Wills & Company, shipowners, of ^{2D DIVISION.} ^{Sheriff of} Lanarkshire.

* "It is this day mutually agreed between G. H. Wills & Company, of the good steamship called the 'Castro,' of the measurement of 725 tons nett register or thereabouts, bound Stockton, now 'Elba', guaranteed 1400 tons d. w. cargo outwards, and 1550 tons d. w. cargo homewards if d. w. cargoes provided, and Burrell & Son, of Glasgow, merchants.

"That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Glasgow, or so near thereunto as she may safely get, and there load, from the factors of the said merchants, a full and complete cargo of lawful merchandise, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture: and being so loaded shall therewith proceed to Trinidad and Demerara, to discharge and reload at Demerara and/or Trinidad to London, or so near thereunto as she may safely get, and there deliver the same on being paid freight, as follows:—Lump sum fourteen hundred and twenty-five pounds (£1425) for the round voyage, charterers paying all expenses on the round, excepting coals, wages, stores, victualling, and insurance, ship giving use of winches, winchmen, and maintaining steam. All repairs, damage, &c., to steamer for owners' account.

"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers, and people, collisions, strandings, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

"Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager.

"The cargo to be brought to and taken from alongside at merchants' risk and expense.

"Steamer to have liberty to tow and assist vessels in all situations, and to call at any port or ports for coals, and for other necessary supplies.

"Average, if any, to be settled according to York-Antwerp rules. The master to sign bills of lading, including negligence clause, at any other rate of freight, without prejudice to this charter. The freight to be paid as follows,—say £500 advance fourteen days after sailing, balance in cash on delivery of the cargo in London.

"Steamer to be loaded and discharged at all ports in thirty days (Sundays and holidays excepted), except in case of strikes, accidents to machinery, or other causes beyond charterers' control preventing the loading or unloading, and any days on demurrage, over and above the said laying days, at eighteen pounds per day, to be paid day by day as the same shall become due, it being agreed, that for the security and payment of all freight, dead-freight, demurrage, and all other charges, the said master or owners shall have an absolute lien and charge on the said cargo.

"Charterers to have option of sending steamer into Barbadoes on outward voyage, paying £20 extra, also option of sending steamer into Barbadoes, Grenada, or St Vincent, after loading at Trinidad on homeward voyage, paying

No. 96. Cardiff, chartered the steamship "Castro," belonging to them, to Burrell & Son, of Glasgow, for a voyage from Glasgow to Trinidad and Barbadoes, and thence to London.
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The "Castro" performed the voyage and earned the stipulated freight of £1425. This sum Burrell & Son paid to Wills & Company, with the exception of a sum of £76, 18s. 11d., being the nett amount of the freight received by Wills & Company for carrying a quantity of pineapples which the master of the "Castro" had taken on board and stowed as a deck cargo at St Michael's, where the "Castro" had called to load bunker coal on the voyage home to London. Burrell & Son maintained that it was an implied condition of the charter-party that they should have the exclusive use of the ship for cargo during the voyage, and, consequently, that they were entitled to credit for this sum of £76, 18s. 11d.

Wills & Company thereupon brought an action against Burrell & Son, in the Sheriff Court at Glasgow, for payment of £76, 18s. 11d.

The pursuers pleaded;—(2) The pursuers having, in terms of said charter-party, earned freight, they are entitled to decree against the defenders for the sum sued for as restricted, being the balance still due to them, with expenses. (5) The defenders having no power to load cargo at St Michael's; and, in any case, the freight for the pineapples having been earned through the labours of the pursuers, the pursuers are entitled thereto.

The defenders pleaded;—(3) The freight collected by the pursuers for the St Michael's cargo having been earned for and on behalf of the defenders, they are entitled to credit therefor.

The defenders also had averments and pleas to the effect that they had suffered damage to at least the amount sued for by reason of the pineapples having been shipped on board, but this part of their defence was not seriously pressed, and there was no proof. They admitted that the pursuers had carried passengers on board during the voyage, and had received the passage-money without objection on their (the defenders') part.

On 23d October 1893 the Sheriff-substitute (Guthrie) pronounced this interlocutor:—"Finds that, according to the true meaning and intention of the charter-party, the freight paid for the carriage on deck of the 'Castro' of pineapples from St Michael's, on the homeward voyage, is due to the shipowners and not to the charterers. Therefore repels the defences, and decerns against the defenders for the restricted sum of £76, 18s. 11d." &c.

The defenders appealed, and argued;—It was not maintained that under this charter-party there was a demise of the ship. The position of the defenders was that they had hired the whole of the ship, and were consequently entitled to her whole carrying capacity. What was here called freight was in reality a sum paid for the use and hire of the ship.¹ The defenders therefore might have loaded a deck cargo had they chosen. They were not bound to do so. A charterer who had hired the whole of a ship might load as much or as little cargo as he

£20 extra for each place, also option sending steamer into Havre, paying £20 extra.

"If required, steamer to have liberty to take some bunker coals in holds outwards, properly separated. Owners to have the option of reducing homeward cargo to 1500 tons dead-weight, guaranteed lump sum to be reduced to £1400 for the round."

¹ The "Norway," 1865, 3 Moore P. C. Reps. 245, *per* Lord Justice Knight Bruce, at p. 265; Robinson v. Knights, 1873, L. R., 8 C. P. 465, *per* Mr Justice Keating, at p. 467.

pleased, subject only to this qualification, that he must load as much as would enable the vessel to perform her voyage in safety.¹ The fact that the charterer had left some cargo space unoccupied did not give the master right to fill up the unoccupied space unless that was necessary for the safety of the ship. If the master did fill up the unoccupied space with other cargo he did so as the agent of the charterer, and was accountable to the charterer for the freight thereby earned.² The defenders therefore were entitled to the freight earned by carrying the pineapples.

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Argued for the pursuers;—Under this charter-party there was not, as the defenders conceded, a demise of the ship. *Meiklereid v. West*³ was an example of a case in which there was a demise of the ship, but the present case was similar to that of *Sandeman v. Scurr*,⁴ in which it was held that there had been no demise. That being so, the defenders were not entitled to load a deck cargo, the deck not being part of the ordinary carrying capacity of a ship.⁵ The case of the "*Norway*,"⁶ and *Robinson's*⁶ case, were distinguishable from the present. In these cases it was held that what was called freight was truly a sum paid for the hire of the ship; here freight was used in its strict sense of the sum paid for the carriage of a cargo on board ship.

At advising,—

LORD TRAYNER.—I am of opinion that the claim made by the charterer in this action is quite untenable.

The charter-party in question cannot be regarded as amounting to a demise of the vessel. Some of its clauses are quite inconsistent with the idea of any such thing being contemplated, and indeed the counsel for the defenders admitted in the course of the debate that he could not contend that there had been a demise of the vessel, taking that phrase as it is usually understood. The view maintained for the defenders rather was, that they had hired the whole carrying space of the vessel for the round voyage, and that whatever was carried in the course of the voyage was carried for their benefit. The answer to that contention, however, which seems to me to be conclusive, is, that under such a charter-party as we have now before us the carrying space contracted for is only the usual carrying space below hatches. The deck is never regarded as carrying space to the use or benefit of which a charterer is entitled, unless specially stipulated for. It was not stipulated for in the present case, and therefore anything of the nature of cargo stowed and carried upon deck was not occupying space to which the charterers had any claim. If they had no claim to occupy the space themselves or with their own cargo, they can have no claim

¹ *Hunter v. Fry*, 1819, 2 Barnwell and Alderson, 421.

² Bell's Comm. i. 539 (5th edit.), 587 (7th edit.); Pothier, *Charte Partie*, No. 22, vol. ii. p. 377; Parsons on Shipping, vol. i. pp. 293 and 297; Abbott, *Law of Merchant Ships* (13th edit.), pp. 267 and 539; *Marquand v. Banner*, 1856, 25 L. J. Q. B. 313.

³ *Meiklereid v. West*, 1876, L. R., 1 Q. B. Div. 428.

⁴ *Sandeman v. Scurr*, 1866, L. R., 2 Q. B. 86.

⁵ *Towse v. Henderson*, 1850, 19 L. J. Excheq. 163, 4 Excheq. (Wels. Hur. and Gor.) 890; *Mitcheson v. Nicol*, 1852, 21 L. J. Excheq. 323, 7 Excheq. (Wels. Hur. and Gor.), 929; *Neil v. Ridley*, 9 Excheq. (Wels. Hur. and Gor.), 677.

⁶ *Supra*, note, p. 528.

No. 96. to the freight of goods there carried. But what is an equally conclusive answer to the defenders' demand is this, that they have got all they contracted to get for their lump freight, and must therefore pay the lump freight without deduction. What they contracted for was that the ship would receive a full and complete cargo at the loading ports named, and carry that cargo to the specified ports of delivery, while the owners guaranteed that the vessel would stow and carry to and from these ports deadweight cargo, if provided, up to a certain weight. That specified cargo was supplied by the charterers, and was received and carried by the vessel, and the defenders have no complaint to make on this head. They must therefore fulfil their counter obligation by paying the stipulated freight.

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I could have understood a claim for damages at the defenders' instance if the guaranteed weight of cargo had not been carried, or if the loading space below hatches had been occupied by goods taken by the master of the vessel to the exclusion of goods which the charterers had tendered for carriage, or if the carrying of the pineapples on deck had been to the injury of the charterers through delaying the arrival of their cargo, with consequent loss of market or fall in market price. No such ground of damage is seriously put forward, and certainly no damage has been established. But even if it had, it would have been a claim for damages for breach of contract which the defenders would have had, not a claim for freight. Freight they could not claim unless they were owners of the vessel, or were in the position of owners *pro tempore* by the demise of the vessel, and the defenders cannot claim either character. The authorities cited by the defenders have very little bearing upon the question here raised. In the case of "*The Norway*"—followed in the case of *Robinson*—it was decided that where a lump freight was stipulated for a single or a round voyage, the full amount was payable, although from a cause for which the ship was not responsible less than a full cargo was delivered. The opinion in the former case by Lord Justice Knight Bruce that the lump sum although called freight was "more properly a sum in the nature of a rent to be paid for the use and hire of the ship," must be read in connection with the special facts of the case in which it was delivered. The charter-party in "*The Norway*," 3 Moore, P. C. R. (N. S.), 245, expressly bore that the lump freight was "for the use and hire of the vessel." The charter-party in *Robinson's* case was not expressed in the same terms, but what was decided—and alone decided—in both cases, as I have already stated, was this, that where a lump freight was stipulated, that was due and payable without regard to the quantity of cargo delivered at the port of discharge. No question was raised or decided as to whether "the entire vessel" for which the rent or hire or freight was paid included more than the usual carrying space. That question could not have been raised in *Robinson's* case, L. R., 8 C. P. 465, for there was a distinct stipulation by the charterers for a right to carry deck cargo. A passage in Bell's Commentaries was also cited (i. 587). But that passage, I think, can only be read as applicable to the case of a demise of a ship, a phrase not used by Bell, but not used probably because the phrase was not in common use among Scots lawyers in his time. The passage, however, is descriptive of what is now called a demise of the ship, and correctly states the rights which are conferred on the charterer by a charter which amounts to a demise. But if Professor Bell uses the words "entire ship" as meaning something less than "demise" imports, the passage is still no authority in support of the defenders'

claim. For reading "entire ship" as entire carrying space, that would not, according to recent authorities, include the deck. No. 96.

I think the judgment appealed against should be affirmed.

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The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

The COURT adhered.

MORTON, SMART, & MACDONALD, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

ROBERT OLIPHANT, Pursuer (Appellant).—*A. M. Anderson.*

No. 97.

JOHNSTONE & MACLEOD, Defenders (Respondents).—*W. Campbell.*

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Oliphant v.
Johnstone &
Macleod.

Reparation — Relevancy — Specification of fault — Defective hoist. — In an action of damages for personal injuries the pursuer averred that he had been sent by his employers to take delivery of goods at the defenders' premises; that in descending with the goods from the top flat by means of a hoist used for the conveyance of persons and goods, and in charge of an attendant in the defenders' employment, "the regulating power seemed to lose its control, and hoist and contents fell to the ground," and the pursuer was injured. The pursuer further averred,—"It was the duty of the defenders to see that the hoist was in a safe condition before allowing those using it in connection with their business to do so, and this they negligently failed to do. The hoist was not in a proper state of repair, or at all events was not running as it should have been, and this the defenders knew, or ought to have known, or at any rate could have discovered, had they made a proper examination thereof, or inquiries in regard thereto."

The defenders maintained that the action was not relevant, as no specific fault on the part of the defenders had been set forth.

Held that the action was relevant.

ROBERT OLIPHANT, a carter in Glasgow, raised an action of damages for personal injuries against Johnstone & Macleod, corset makers, Calton, Glasgow. 2D DIVISION.
Sheriff of
Lanarkshire.

The pursuer averred;—(Cond 3) "At the date of the accident, and for some time prior thereto, the pursuer was in the employment of the Caledonian Railway Company, his duties being to deliver and take delivery of goods for the company." (Cond. 4) "On or about 23d June 1893 he was sent to defenders' place of business to receive certain goods to be taken by him to the company's station at Buchanan Street, Glasgow." (Cond. 5) "On arrival at said place of business the pursuer proceeded to the top flat of the building occupied by the defenders in order to obtain delivery of the goods which he had been sent for, and in order to reach said top flat he stepped into a hoist used for the conveyance of persons and goods from the ground flat thereto, and which was in charge of an attendant in defenders' employment." (Cond. 6) "After obtaining delivery of the goods for which he had been sent, and depositing them in the hoist to be taken to the ground flat, the pursuer stepped into said hoist along with said goods, and the same having been set in motion by the attendant, they began to descend, and went all right until they reached the second flat, when the regulating power seemed to lose its control, and hoist and contents fell to the ground with such terrific speed that on reaching it the pursuer was not only thrown out, but the hoist rebounded to the top flat and remained fixed there." (Cond. 7) "In consequence of the rapidity of the descent of said hoist, and the violence with which it came into contact with the ground flat, and the manner in which the pursuer was thrown therefrom, he sustained serious injuries." (Cond. 8) "It was the duty of the defenders to see that the hoist was in a safe condition before allowing those using it in connection

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with their business to do so, and this they negligently failed to do. The hoist was not in a proper state of repair, or at all events was not running as it should have been, and this the defenders knew, or ought to have known, or at anyrate could have discovered, had they made a proper examination thereof, or inquiries in regard thereto."

The defenders pleaded, *inter alia*, (1) The action is irrelevant.

On 15th November 1893 the Sheriff-substitute (Guthrie) found that the pursuer had not stated a relevant case, and therefore dismissed the action.*

The pursuer appealed, and argued;—There was no *onus* upon the injured person in a case of this kind to aver what was the specific defect which caused the accident.¹ The occurrence laid the *onus* on the employer to account for it, and to prove that it was unavoidable.

Argued for the defenders;—The judgment was right. Practically all that the pursuer averred was that there was an accident, and he inferred from this that there was a defect which the defenders ought to have discovered. The case was ruled by *Macfarlane v. Thomson*,² in which the cases last cited by the pursuer had been explained, and in which it was held that the fact that an accident has happened will not raise a presumption that it was caused by a defect in the plant for which the master was responsible. That defect must be averred.

LORD JUSTICE-CLERK.—I have no doubt whatever that the pursuer's record is relevant as it stands, and that he is entitled to an issue.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

THE COURT recalled the interlocutor appealed against, and allowed the pursuer to lodge issues.

JOHN VEITCH, Solicitor—J. & J. GALLETTY, S.S.C.—Agents.

No. 98. SARAH JANE BROUGH OR PRINGLE AND ANOTHER, Pursuers (Respondents).

—*Salvesen*—*A. S. D. Thomson*.

F. GROSVENOR, Defender (Reclamer).—*Shaw*—*Sym*.

Feb. 3, 1894.
Pringle v.
Grosvenor.

Reparation—Factory—Mill-gearing—Fencing—Factory and Workshop Act, 1878 (41 Vict. c. 16), sec. 5, subsec. 3, sec. 96, and sec. 9—Factory and Workshop Act, 1891 (54 and 55 Vict. c. 75), sec. 6, subsec. 2—Contributory negligence.—When a worker in a factory is injured by an accident which would not have happened if the mill-gearing had been properly fenced in terms of the statute, the employer will not be liberated from liability by the fact that the accident was partly due to a mistake on the part of the worker.

A moulding-machine in a pottery was connected with the motive power supplied from a steam-engine by a drum being pressed on a revolving plate forming part of the mill-gearing. The drum and revolving plate, which were under the worker's bench, were accessible from three sides to persons wishing to clean the revolving plate.

A woman engaged at the machine, in cleaning the revolving plate while in motion (which she had to do from time to time), though aware of the danger, did so from the side where the edges of the revolving plate and of the drum were approaching each other instead of from the side where they were separating, and had her hand drawn in and crushed.

* "NOTE.—No specific fault of the defenders has been set forth."

¹ *Macaulay v. Buist & Co.*, Dec. 9, 1846, 9 D. 245, per Lord Fullerton, 247 and 248, 19 Scot. Jur. 81; *Fraser v. Fraser*, June 6, 1882, 9 R. 896; *Walker v. Olsen*, June 15, 1882, 9 R. 946.

² *Macfarlane v. Thomson*, Dec. 6, 1884, 12 R. 232.

In an action of damages at her instance against her employer *held* that the accident would not have happened if the revolving plate forming part of the mill-gearing had been fenced, as required by the statute, at the dangerous side, and that the defender was liable in damages.

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Feb. 3, 1894.
Pringle v.
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SARAH JANE BROUGH OR PRINGLE, wife of George Pringle, harness clipper, and George Pringle, as her curator and administrator-in-law, raised an action of damages at common law, or under the Factory and Workshop Acts, 1878 to 1891, or under the Employers Liability Act, 1881, against F. Grosvenor, pottery manufacturer, Eagle Pottery, Glasgow, for personal injuries sustained by the female pursuer when working at a machine in the defender's pottery.

2D DIVISION.
Sheriff of
Lanarkshire.

The pursuers averred that these injuries were received through the fault, failure, and culpable recklessness of the defender or his foreman, *inter alia*, "first, in failing to have the machine at which the pursuer was working securely fenced to prevent access thereto or interference therewith while in motion; third, in imposing the duty of cleaning and attending to the said machine upon the pursuer."

The pursuer pleaded;—(1) The pursuer, having sustained loss, injury, and damage, through the fault, culpable, careless, and reckless conduct or negligence of the defender, or others for whom he is responsible, as condescended on, is entitled to damages and *solatium* at common law, or under the Factory and Workshop Acts,* or under the Employers Liability Act.

The defender pleaded;—(2) The injuries to the female pursuer not having been caused by the fault or negligence of the defender, or anyone for whom he is responsible, the defender is entitled to absolvitor. (3) The injuries sustained by the female pursuer being caused by her own negligence, or carelessness, or at least such negligence having materially contributed thereto, she is barred from suing the present action.

A proof was allowed, and the following facts were established:—

Mrs Pringle was employed in the defender's pottery in moulding jam-pots at a Jolly machine. The frame of the machine, made of cast iron, stood about three feet from the floor, and was covered by a flat working table or bench, about four feet square. The machine was set in motion by the worker pressing with her foot a lever about four inches from the ground. This lever, when so pressed, brought a horizontal drum, underneath the bench and forming part of the machinery by which the mould was turned, into contact with a circular wheel or plate behind, which revolved perpendicularly, connected with the mill-gearing. The

* The Factory and Workshop Act, 1878, enacts,—Sec. 5, "With respect to the fencing of machinery in a factory the following provisions shall have effect . . . (3) Every part of the mill-gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced."

Sec. 96 provides,—"The expression 'mill-gearing' comprehends every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process."

Sec. 9. " . . . A young person or woman shall not be allowed to clean such part of the machinery in a factory as is mill-gearing while the same is in motion for the purpose of propelling any part of the manufacturing machinery . . . A child, young person, or woman allowed to clean or to work in contravention of this section, shall be deemed to be employed contrary to the provisions of this Act."

The Factory and Workshop Act, 1891, enacts, sec. 6 (2). In subsection 3 of the 5th section of the Act of 1878, "before the words 'every part' shall be inserted the words 'all dangerous parts of the machinery and.'"

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pressure of the drum against the revolving plate caused the drum to revolve, and thus caused the machinery of the Jolly machine to move. By removing the foot from the lever, the worker relieved the pressure. If the machine had been in perfect working order the drum would then have stopped, but as it was not, the contact was not entirely broken and the drum continued to revolve, though more slowly.

It was the usual custom in other potteries to have the drum and plate boxed in so that the worker could not tamper with them, and a man was sent round the works in order to remove the oil when it trickled down from the spindle between the plate and the drum. In the defender's pottery the machine was placed with one side to a wall. At the other three sides the revolving wheel and the drum were accessible to any person wishing to clean them. In front of the bench there was an upright board about eight inches broad, but it did not prevent access. It was part of the recognised work of the women in this pottery to clean the plate and drum when oil fell upon them, the effect of the oil being to prevent the drum gripping the plate. At the right hand side the revolving plate and the drum revolved inwards towards each other, so that any worker who happened to be cleaning the machine from the right hand side was exposed to the danger of having her hand drawn in between the drum and the plate. At the left hand side, which was equally accessible, there was not this danger.

On 22d September 1892, while the pursuer was cleaning the revolving plate and drum at the right hand side of her machine with a piece of waste, it was caught between the plate and drum, and her hand was drawn into the machinery and crushed. It was proved that she knew that it was dangerous to clean the machine from that side.

On 5th April the Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds that the pursuer was on the 22d September 1892 engaged at a Jolly machine in the defender's works, and while engaged in cleaning with a piece of waste a certain plate and drum her right hand was drawn in and serious injuries sustained thereto: Finds that the system of defender was faulty: Repels the third plea in law stated for defender, and also the whole defences: Finds defender liable in damages; assesses these at the sum of £35."

On appeal, the Sheriff (Berry) adhered.

The defender appealed, and argued;—"The drum and revolving plate were not part of the mill-gearing. They were only connected with the mill-gearing proper when the strap was placed round the plate. The defender was then not within the Factory Acts. But assuming that the drum and plate were parts of the gearing, they were sufficiently fenced. "Securely fenced" meant fenced with safety to persons doing their proper work in the mill. No accident could have happened had not the pursuer been cleaning the machine on the dangerous side, a proceeding which, it was proved, she knew was fraught with danger.¹

Argued for the pursuer;—"The drum and plate, or, at all events, the latter, were "part of the mill-gearing." The motion of the first moving power was communicated by the revolving plate to the drum. They should then have been properly fenced in terms of section 5 of the Factory Act of 1878. The dangerous character of the cleaning was not so obvious that the pursuer could be held to have willingly exposed herself to the risk of an accident.² The defender had further contravened

¹ Caswell v. Worth, 1856, 5 E. and B. 849; Gibb v. Crombie, July 6, 1875, 2 R. 856, per Lord Ormisdale.

² Britton v. Green Western Cotton Co., 1872, L. R., 7 Exch. 130.

section 9 of the Factory and Workshop Act of 1878 in allowing the pursuer to clean the machinery. No. 98.

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LORD JUSTICE-CLERK.—It is clearly proved that the women working in this factory had, as part of their regular and recognised duty, to clean the revolving disc which was the means of communicating motion to the machine. It appears that in other factories that is not permitted. It is also clear from the evidence that the revolving disc and the axle were part of the mill-gearing of the pottery. Such gearing required under the statute to be fenced. The question whether it was or was not fenced depends upon whether the board which stood upright in front of the table where the female pursuer was working was fencing. It may in a sense be called fencing, but it certainly did not fence that part of the gearing which might be dangerous if a person had to go near it in order to clean the machinery as the pursuer did.

It is said that the pursuer is not entitled to succeed because she cleaned the machine in a way dangerous to herself by going to the side where her hand might be drawn in.

It appears to me that that is just one of the things which the Legislature provided for by enacting that such gearing should be fenced. Here it is plain that the gearing was not fenced at a point where there was manifest danger.

But it is said on the part of the defender that he may have been in fault, but that the pursuer contributed to the accident by deliberately going to the side of the machine where the danger existed.

Now, I think the Legislature intended to provide not against a person putting the hand wilfully, deliberately, and intentionally into danger from mere wanton bravado or anything of that kind, but against a person committing a mistake,—the inadvertent mistake it may be,—of going to the wrong side of the machine and thereby sustaining injury.

I think that is quite sufficient ground for adhering to the Sheriff's judgment, and I do not express any opinion upon the question whether the defender was not also in fault in allowing the woman to clean this machine having regard to section 9 of the Act of 1878.

LORD RUTHERFURD CLARK.—I am of the same opinion. It is quite clear that the upright wheel formed part of the gearing and should have been fenced. It is also quite clear that it was not fenced, and that by reason of this statutory omission the pursuer was injured. She could not have been injured if the defender had performed his statutory duty.

I do not mean to say that if the pursuer had deliberately exposed herself to a known danger she might not be debarred from recovering damages. But there is no such case here presented. There may have been inadvertence, but that arose from the women in this factory being allowed to clean the machinery while in motion.

LORD TRAYNER.—I am of the same opinion.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Dismiss the appeal, and affirm the interlocutors appealed against."

HUTTON & JACK, Solicitors—JOHN RHIND, S.S.C.—Agents.

No. 99.

REVEREND JAMES BAIN (Minister of the Parish of Duthil), Pursuer
(Respondent).—*Dickson—Dewar.*

Feb. 13, 1894.
Bain v.
Heritors of
Duthil.

COUNTESS OF SEAFIELD AND OTHERS (Heritors of Duthil), Defenders
(Appellants).—*Jameson—Maconochie.*

Process—Appeal for Jury Trial—Proof—Remit to Sheriff—Judicature Act, 1825 (6 Geo. IV. c. 120), sec. 40.—In an action raised in the Sheriff Court by a parish minister against the heritors for manse rent in consequence of their failure to provide a habitable manse, the defenders appealed under the 40th section of the Judicature Act, 1825, and moved that the cause should be remitted to the Lord Ordinary on Teinds in respect there was already pending before him a cognate cause under the Ecclesiastical Buildings, &c. Act, 1868. The respondent moved that the cause should be remitted back to the Sheriff. The Court, in respect that neither party asked for jury trial, and that the question to be tried was peculiarly appropriate to a local tribunal, *remitted* to the Sheriff.

1st DIVISION.
Sheriff of In-
verness-shire.

IN July 1892 the Reverend James Bain, minister of the parish of Duthil, raised an action in the Sheriff Court at Inverness against the heritors of that parish for payment of £1000 as manse mail.

He averred that he had been elected minister of the parish in 1877, and that in 1884 he had been obliged to leave the manse, which had become uninhabitable owing to its condition of disrepair, its insufficient water supply, and its defective drainage, and also because of the noxious smells which pervaded the manse from its proximity to the churchyard, which was on a higher level, and was overcrowded and dangerous to health.

It appeared from the statements of parties that the pursuer had in 1890 presented a petition to the Presbytery praying that Court to order the heritors to put him in possession of a habitable manse, and had subsequently appealed to the Sheriff of Inverness, &c., under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, and thereafter to the Lord Ordinary on Teind causes.* The Lord Ordinary (Stormonth-Darling), after obtaining reports from men of skill, had ordained the heritors to execute certain repairs and alterations on the manse and offices.

These repairs had not been finished at the date when Mr Bain raised this action.

The pursuer pleaded;—The defenders having failed to implement the obligations incumbent on them as heritors of Duthil to provide the pursuer with a habitable manse, are liable in manse rent, and decree ought to be pronounced against the defenders jointly and severally, or severally according to their respective liabilities, for the sum sued for, with expenses.

By interlocutor dated 27th May 1893 the Sheriff-substitute (Blair) allowed a proof, and this interlocutor was affirmed by the Sheriff on 28th December 1893.

The defenders appealed under the 40th section of the Judicature Act, and argued;—The case should be remitted to Lord Stormonth-Darling to take a proof. There was already pending before him, as Lord Ordinary on Teinds, the appeal taken by the pursuer under the Ecclesiastical Buildings, &c., Act, which was concerned with practically the same

* The Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (31 and 32 Vict. c. 96), section 20, enacts, " . . . Provided also that all . . . interlocutors, judgments, or decrees pronounced by the Lord Ordinary shall be final and not subject to review."

matter as the present case. It had been held competent to remit to a Lord Ordinary in the case of *Willing & Company*,¹ and what had influenced the Court there was that a cognate cause was already pending in the Outer-House. The case was of too great magnitude to be remitted to the Sheriff, and besides, that course had been disapproved.²

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Argued for the respondent;—The case was peculiarly appropriate for trial by the local Judge, and should never have been brought to the Court of Session. The action pending in the Outer-House had no concern with the claim for manse rent for the years in question. The appellants admitted that their object in appealing had not been to obtain a jury trial, and the case should, therefore, be remitted back to the Sheriff.

LORD PRESIDENT.—My opinion, on the whole, is that we shall best exercise our jurisdiction by dismissing this appeal and remitting this case back to the Sheriff. The action is one for a considerable sum, but at the same time the kind of question which has to be tried is peculiarly appropriate to a local tribunal, and the evidence is to be found in the place where the subjects are.

The appellants rest their appeal on one definite ground. They say that there has already been a good deal of procedure before a Lord Ordinary in a proceeding relating to the condition of this same manse. But then the appellants admit that this case must go to proof. Now, the procedure in the Outer-House to which they refer has not been of the nature of proof. Remits were made to men of skill and reports obtained—a mode of inquiry quite appropriate to the proceedings before the Lord Ordinary—and the Lord Ordinary has decided the matter upon these reports. But it is admitted that the case must be opened afresh and tried on evidence yet to be given. That being so, I am disposed to think that there is no such high convenience in sending the case to a Judge who has already had cognisance of the matters in dispute as there would at first sight appear to be, for his Lordship would require to divest his mind of the impressions formed in the course of the previous procedure.

I am also to some extent influenced by the consideration that if the case be tried in this Court before a Judge an appeal to the House of Lords on the facts would be competent; that, although not conclusive, has a legitimate weight. Accordingly I am not prepared to accede to the motion of the appellants that the case should be tried by a proof before the Lord Ordinary.

Now, neither party asks for jury trial; the appellants appealed for the definite purpose which I have discussed, and the respondent's motion is that we should dismiss the appeal. That last seems to me to be the proper course to take.

LORD ADAM.—I am of the same opinion. The appeal has been brought here under the 40th section of the Judicature Act. The object of that section is to enable the party appealing to obtain a trial by jury. But the appellant in this case, having come here, says that that was not the object of his appeal, but that the case ought to be tried by a Judge. And as the other side also say that a proof is the appropriate mode of trial, I think we are entitled to send the case for proof. If it had been truly an action of damages, there would have been more difficulty in not sending it to a jury. But that is not the nature of the case. The case is laid on the proposition that it is the duty of heritors to supply

¹ *Willing & Co. v. Heys & Sons*, Nov. 15, 1892, 20 R. 34.

² *Willing & Co.*, *supra*, note 1, Lord M'Laren at p. 35.

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a habitable manse, and the action is for breach of that duty from 1884 onwards, and if that is established then there remains to be considered what is a fair rent during that period.

The question, therefore, is, assuming that there is to be a proof, who is to take it? To my mind the case ought never to have come from the Sheriff. It is entirely a question for a local inquiry before the Sheriff, viz., What has been the state of these subjects during a considerable period? In the whole circumstances, I think that the case ought never to have been brought up from the Sheriff, and that we should send it back.

LORD M'LAREN.—I am reminded by counsel that in a former case I had expressed an opinion unfavourable to the practice of remitting advocations—for this is really an advocacy though it is called an appeal—to the Sheriff. The ground of that opinion is that while the Sheriff Courts by their original constitution had unlimited jurisdiction in personal actions, the Legislature had thought fit to restrict that jurisdiction by providing that it should only exist concurrently with a right to either party to remove the case to the Court of Session for jury trial, if the case be of the value of £40. If the question were open, I should doubt whether this Court had the power in such cases to remit to the Sheriff. But it has been decided in a very authoritative way that this course may be taken. I agree that the circumstances of this case are such as to render it more suitable for investigation before the local tribunal rather than before the Court of Session, because of the entirely exceptional character of the case, and because of its affinity to cases arising under the Act 31 and 32 Victoria, cap. 96, in which the Judge is final on the facts. Neither party desires that the case should be sent to a jury, and we cannot, I think, be wrong in taking the course which will make the decision on the facts final, at all events, in the Court of Session.

LORD KINNEAR.—I concur with your Lordship in the chair.

THE COURT refused the appeal, and remitted to the Sheriff to proceed.

CORNILLON, CRAIG, & THOMAS, S.S.C.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

No. 100. MRS MARY JANE WEATHERALL OR MORISON, Pursuer (Respondent).—
D. Dundas—Craigie.

Feb. 13, 1894. MORISON v. MORISON. FREDERICK DE LEMARE MORISON, Defender (Reclaimer).—*Murray—Lees.*

Entail—Provision to widow—Increase of provision after granter's death—Aberdeen Act (5 Geo. IV. cap. 87), secs. 1 and 3.—Although a bond of provision by way of liferent annuity granted under the Aberdeen Act by an heir of entail in possession in favour of his wife may not at the date of the granter's death be effectual, or may be effectual only to a limited extent by reason of the subsistence of similar bonds in favour of widows of prior heirs, it will become effectual (within the limits of the statute) as these prior bonds lapse.

2D DIVISION.
Ld. Kyllachy.

By bond of annuity, dated 15th January, and (with codicil, dated 4th March, declaring the annuity to be irrevocable), recorded 19th March 1880, granted by John Morison, heir of entail in possession of the estate of Bognie, Aberdeenshire, on the narrative that by the Act 5 Geo. IV. cap. 87,* it

* The Entail Amendment Act, 1824, Aberdeen Act (5 Geo. IV. c. 87), sec. 1, enacts,—“That it shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be

was, "*inter alia*, enacted that it shall and may be lawful to every heir of No. 100.
 entail in possession of an entailed estate, under any entail then already made or thereafter to be made in Scotland under the limitations and conditions therein mentioned, to provide and infest his wife in a liferent provision out of his entailed lands and estates by way of annuity to the extent therein mentioned," and on the farther narrative that he was "desirous of securing a suitable annuity out of my said entailed lands and estates to Mary Jane Weatherall or Morison, my wife, during her life after my death in case she shall survive me," he did thereby "in virtue of the foresaid Act of Parliament, provide and dispoise to the said Mary Jane Weatherall or Morison, my wife, in liferent during all the days of her life after my decease in case she shall survive me only, All and Whole a free yearly annuity of £1800 sterling, exempted from all burdens and deductions whatsoever, but subject to the conditions and limitations of the foresaid Act of Parliament, to be uplifted and taken at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms which shall happen after my decease . . . Providing always and declaring that should there be two liferent provisions in favour of the widows of two former heirs of entail in possession granted under the power contained in the said Act of Parliament subsisting at the same time of my decease, then the liferent provision hereby constituted shall not take effect till one of the former subsisting liferents shall cease or expire; and further declaring that the foresaid liferent annuity hereby granted is provided under all the conditions and limitations contained in the foresaid Act of Parliament in so far as the same are applicable thereto: And particularly declaring that should the foresaid annuity of £1800 be found to exceed one-third of the free yearly rent or value of the said entailed lands and estate as the same shall be ascertained in manner pointed out by the said statute at the date of my death, or such other sum as in the circumstances may be consistent with the terms and provisions of the said statute, then

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made, to provide and infest his wife in a liferent provision out of his entailed lands and estates by way of annuity, provided always that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estate where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, . . . and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the granter."

Section 3 enacts,—“Provided always, and be it enacted, that where two liferents to wives or husbands, granted under the powers hereinbefore contained, shall be subsisting at any one time upon an entailed estate, it shall not be competent to grant a third liferent to take effect till one of the former subsisting liferents shall cease or expire, but the power of granting a liferent may be exercised so as to increase a former liferent, or grant a new liferent to the extent hereinbefore authorised to be granted, upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent.”

Section 7 enacts,—“Provided always, and be it enacted, that in every case in which the provision granted to a wife or husband . . . under the authority of this Act shall exceed such proportions of the rent or value of any entailed estate as hereinbefore mentioned, such provision shall not be deemed to be null and void, but the same shall be voidable at the instance of the heir of entail next in the order of succession, or of any other heir of entail, to such extent as such provision shall exceed those herein authorised in each respective case to be granted, but no further.”

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the said annuity so provided to my said wife shall be restricted to a sum corresponding to the one-third of the free yearly rent or value of the said entailed lands and estate ascertained in manner foreshaid, or to such other sum as in the circumstances may be consistent with the terms and provisions of the said statute."

Mr Morison died on 10th November 1886, survived by his widow, Mrs Mary Weatherall or Morison, and by a son, Colonel Frederick De Lemare Morison, who succeeded his father as heir of entail in possession.

At the date of Mr Morison's death the entailed estates were burdened with a liferent annuity, granted under the Aberdeen Act for £1800 in favour of Mrs Catherine Young or Morison, the widow of a former heir of entail. On 29th October 1889, in a petition by Frederick De Lemare Morison for restriction of the amount of the annuity payable to his father's widow, the Lord Ordinary (Kyllachy) pronounced an interlocutor restricting the annuity to £980 per annum, but reserving "to the said Mrs Mary Jane Weatherall or Morison her claim on the death of Mrs Mary Catherine Young or Morison, widow of the deceased Alexander Morison, to the full annuity of £1800 provided to her by the said bond."

Mrs Catherine Young or Morison died on 5th May 1893.

On 17th June 1893 Mrs Mary Jane Weatherall or Morison brought an action against Frederick De Lemare Morison, as heir of entail in possession, for declarator that the annuity payable to her under the bond of 1880 was £1800, payable half-yearly, beginning Whitsunday 1893, and for payment accordingly.

The parties subsequently by minute agreed that one-third of the free rental of the estate at the date of John Morison's death was £1580, assuming that the amount of the annuity to Mrs Young or Morison was included, and the pursuer restricted the summons to £1580 accordingly.

The defender pleaded;—(2) The pursuer's husband had no power under the statute to increase the liferent to his widow beyond the one-third of the free yearly rent ascertained as at the date of his death, seeing that the liferent could not be, *quoad* the bond granted by him, a "former" liferent in the sense of the statute. (3) *Esto* that the pursuer's husband had power under the statute to provide an increase of her annuity on the expiry of a former liferent, such power could not take effect unless exercised by him. (4) In any event, the pursuer's husband having, by the terms of the said bond and codicil, irrevocably fixed the determination of the amount of her annuity, as at the date of his death, and not having provided for any subsequent increase thereof, and having made delivery of the said deeds, and having had them duly feudalised immediately thereafter, the measure of the pursuer's rights under the said bond falls to be taken finally as at the date of the granter's death.

On 24th November 1893 the Lord Ordinary (Kyllachy) pronounced an interlocutor decerning in favour of the pursuer.*

* "OPINION.—In this case I have given every consideration to the argument which was pressed upon me on behalf of the defender, but the result is that I have not been able to find grounds for holding that there is any obstacle, either upon the terms of the statute or upon the language of the bond of provision, to the pursuer making good her claim to the increased annuity which she now seeks.

"So far as the bond is concerned, I cannot doubt that its just construction is that the granter desired to give his widow an annuity of £1800, subject only to such restriction as the statute required. That is, I think, the whole scheme of the deed and the plain meaning of the language. The only question, therefore, in my judgment, is whether the statute permits an heir of entail to grant to his wife what has been termed an expanding annuity—that is to say, an

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The defender reclaimed, and argued;—(1) The present case did not fall within the scope of section 3d of the Act. The pursuer's liferent was neither a "new liferent," as it had been in operation to the extent of £980 since Mr John Morison's death, nor a "former liferent," for a liferent could not be "former" with reference to itself. Assuming, however, that by "former" was simply meant "subsisting," what the statute said with reference to such liferents was that "the power of granting a liferent may be exercised so as to increase a former liferent to the extent hereinbefore authorised to be granted." Now, "the extent hereinbefore authorised to be granted" was "one-third part of the free yearly rent . . . after deducting," *inter alia*, "liferent provisions . . . all as the same may happen to be at the death of the granter." But the liferent provision in favour of Mrs Young or Morison was a liferent provision existing at the death of the granter here; the amount of that provision, therefore, did not become part of the free yearly rent, as in the present question, when the provision terminated. The amount of a widow's annuity under the Act was to be calculated as at the date of the husband's death, and was neither to be increased nor diminished by anything happening after that date.¹ The case of *Bonar*² was special, as there the prior annuity was not constituted under the Act. But (2) assuming that an heir in possession had power to provide for an expanding annuity in the way now proposed, that power had not here been exercised. Powers conferred by statute on heirs in possession under an entail, to be effectually exercised, must be exercised in the way pointed out by the Act, and must be actually exercised by the heir himself. It was not enough that the Court, proceeding on the ordinary rules of testamentary interpretation, should be satisfied that the heir in possession intended that the power should be exercised; his deed must either expressly or by necessary implication contain an actual exercise of the power by him.³ The present deed contained no such exercise. It is true that £1800 was mentioned as the amount of the annuity, but that was merely a random

annuity which shall increase on the free rental as at the date of the death becoming enlarged by the lapse of some previous annuity. Now, of course, if that question depended on the language of the first section of the statute, it must be answered in the negative. No annuity could, according to that section, exceed one-third of the free rental as at the death of the granter. But the point really turns upon the terms of the third section of the statute, and that section, as I read it, makes an express exception from the general rule of the first section; that exception being in effect this, that in so far as the free rental at the death of the granter is diminished by a previous widow's annuity, such diminution shall not count against a succeeding annuity which is to begin to run or to be increased on the termination of the first.

"I am not, I confess, able to find any reasonable interpretation for the third section except what I have just stated. In short, it appears to me that the third section has effectually provided, *inter alia*, for the very case which has occurred here.

"I propose, therefore, to decern and declare in terms of the summons—as restricted—that is to say, for an annuity of £1580, being the amount fixed at the date of the death *plus* one-third of £1800 of which the estate has been disburdened by the death of Mrs Morison senior."

¹ *Christie v. Christie*, Dec. 10, 1878, 6 R. 301.

² *Bonar v. Anstruther*, June 6, 1868, 6 Macph. 910, 40 Scot. Jur. 509.

³ *Bonar v. Anstruther*, June 6, 1868, 6 Macph. 910, per Lord Benholme, p. 916, 40 Scot. Jur. 509; *Callander v. Callander*, May 21, 1869, 7 Macph. 777, 41 Scot. Jur. 404; *Dickson v. Dickson*, June 12, 1854, 4 Macq. 734; *Carter v. Lornie*, Dec. 20, 1890, 18 R. 353; *Stewart v. Burn-Murdoch*, June 27, 1882, 9 R. 458.

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sum, and *per se* meant nothing. Then while the granter provided that the liferent should be in abeyance while there were two prior existing liferents, and also that it should not exceed one-third of the free yearly rental, there was nothing to suggest that once the annuity began to run it should in any event increase in amount, unless it was the general declaration that the annuity was granted "under all the conditions and limitations" contained in the Act. But that was far too vague and general to be regarded as an exercise of a power conferred by the Act.

Argued for the pursuer;—The leading purpose of the Act was to empower an heir of entail in possession to grant a liferent provision to his widow of not more than one-third of the free rental. If there was one prior subsisting widow's liferent, then the second was diminished so long as the prior liferent continued; if there were two prior liferents, then the third was in abeyance until one or other of the prior liferents lapsed. But the prior liferents were mere burdens on the later liferent, and as soon as these burdens were removed the later liferent increased automatically until it reached the highest amount permitted by the Act, provided, of course, that the amount of the liferent granted by the heir admitted of that. It was not necessary for the heir expressly to exercise the power to increase the liferent. All that was necessary for him to do was to specify the amount of the provision which he wished to grant, and if this sum exceeded what he was entitled to grant, either absolutely or *pro tempore*, then under the 7th section the liferent would be restricted absolutely or *pro tempore* to the amount permitted by the Act. Even if the Act merely created a power which the heir in possession must exercise if the liferent was to increase, the present deed contained, by clear implication, an exercise of the power.

LORD YOUNG.—This case raises an interesting enough question, but the Lord Ordinary has apparently decided it without much doubt or difficulty, and I must say that I have much sympathy with the views he has expressed in the note to his interlocutor.

I think that the plain meaning of the statute is, that if there are two subsisting liferents—by which I mean liferent annuities—in favour of the widows of two previous heirs of entail, then the granting of a third liferent annuity in favour of the widow of another heir of entail shall have no effect until one of the prior liferents shall have disappeared by the death of the annuitant. I think further that the statute intended that a liferent provision to a widow, granted according to the terms of the first clause of the Aberdeen Act, should be calculated with respect to the state of affairs which might exist, not only at the death of the granter of the annuity, but also with reference to the state of affairs which might exist at the expiry of one or both of the prior liferents. If there are two subsisting prior liferents on an estate, the grant of a third one can have no effect or validity so long as both the prior liferents continue, but it is clear that under section 3 of the statute this want of effect and validity ceases on the death of one or other of the prior liferenters, for otherwise the provisions of the statute would come to mean this, that if at any time two liferent annuities happened to be subsisting upon an estate, the grant of a third never could have any effect and validity. That is not the language of the statute. This is what the Act says,—“Provided always that where two liferents to wives or husbands, granted under the powers hereinbefore contained, shall be subsisting at any one time upon an entailed estate, it shall not be competent to grant a third liferent to

take effect till one of the former subsisting liferents shall cease or expire." No. 100.
 Not that it shall not be competent to grant a third liferent at all, but that it shall not be granted with effect and validity until the death of one of the prior liferenters, the plain inference being that it then shall take effect and have validity. The deed granting the liferent is a living deed, although its operation is suspended in regard to the rents of the estate until the death of one of the prior liferenters leaves only one liferent annuity charged upon the entailed estate as an annuity under this Act. So also is it a living deed with reference to the sum provided as the amount of the annuity, although that is greater than one-third of the free rental of the entailed estate as at the death of the granter. The deed is not to have any effect at all while there are two widows of former heirs of entail drawing annuities from the estate, but if one of the annuitants dies, then it is to have effect, so far as relates to one-third of the free rental of the estate, after deducting the annuity paid to the other annuitant and the other deductions ordered by the statute.

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I do not think that this third clause is merely an empowering clause the meaning of which is to put an heir of entail in possession into this position, that if he grants a deed, giving a liferent annuity to his widow out of the free rental of the entailed estate, when there are two subsisting liferents, he is empowered to put a clause into the deed which shall have the effect of enabling his widow to draw her annuity from the estate when one of the prior annuitants dies. What the Act says is this,—“But the power of granting a liferent may be exercised so as to increase a former liferent, or grant a new liferent to the extent hereinbefore authorised to be granted, upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent.” Now, what is the meaning of these words. They have reference solely to the amount of the annuity to be granted by the deed. The amount “hereinbefore authorised” is a third of the free rental of the entailed estate after deducting the various burdens upon it, and in my opinion the words mean that in estimating the amount that may be given to the new annuitant or the increase granted to a prior annuitant, the amount of the annuities which have expired is not to be taken into account. I think that that is the fair view to take of the meaning of the statute, and the only point which was urged against it was that this provision gave only a power to the granter of the deed to increase the annuity, or to grant a new one on the death of the prior annuitant, and that any deed to be effectual must be in terms an exercise of this power, or it must so read that although there are not actually words in the deed stating that it is granted under the powers conferred by the statute, the Court shall come to be of opinion, on consideration of its whole terms, that that was the intention of the granter of the deed. I think that that is far too technical an argument to overcome the manifest considerations of convenience and good sense which, in my opinion, exist in the statute as I have explained them.

I should like to say that I have great difficulty in recognising the case of *Bonar v. Anstruther*, June 6, 1868, 6 Macph. 910, as an authority in this case. It appears to me doubtful whether the third clause of the statute is applicable at all to that case. It appears to me that that section is applicable only where there are two liferents charged upon the estate which have been granted under the powers conferred by the first clause of the statute. In *Bonar's* case there was only one such. The question which arose on the second branch of that

No. 100. **Morison v. Morison.** Feb. 13, 1894. case was whether a prior liferent secured over the estate, but which had not been granted under the powers of the Act, or indeed under the entail at all, was to be deducted from the free rental of the entailed estate in calculating the amount of a liferent annuity charged under the statute. The original annuity had been granted by the entailer himself, in the deed of entail, in favour of his own wife. It was certainly a burden to be deducted in calculating the free rental available for another annuity under the statute, but I think that it was to be deducted merely as a burden to be taken into account at the date of the death of the granter of the second annuity, in no respect different from an annuity to a distant relative or to a stranger. The prior annuity deed was not granted either under the statute or under the powers of the entail, and the burden which it imposed was not different from any burden which the entailer, as being himself fee-simple proprietor of the lands, might have put upon the lands in the shape of an annuity in favour of any stranger. Therefore how clause 3 of the statute could have anything to do with the matter I fail to see.

But although I am not prepared to regard the decision as an authority on the question then before the Court, I admit at once that the remarks of the Judges upon the meaning and spirit of the Act are valuable and worthy of consideration. With regard to that matter, I adopt the view which the Lord Ordinary has taken, and I agree with him that that is the reasonable interpretation of the statute. It is a remedial statute and ought to be liberally construed, so as to attain its plain meaning and object, which is to give each successive annuitant the largest possible benefit contemplated by the statute. So long as both or one of two prior annuities continue operative, they are obstacles to the enjoyment of that benefit by the third annuitant, but when they or either of them cease to be operative they *ipso facto* cease to be obstacles.

LORD RUTHERFURD CLARK.—I agree with your Lordship and with the Lord Ordinary. I do not express any opinion as to the case of *Bonar*.

LORD TRAYNER.—The puzzle in this case I think is raised by the peculiar way in which the third clause is expressed. In my opinion the Lord Ordinary has solved it in a way in accordance with the fair meaning of the statute, and with the purpose which the statute was meant to effectuate.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

MACKENZIE & BLACK, W.S.—AULD & MACDONALD, W.S.—Agents.

No. 101. **ALEXANDER MACKENZIE, Pursuer (Reclaimer).—Salvesen—Dewar.**
LUCAS & AIRD, Defenders (Respondents).—D. Dundas.
Mackenzie v. Lucas & Aird. Feb. 15, 1894. *Process—Reclaiming Note—Competency—Interlocutor ordering proof—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 28.*—The Court of Session Act, 1868, sec. 28, enacts that any interlocutor by a Lord Ordinary ordering proof “shall be final unless within six days from its date the parties or either of them shall present a reclaiming note against it to one of the Divisions of the Court.”

On 30th January a Lord Ordinary pronounced an interlocutor allowing a proof. The Court rose for recess on 3d February and met again on 13th February. The pursuer boxed a reclaiming note against the interlocutor on 12th February, being the earliest day after 3d February on which it was

possible to box, but he did not, as he might have done, lodge a reclaiming note No. 101. with the Clerk of Court within the six days allowed for reclaiming. *Held* — Feb. 15, 1894. *Mackenzie v. Lucas & Aird.* (diss. Lord Young) that the reclaiming note had not been presented within six days from its date, and was therefore incompetent.*

In an action of damages for personal injuries, brought by Alexander Mackenzie, labourer, Fortrose, against Lucas & Aird, contractors, Fort-William, the Lord Ordinary (Kincairney), on 30th January 1894, pronounced this interlocutor:—"Dispenses with the adjustment of issues: Allows the parties a proof of their respective averments on record on a day to be afterwards fixed."

The Court rose for the February recess on Saturday, 3d February, and sat again on Tuesday, 13th February.

On 12th February the pursuer boxed a reclaiming note against the foregoing interlocutor.

The defenders objected to the competency of the reclaiming note, and argued;—This being an interlocutor allowing a proof, a reclaiming note against it must be presented within six days of its date.† No doubt here the six days expired when the Court was not sitting and the boxes were not open, but the reclaiming note would have been timeously "presented," if it had been lodged with the Clerk within the six days, as here it might have been, although the boxing only took place on the earliest possible day thereafter.¹ The Acts of Sederunt, July 11, 1828, sec. 79, and July 20, 1853, did not apply to interlocutors allowing a proof.

Argued for the claimer;—The principle applicable here was that if it was impossible to do the thing required by the statute within the limited time mentioned in the statute, it would be sufficient if it was done on the earliest possible opportunity thereafter.² A reclaiming note was presented if it either was boxed or was lodged with the Clerk. Here the claimer had chosen the former alternative, and the note had been duly boxed on the earliest possible day. It was therefore competent.

LORD RUTHERFURD CLARK.—I think that this reclaiming note is incompetent, and that the Act of Sederunt does not apply. The statute says that a reclaiming note of this kind ought to be presented within six days, and I think it must be presented within that time.

LORD TRAYNER.—I agree. I think that the provisions of the statute are imperative. I do not think that the boxing of the prints on the first day they could be boxed is enough. I think that the reclaiming note must be lodged within six days.

LORD YOUNG.—It seems to me not at all doubtful that in deciding this question exactly the same considerations must weigh with the Court which had weight when the Court passed the Acts of Sederunt which regulated the way in which reclaiming notes against interlocutors which might be reclaimed against

* On 14th March 1894 the Court passed an Act of Sederunt, which enacted and declared,—“That in all cases where the days allowed for presenting a reclaiming note against an interlocutor pronounced by a Lord Ordinary in the Outer-House expire during any vacation, recess, or adjournment of the Court, such reclaiming note may be presented on the first box-day occurring in said vacation, recess, or adjournment, after the reclaiming days have expired; and if there be no such box-day, then on the first ensuing sederunt-day.”

† Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 28.

¹ Bain v. Allen, Feb. 29, 1884, 11 R. 650.

² Henderson v. Henderson, Oct. 17, 1888, 16 R. 5; Allan's Trustee v. Allan & Sons, Oct. 23, 1891, 19 R. 15.

No. 101. in twenty-one days, or in ten days, should be presented in vacation. I pointed out during the discussion that these Acts of Sederunt were founded upon considerations of good sense and expediency as to what should be done in such cases, and I thought that the same considerations were equally applicable to this case. No Act of Sederunt, however, regulating reclaiming notes which must be presented within six days has been passed, and the only question therefore is whether a Division of the Court may not act upon the same considerations of good sense and expediency which actuated the Court in passing these Acts of Sederunt. I think it would be standing out for a mere matter of form for the Court to decline to act upon such considerations seeing that the judgment which your Lordships are to pronounce could have been obviated by an Act of Sederunt.

The result is that we refuse this reclaiming note.

The LORD JUSTICE-CLERK was absent.

THE COURT dismissed the reclaiming note as incompetent.

JAMES ROSS SMITH, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

No. 102. WILLIAM JAMES NEILL AND OTHERS (James Clark's Trustees), First Parties.—*Dickson—Moffat.*
 Feb. 16, 1894. KENNETH MACKENZIE CLARK AND ANOTHER (James Alexander Clark's Executors), Second Parties.—*Ure—McClure.*
 Clark's Trustees v. Clark's Executors.

Succession—Faculties and powers—Liferent with power of testing—Exercise of power.—A son who was entitled under his father's settlement to the fee of part of his father's estate and to the liferent of another part with a power of testing thereon, left a will in which, after bequeathing certain legacies, he left the residue of his real and personal estate to his brothers.

Held that the will was to be construed as embracing the share of his father's estate of which he had power to dispose by will.

Hyslop v. Maxwell's Trustees, Feb. 11, 1834, 12 S. 413, *followed*.

Observations on Mackenzie v. Gillanders, June 19, 1874, 1 R. 1050.

2D DIVISION. JAMES CLARK, thread manufacturer in Paisley, died on 3d August 1881, leaving a trust-disposition and settlement, dated 17th August 1880, by which he, in the last place, with regard to the residue of his means and estate, directed his trustees "to hold and apply, pay and convey, the same to and for behoof of all my children equally, and their respective issue, as follows, viz., one-half of the shares falling to sons to be paid and conveyed on my death to such of them as shall then be twenty-five years of age, and to such of them as shall not then have attained that age on their respectively attaining the age of twenty-five years; and the other half of the shares falling to sons, and the whole of the shares falling to daughters, to be held and applied, paid and conveyed, to and for their behoof, in liferent, for their respective alimentary uses only, and to and for behoof of their respective children *per stirpes*, in fee; . . . declaring, with regard to the shares of residue before directed to be held for behoof of my sons and daughters respectively in liferent, and their respective issue in fee, that in the event of any of my said children dying without leaving issue, or in the event of any of them dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, then the share of residue (whether original or as augmented by accretion) which may have been liferented by such child shall devolve upon his or her surviving brothers and sisters, along with the issue of any brother or sister who may have deceased leaving issue,

such issue always taking the share which their parent would have taken No. 102. on survivance; but subject always such accretion, in as far as in favour of sons, to the extent of one-half thereof, and in as far as in favour of daughters, to the whole extent thereof, to the same liferent, and also to the same destination, declarations, and conditions in all respects as are herein contained with regard to the original shares of residue provided to them respectively in liferent, and their respective issue in fee." Feb. 16, 1894.
Clark's Trustees v. Clark's Executors.

The settlement also contained this provision,—“And further, and notwithstanding anything hereinbefore contained, I provide and declare . . . (secondly) that in the event of any of my sons and daughters dying without leaving issue, or of any of them dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, it shall be competent to him or her to test upon the share of residue (whether original or as augmented by accretion) that may have been liferented by him or her, and that in favour of such person or persons, or for such uses and purposes, and in such way and manner, all as he or she may think proper.”

Mr Clark was survived by his widow and by six sons and two daughters.

One of the sons, James Alexander Clark, died on 8th January 1893, unmarried, at the age of thirty. He left a holograph will, dated 13th October 1892, by which, after bequeathing certain legacies, he provided as follows:—“And the residue and remainder of my real and personal estate I give, devise, and bequeath unto my brothers Kenneth Mackenzie Clark and Norman Clark, equally, and I hereby appoint Kenneth Mackenzie Clark and Norman Clark, or the survivor of them, executors of this my will.”

After James Alexander Clark's death, the question arose, whether his will was a valid exercise of the power contained in his father's trust-disposition and settlement of testing on the share of his father's estate liferented by him, and a special case was presented.

The first parties—Mr Clark senior's trustees—maintained that James A. Clark's will was not a valid exercise of this power, and accordingly that the share liferented by him fell to be administered by them in terms of Mr Clark senior's trust-disposition and settlement.

The second parties—James A. Clark's executors—maintained that his will was a valid exercise of the power, and therefore that the share liferented by him fell to be paid over to them.

In addition to setting forth the facts already narrated, the case stated that James A. Clark was survived by three brothers and one sister, and was predeceased by two brothers and one sister (all of whom left issue); and further, that he never received any portion of his father's estate, and at the time of his death was entitled to one-eighth part of the residue, one-half in fee, and one-half in liferent.

The questions of law were,—“(1) Are the first parties entitled to retain and administer, as trustees of the said James Clark, the portion of the residue of the estate of the said James Clark liferented by the said James Alexander Clark? or (2) Are the first parties bound to pay to the second parties the portion of the residue of the estate of the said James Clark liferented by the said James Alexander Clark?”¹

¹ *Authorities cited.*—Hyslop v. Maxwell's Trustees, Feb. 11, 1834, 12 S. 413; Mackenzie v. Gillanders, June 19, 1874, 1 R. 1050; Smith v. Milne, June 6, 1826, 4 S. 679; Glendonwyn v. Gordon, May 19, 1873, 11 Macph. (H. L.) 33, 45 Scot. Jur. 183; Dalgleish v. Young, June 29, 1893, 20 R. 904; Whyte v. Murray, Nov. 6, 1888, 16 R. 95; Bowie's Trustees v. Paterson, July 16, 1889, 16 R. 983; Grierson v. Miller, July 3, 1852, 14 D. 939, 24 Scot. Jur. 571; Cameron v. Mackie, Aug. 29, 1833, 7 W. and S. 106.

No. 102. At advising.—

Feb. 16, 1894.
Clark's Trustees v. Clark's Executors.

LORD YOUNG.—The question which is raised in this case is, whether a will, although it in terms refers only to property of which the testator had the fee, may be read as including also other property of which he had the liferent with an absolute power of disposal of the fee. That question is not now raised for the first time, for it was raised and determined in the affirmative in the case of *Hyslop v. Maxwell's Trustees*, 12 S. 413. The maker of the will which is here in question had, I understand, a large fortune of his own, part of it consisting of a share of his deceased father's estate, which he had permitted to remain in the hands of his father's trustees. With respect to another part of that estate, it was not his own, but he had the liferent of it, together with an absolute power to dispose of the capital. It is not disputed that the will which he left is applicable to that part of his father's estate of which he had the fee, although it remained in the hands of his father's trustees. But the contention is, that it is not applicable to the fee of the other part, of which he had the liferent with an absolute power of disposal. I am unable to agree in that view. I think the case is indistinguishable from *Hyslop v. Maxwell's Trustees*, only that it appears to me to be a stronger and clearer case for the application of the rule there established. The circumstances here are altogether favourable to the inference of an intention on the part of the testator to dispose of the fee of the property, of which he had the liferent with an absolute power of disposal, for it would be making a distinction not likely to occur to an ordinary testator to suppose that he understood that he was disposing of that part of his father's estate of which he had the fee, but not of that other part of which he had the liferent, but with an absolute power of disposing of the fee of it. That circumstance makes this case an exceedingly clear case for the application of the rule. We must of course be satisfied that the rule is in accordance with the true meaning of the will in the particular case, and if there is anything to hinder us from giving effect to the rule of course it will not hold, but here I can find nothing, and therefore I apply the rule established in *Hyslop v. Maxwell's Trustees*, and give that effect to the will here which makes it carry the property of which the testator had the liferent with an absolute power of disposal. I am of opinion accordingly that we should answer the first question in the negative, and the second in the affirmative.

LORD RUTHERFURD CLARK.—I am of opinion that we must follow the rule of the case of *Hyslop v. Maxwell's Trustees*. I cannot distinguish the present case from it. I have examined the case of *Mackenzie v. Gillanders*, 1 R. 1050. I am satisfied that it was decided on special grounds, viz. (1) because of the form of the will, and (2) because of the peculiarity of the power.

LORD TRAYNER.—I come to the same conclusion. I think this case cannot be distinguished in any material respect from the case of *Hyslop v. Maxwell*, the decision in which has never been overruled, but has, on the contrary, been referred to with approval in subsequent cases. I do not regard the decision in the case of *Mackenzie* as derogating from or competing with the authority of *Hyslop v. Maxwell*. *Mackenzie's* case was very special in its circumstances, and was decided in respect of specialties.

The LORD JUSTICE-CLERK was absent.

THE COURT answered the first question in the negative, and the second in the affirmative. No. 102.

RONALD & RITCHIE, S.S.C.—DRUMMOND & REID, S.S.C.—Agents.

Feb. 16, 1894.
Clark's Trustees
v. Clark's
Executors.

WILLIAM CUTHILL, Pursuer (Respondent).—*Chisholm*.

JOSEPH STRACHAN, Defender (Reclaiming).—*Salvesen—Graham Stewart*.

No. 103.

Feb. 16, 1894.
Cuthill v.
Strachan.

Payment—Appropriation of indefinite payments—Account-current—Bank—Cash-credit account.—In an account-current where there is no appropriation of payments to the discharge of any particular debts, the law makes an appropriation according to the order of the debit items in the account.

Strachan, one of the cautioners for a cash-credit account with a bank, was sequestrated, the balance against George Cuthill, the principal under the cash-credit account, being £599 at the date of the sequestration. The bank made no claim in the sequestration, and Cuthill continued to operate on the cash-credit account until he granted a trust-deed for creditors, when the bank closed the account, the balance due by Cuthill then being £615. William Cuthill, another cautioner, having paid this £615 to the bank, made a claim of relief against Strachan, who had carried through a composition settlement with his creditors. In defence it was pleaded that the balance due to the bank at the date of Strachan's sequestration had been extinguished by subsequent payments by George Cuthill into the bank. It appeared that sums exceeding the balance, as at Strachan's sequestration, had been subsequently paid into bank, but that the daily debit balance was never less than £550, and that the aggregate amount paid in was almost exactly equal to that withdrawn. } 559

Held (rev. judgment of Lord Stormonth-Darling) that the rule above given applied, and that Strachan's cautionary obligation had been extinguished.

IN March 1887 William Cuthill, spirit merchant, Hilltown, Dundee, Joseph Strachan, wholesale grocer, Tower Nook, Arbroath, and Jonathan Forbes, merchant, Shore Terrace, Dundee, became cautioners under a cash-credit bond to the British Linen Company Bank, for an account-current, at the Arbroath branch of the bank, to be kept in the name of George Cuthill junior, Keptie Street, Arbroath, for £600. 2D DIVISION.
Ld Stormonth-Darling.

On 4th September 1888 the estates of Joseph Strachan, one of the cautioners, were sequestrated. The sequestration was closed under a composition arrangement of 7s. 6d. in the pound, and Strachan was discharged on 2d November 1888. The bank did not lodge any claim in the sequestration, and took no payment under the composition arrangement. At the date of the sequestration, 4th September, the balance due to the bank on the cash-credit account was £599, 7s. 6d.

On 22d June 1891 George Cuthill, the principal debtor, granted a trust-deed for behoof of his creditors, and the cash-credit account with the bank was closed of the same date.

At the date of George Cuthill's trust-deed the balance due to the bank on the cash-credit account, with interest, was £615, 5s. 8d. On 21st October 1891 William Cuthill, as cautioner, being called on to do so by the bank, paid this £615, 5s. 8d. to the bank.

Forbes, the remaining cautioner, subsequently relieved William Cuthill of this payment to the extent of his liability for himself and Strachan. William Cuthill then brought an action against Strachan for payment of £37, 9s. 2d., being the amount of the composition of 7s. 6d. in the pound on one-half of Strachan's third of £599, 7s. 6d.

In defence, Strachan maintained, *inter alia*, that he was not liable to the pursuer, in respect that between the date of his sequestration and the closing of the cash-credit account sums were paid into the account by the

No. 103. principal debtor equal to the amount for which he, the defender, was liable at the date of the sequestration, assuming a claim to have been then made against him by the bank.
 Feb. 16, 1894.
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 Strachan.

From joint minutes lodged by the parties it appeared that the total sum paid into the cash-credit account from 4th September 1888, the date of the defender's sequestration, to 22d October 1891, the date of the closing of the account, was £6266, and that the total sum withdrawn during the same period was £6291, 17s. 11d. It further appeared that the actual debit balance on the account from day to day was never reduced below £550 or thereby.

On 24th November 1893 the Lord Ordinary (Stormonth-Darling) granted decree against the defender for £37, 9s. 2d., with interest from the date of citation.*

The defender reclaimed.¹

X LORD YOUNG.—The rule of law stated in the case of *Lang v. Brown*, December 2, 1859, 22 D. 113, is conclusive, and it is stated as a principle held by the Court to be well settled, that to an account-current the principle is applicable that where payments are made by a debtor and are not appropriated by the parties, the law appropriates them to the extinction of the items of debit in their order in the account. Applying that principle to the facts of the present case, I think that the various entries by the principal debtor after the sequestration of the defender settles the debt just as clearly as if the first payment had been an entry by the principal debtor of £600, which admittedly

* "OPINION.— . . . It only remains for me to notice the defender's argument founded on *Devayne's* case, 1 Merivale, 585, and the cases of *Houston v. Spiers*, 3 W. and S. 392, and *Royal Bank v. Christie*, 2 Rob. 118. The principle of *Devayne's* case is simply this, that in an account-current where no special appropriation has been made by the parties, the law appropriates payments to the various debts in their order, so that the first item on the credit side discharges the first item on the debit side, and so on. In *Houston's* case (which was one of suretyship), there was a change in the mode of dealing which was held to liberate the cautioners after a certain time. The balance against them at that time was afterwards entirely extinguished if the payments which they subsequently made were applied to the debit entries in their order, and it was held that they must be so applied. So in *Christie's* case (which was one of partnership dissolved by death), the balance against the deceased partner at the date of his death was afterwards entirely extinguished if the subsequent payments by the surviving partners were applied to the debit entries in their order. But what the defender wishes to do here is, not to set one entry against another in order of time, but to pick all the credit entries out of the account and by adding them up and disregarding the debit entries altogether, to shew that they exceeded the sum of £599, 7s. 6d. This seems to me quite inadmissible. The actual debit balance on the account from day to day was never reduced below £550 or thereby. Once there was an apparent reduction to £444 by a credit payment of £149, but there were drafts on the same day which restored the balance to £599. Substantially the state of the account remained unaffected from September 1888 to June 1891. It seems to me therefore that the principle of these cases would not apply, even if it could be said the defender had no control over the account after his sequestration. But I think he had, because . . . he could have called upon the bank to stop it if he had chosen. I shall therefore give decree . . . but with interest only from the date of citation."

¹ *Authorities in addition to those cited by the Lord Ordinary.*—*Lang v. Brown*, Dec. 2, 1859, 22 D. 113, 32 Scot. Jur. 64; *Scott's Trustees v. Alexander's Trustees*, Jan. 10, 1884, 11 R. 407.

would have extinguished the debit balance on the account. He had no doubt the intention of continuing to operate upon the account, and as circumstances arose he might thereafter continue to draw on his account, thereby making himself a debtor to the bank, or by paying in a larger sum make himself a creditor, but at the date of the sequestration the defender's cautionary obligation was extinguished for the future. What the condition of the cash-credit was when it came to an end does not signify.

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LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

DAVID MILNE, S.S.C.—T. F. WEIR & ROBERTSON, S.S.C.—Agents.

JOHN BEVERIDGE AND ANOTHER (Thomas Spinks's Executors), First Parties.—*C. J. Guthrie.*

No. 104.

THOMAS SIMPSON, Second Party.—*Macfarlane.*

Feb. 16, 1894.
Spinks's
Executors v.
Simpson.

MARGARET GALLOWAY SPINKS AND ANOTHER, Third Parties.—*C. J. Guthrie.*

Succession—Liferent or fee—Intestacy.—A testator by his settlement "willed and disposed of" his whole property in favour of his two surviving daughters *nominatim* "during their lifetime, share and share alike," and appointed two persons to be trustees "to see the provisions of this my will carried into effect." The settlement did not dispose of the fee of his estate *per expressum*.

The testator was survived by the two daughters named in the will, and by a grandchild, the daughter of a deceased daughter. His wife predeceased him.

In a competition between (1) the two surviving daughters, and (2) the grandchild, *held (dub. Lord Trayner)* that the settlement conferred a liferent only of one-half the estate on each of the surviving daughters, and that as each liferent terminated, the half of the fee liferented fell to be disposed of as intestate succession of the testator.

THOMAS SPINKS, watchmaker in Edinburgh, died on 24th March 1893, 2D DIVISION. leaving a settlement in the following terms:—"I, Thomas Spinks, . . . do hereby . . . will and dispose of all my money, goods, chattels, household property, furniture, merchandise, stock in trade, and all my earthly belongings, &c., in favour of my daughters, Margaret Galloway Spinks, and Alexandrina Ramsay Spinks, during their lifetime, share and share alike. I hereby appoint the following trustees to see the provisions of this my will carried into effect." Then followed the names of the trustees, who accepted office as executors and were confirmed.

Questions having arisen as to the construction and effect of the settlement, a special case was presented. Mr Spinks's executors were the first parties. He was predeceased by a daughter, Euphemia, Mrs Simpson, who left a pupil daughter, Mary Ramsay Simpson, represented by her father, Thomas Simpson, as second party. The third parties were the two daughters named in the settlement, who were unmarried and were in majority. Mr Spinks's wife predeceased him.

The case stated:—"At the date of his death the heritable property belonging to the testator consisted of a house worth about £400, burdened with a bond for £150. The net amount of his estate, heritable and moveable, is estimated at about £530. The deceased's daughters were not taught any means of earning their livelihood, and have no means of

No. 104. support other than what they may obtain from their father's estate. They are, however, carrying on their father's business, with the aid of a practical manager; and one of them attended the shop during her father's last illness, and will continue to do so." It was further stated that the settlement was framed by one of the executors without legal assistance, and with a view to carry out instructions verbally given by the testator to him.

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Simpson.

The second party maintained (1) that the right of the third parties under the settlement was one of *liferent* only; and (2) that on the death of either of them, the share *liferented* by her would either pass to the testator's grandchild, Mary Ramsay Simpson, or fall into intestacy.

The third parties maintained that, on a sound construction of the said settlement, the testator had bequeathed the capital of his whole estate equally in fee to his surviving daughters, and that they were entitled to immediate payment and conveyance thereof from the first parties. In the event of its being held that the third parties were not so entitled, and that their right was limited to a *liferent*, they maintained that the survivor of them would be entitled to *liferent* the whole of the deceased's estate. In the event of it being held that the fee of the deceased's estate was not disposed of by his settlement, the third parties maintained that they were entitled to two-thirds thereof.

The following were the questions of law:—“(1) Whether the third parties are entitled to immediate payment and conveyance of the deceased's whole estate, share and share alike, in fee; or whether the right of the third parties in the said estate is limited to a *liferent*? (2) Whether, in the event of it being held that the right of the third parties in the said estate is limited to a *liferent*, the survivor of these parties, on the death of one of them, is entitled to *liferent* the whole estate? or, (3) Whether, in the event foresaid, on the death of each of the third parties, the share *liferented* by her will pass to the testator's grandchild, the said Mary Ramsay Simpson? or, (4) Does the fee of the estate, on the death of either or both *liferent*rices, fall into intestacy; and in that event are the third parties entitled to two-thirds thereof?”¹

LORD YOUNG.—The testator by his settlement wills and disposes of his money, household property, and all his earthly belongings, “in favour of my daughters,” naming them “during their lifetime, share and share alike,” and then he appoints certain persons as trustees. Now, I think it is impossible to disregard these words “during their lifetime” as a limitation on the gift, and to read the clause as if it was an absolute gift to his daughters. In my opinion the will gives a *liferent* only to the daughters in the estate, which, during their lifetime, is protected by the appointment of trustees and that there is intestacy as regards the fee. Of course he might have disposed of the fee. Had the will gone on, “I give all my property to A, B, and C, after my daughters' death,” that would have been disposing of the fee, but there being no such clause he dies intestate as regards the fee, and the law of the matter is not doubtful.

The testator had three daughters, one of whom predeceased him but left a child. They are his heirs, and must take the fee of his estate. Upon the decease of the two surviving daughters, the one-third share of the fee falling to each will go as she may choose to direct if she should leave a will disposing of it, if

¹ *Authorities cited.*—Sanderson's Executors v. Kerr, Dec. 21, 1860, 23 D. 227; Clouston's Trustees v. Bulloch, July 5, 1889, 16 R. 937; Jamieson v. Leslie's Trustees, June 19, 1889, 16 R. 807; Mackinnon's Trustee v. Official Receiver in Bankruptcy in England, July 19, 1889, 19 R. 1051.

not it will be disposed of as intestate succession of her. With respect to the other third, upon the termination of the life interests that will go to the grand-child. Each sister takes the life interest of one-half of the estate, and upon the death of one of them the half liberated will be disposed of as fee, the surviving sister continuing to enjoy the life interest of the remaining half, which on her death will in turn be disposed of as fee.

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Feb. 16, 1894.
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LORD RUTHERFURD CLARK.—I concur.

LORD TRAYNER.—I concur in the result. I confess I have had more difficulty in the matter than your Lordships, the leaning of my mind rather being to hold that the two surviving daughters took a right of fee, but I do not dissent.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced this interlocutor:—"Answer the first alternative in the first question in the negative, and the second alternative of said question in the affirmative: Answer the second question in the negative, and the fourth question in the affirmative: Find it unnecessary to answer the third question: Find and declare accordingly, and decern."

W. MARSHALL HENDERSON, L.A.—TAIT & CRICHTON, W.S.—Agents.

THE LORD ADVOCATE, Pursuer (Respondent).—*C. J. Guthrie—C. N. Johnston.*

No. 105.

WILLIAM A. HOME DRUMMOND MORAY, Defender (Reclaimer).—*Murray—D. Dundas.*

Feb. 16, 1894.
Lord Advocate v. Moray.

Superior and Vassal—Composition—Relief—Implied entry—Entail—Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94), sec. 4.—An institute under a deed of entail obtained an implied entry with the superior by the Conveyancing Act, 1874, and not being an heir *alioqui successurus* became liable in composition. The superior discharged his claim on payment of relief-duty. On the next heir of entail—who was not heir of line—obtaining an implied entry the superior claimed composition.

Held that the vassal being the heir of investiture was only liable in relief-duty.

Opinion (per Lord Kinnear) that an implied entry must be subject to all the conditions and reservations by which the superior would have been entitled to qualify an express entry by progress.

WILLIAM MORAY STIRLING, of Abercairney, was proprietor of certain lands, held of the Crown, under a deed of tailzie dated 1769. He was duly entered with the superior. In 1849 he disentailed the lands and executed a new entail whereby he disposed them to himself, whom failing to his sister Mrs Home Drummond, whom failing to her second son Charles Home Drummond and the heirs of his body, and failing them to a certain series of heirs, but under the condition that "in case any of the heirs of entail succeeding under the deed should succeed to the estate of Blair Drummond, and should at the time of his death leave (in addition to an eldest son or descendant of an eldest son) a second or other younger son or descendant of such, then the lands should, upon the death of such heir, descend to his or her second or younger sons successively in their order, and the heirs whatsoever of their bodies respectively."

William Moray Stirling was infeft on this disposition. He died in 1850, and in 1851 his sister, Mrs Home Drummond, was served heir of entail and provision to him, and was infeft, but did not enter with the Crown.

1st Division.
Ld. Wellwood.

No. 105. By disposition dated 30th October 1851 Mrs Home Drummond disposed the lands to her second son, Charles Home Drummond (afterwards Charles Stirling Home Drummond Moray), under reservation of her liferent.

Feb. 16, 1894.
Lord Advocate v. Moray.

On her death it appeared that her service was defective, and Charles S. H. Drummond Moray, to whom the succession opened, passing over the title he had acquired from his mother made up his title by serving himself heir of tailie and provision in special to the entailer. An extract of the decree of service, dated 30th July, was recorded in the General Register of Sasines on 15th August 1868, and by the passing of the Conveyancing Act, 1874, he became entered with the Crown.

No casualty was at that time paid to the Crown in respect of his implied entry. In 1876 George, the elder brother of Charles S. H. Drummond Moray, died. Several years thereafter the Crown accepted relief-duties from Charles on the footing that he was heir *alioqui successurus* (under the previous entail), which he was not in 1874 at the date of his implied entry. The receipts granted by the Crown contained no reservation of any sort.

Charles S. H. Drummond Moray died in 1891, and was succeeded in the lands by his second son, William Augustus Home Drummond Moray, in virtue of the destination contained in the disposition and deed of entail of 1849. He was duly infeft, conform to a recorded extract decree of special and general service. The heir-at-law of Charles S. H. Drummond Moray was his eldest son Henry.

In May 1893 the Lord Advocate, as representing the Commissioners of Woods, Forests, and Land Revenue, raised an action against William A. H. Drummond Moray for declarator, that in consequence of the death of Charles S. H. Drummond Moray, who was the vassal last vest and seised in the lands, "a casualty of composition on the untaxed entry of a singular successor" had become due, and for payment.

The record set out the facts above narrated.

The pursuer pleaded;—(1) The defender having taken infeftment as a singular successor in the said lands, is liable in respect of his implied entry in payment to the Crown as superior of the same of a casualty of composition.

The defender pleaded;—(3) The defender being heir of tailzie and provision under the investiture created by the said deed of entail of 1849, and that investiture having been enfranchised by the Crown, as stated in the defences, is only liable in relief-duty.

On 8th November 1893 the Lord Ordinary (Wellwood) found that the defender was liable in payment of composition.*

* "OPINION.—This case raises the question whether an implied entry under the Conveyancing Act of 1874, followed by acceptance without reservation by the superior of relief-duty from the heir of entail in possession under a new entail, has the effect of enfranchising the investiture created by the deed of entail, so as to preclude the superior from thereafter demanding composition, when the succession opens to one who is not *alioqui successurus*.

"I am of opinion that the Crown is entitled to a casualty of composition. Under the law as it stood prior to the passing of the Act of 1874, if a vassal, purchaser, or assignee applied for a charter of confirmation, and tendered a year's rent, the superior was bound to grant, without reservation or qualification, a charter in favour of whatever persons the vassal, purchaser, or assignee might please to name, and to embody in the charter, if required, the fetters of a strict entail; with the result that the whole persons named in the charter, in whatever degree of relationship they stood to the vassal, purchaser, or assignee, or to each other, were entitled, as heirs of the investiture, to obtain an entry on pay-

The defender reclaimed, and argued ;—The defender was heir of investiture, and was liable therefore in relief-duty only. Under the law

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ment of the casualty of relief. By granting such a charter the superior was held to have enfranchised the investiture.

“Again, the superior was bound, when applied to for a charter of confirmation of a deed of entail which changed the destination in the former investiture to grant such a charter on payment of relief-duty only, if the person first called was also the heir of the former investiture ; but he was entitled to insert in the charter a reservation of his right to claim composition when the succession should open to one who was not heir *alioqui successurus*.

“Such being the old law, the Conveyancing Act of 1874, which abolishes charters and writs by progress, provides (section 4, subsection 2),—‘Every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior, whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice.’ If the statute had stopped there the superior’s rights would have been seriously affected in various ways. For instance, formerly, if the superior granted a charter of confirmation he was held to have discharged all claims for past due feu-duties and casualties, and therefore it became necessary to provide, as is done by section 4, subsections 3 and 4, that the superior’s rights in that respect should not be affected by the implied entry.

“Again, when a superior was applied to to grant a charter by progress he was entitled, unless barred by prescription, to recur to the original charter as shewing the measure and extent of the feu-right. He was also entitled to refuse, without a consideration, to enlarge the vassal’s rights by granting an assignable charter, or without payment of composition or reservation, to insert a tailzied destination different from that in the prior investiture.

“But if the vassal’s implied entry were to be held to be equivalent without qualification to a writ of confirmation granted by the superior, the superior might be held to have lost his right to object to the terms of the disposition which was impliedly confirmed. Therefore by section 4, subsection 2, it is provided,—‘But such an implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu-right of the lands, or in the last charter or other writ by which the vassal was entered therein.’

“It seems to me then that after the passing of the Act of 1874 the superior’s rights stood thus : Charters by progress being no longer necessary or competent, and the vassal being entered as if he had obtained a writ of confirmation, the superior could no longer protect himself by inserting a reservation in the charter, or refusing to grant a charter until he was paid composition. But his right to demand a casualty on each implied entry remains intact. If the heir thus entered was heir *alioqui successurus* the superior was entitled to demand and receive relief-duty only. That is what the Crown did in this case when they settled with Charles Drummond Moray. My own view is (but this does not affect the present question) that the Crown might have demanded a year’s rent from him, because at the date of his implied entry, the passing of the Act of 1874, he was not heir *alioqui successurus*, his elder brother being still alive. If the Crown had then received a composition the new investiture would undoubtedly have been enfranchised. But relief-duty only was paid, and the only ground upon which the defender maintains that composition is not now exigible in respect of his entry is that because the Crown, in the receipt granted to Charles Drummond Moray, did not insert a reservation to claim composition, it must be held to have enfranchised the destination just as if a charter of confirmation had been granted without reservation or qualification.

“I cannot adopt this view. I do not think that any such reservation was

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prior to 1874 a vassal was entitled to tender a charter to the superior containing a destination to any series of heirs he chose, and the superior was bound on receiving payment of composition to grant it. If the superior inserted a clause reserving right to demand a composition from each succeeding heir in the series who was not heir of line, such a reservation effected nothing.¹ An apparent exception to this rule was that if the institute under a new entail was also heir under the old investiture, he was entitled to enter for relief, in which event the superior might reserve his claim for composition from the first heir in the new destination who was not also heir under the old investiture.² But that was the only case in which such a reservation was competent. It was not essential, as the Lord Ordinary had held, to the enfranchisement of an investiture that a composition should *de facto* have been paid by someone, and if a superior once granted a charter, it might be for no consideration, he could not, nor could his representatives, refuse a charter by progress on payment of relief merely because no composition had in fact ever been paid.³ The *dicta* of Lord Deas, on which the pursuer founded, in *Swinton's* case⁴ had been disapproved.⁵ The right of a vassal to be entered for relief depended therefore on his being an heir under the existing investiture, provided that he did not fall under the exception above noted. The Act of 1874 made no special exception of what was to happen to casualties because of the implied entry. It was necessary to look to its general provisions for the effect of recording a disposition. It was impossible to maintain that the rights of superior and vassal were absolutely unaffected by these. The superior might be benefited⁶ or the vassal.⁷ Now, whether the superior was prejudiced or not, the effect of the Act was in all cases to enter the vassal infest to the same effect as if the superior had granted a writ of confirmation, *i.e.*, a writ in unqualified terms. In the present circumstances the result of that was that, by the statutory entry of Mr Charles Drummond Moray in 1874, the investiture created by the deed of 1849 was confirmed,⁸ and Mr Moray was entered as a singular successor in fact as well as form, the older investiture being sopited. The Crown might have demanded a composition from Mr Charles Drummond Moray, but its failure to do so could not affect the

required. The receipt was not in the circumstances a proper document in which to insert it. There was no transaction between superior and vassal, and no question except as to the amount of the casualty then due was raised. The most plausible view of the defender's case is that if the Crown had exacted composition from Charles Drummond Moray the defender would only have been liable in relief-duty. But this is not a fair way of putting the case. The Crown accepted what both parties then believed to be the appropriate casualty in any case; and the broad facts remain that the Crown has not received composition from any heir of tailzie, and it has never expressly discharged its right to claim composition. I therefore think that the Crown is not precluded from now demanding composition."

¹ Lockhart v. Denham, 1760, M. 15,047; Stirling v. Ewart, Feb. 14, 1842, 4 D. 684, 14 Scot. Jur. 490, aff. 3 Bell's Ap. 128, 2 Ross' L. C. 340.

² Mackenzie v. Mackenzie, 1777, M. 15,053; Marquis of Hastings, &c. v. Oswald, May 27, 1859, 21 D. 871, 31 Scot. Jur. 482.

³ Duke of Hamilton v. Baillie, Nov. 22, 1827, 6 S. 94.

⁴ Advocate-General v. Swinton, Nov. 14, 1854, 17 D. 21.

⁵ Johnstone v. Duke of Buccleuch, July 25, 1892, 19 R. (H. L.) 39, Lord Watson, p. 42.

⁶ Rankin's Trustees v. Lamont, Feb. 27, 1880, 7 R. (H. L.) 10, Lord Chancellor Cairns, pp. 11, 12.

⁷ Lord Advocate v. Moray, June 17, 1890, 17 R. 945.

⁸ Stuart v. Hamilton, July 18, 1889, 16 R. 1030.

defender. Further, assuming that the Crown might, as a condition of his being entered for relief, have reserved a right to claim composition from the next heir, it had not done so. The receipts would have been the natural place to find such a reservation, and they contained none. In the absence of an express reservation, there was no presumption in law that the Crown must have intended a reservation, for it was admittedly not the invariable practice of the Crown to enforce its extreme rights in entering vassals, and it was to be noted that the only payment which it had demanded here had been made. But no such reservation would have been effectual in any view, for the Crown did not and could not enter Mr Charles Drummond Moray in 1874 as the heir of the old investiture (in which case alone a reservation to claim composition would have been competent), for *de facto* he was not such heir until the death of his elder brother two years later. The writ of confirmation granted by the Crown on the assumption of the Act must therefore have been in absolute and unqualified terms.

Argued for the pursuer;—While there was no presumption that the statute had left the rights of superior and vassal in regard to casualties exactly as they were before, the Court would be slow to accept a construction of the statute leading to results which were anomalous and contrary to principle. Under the former law, when a vassal applied for a charter to give effect to an altered destination, and thus to enlarge the original grant, the superior had it in his power to insert clauses in the charter reserving and protecting his rights. The result of the implied entry introduced in 1874 would have been to deprive the superior entirely of his rights in this respect had there been no saving clause, and subsection 2 of section 4 was introduced for the purpose of protecting the superior's rights.* The statutory "writ of confirmation" was not intended to and did not enlarge the rights of the vassal, and if Charles Drummond Moray had applied for a charter, the Crown would have protected itself by inserting all clauses necessary for that purpose. The words "existing law and practice" could only refer to such a charter as the superior could be compelled to grant. If that were so, the question was whether the Crown had lost its right by what took place in 1874 and subsequently, to claim composition from a succeeding heir under the investiture of 1849, and that depended upon whether the Crown then consented to admit succeeding heirs under that investiture upon payment of relief-duty only. The Crown had never given any such consent, for it was clear that the Crown officials had dealt with Charles Drummond Moray under a mistaken view of the rights and obligations of a superior—a mistaken view which was generally entertained by the profession prior to the decision in *Stuart v. Hamilton*,¹ and accordingly it had treated Mr Moray as heir *alioqui successurus*, the character in which he had been put forward. Nor could it be said that the Crown had lost its right because the receipts contained no reservation. The receipts were documents entirely personal to the individual to whom they were given, and they could never be allowed to contradict or contest the terms of the title.

* The Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94), sec. 4 (2),—"Every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands, shall be deemed and held to be as at the date of the registration of such infeftment . . . duly entered with the nearest superior . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice, . . . but such implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter. . . ."

¹ *Stuart v. Hamilton*, July 18, 1889, 16 R. 1030.

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No. 105. Lastly, the claim of the Crown was not excluded by the fact that a composition might have been claimed from the defender's predecessor, for payment of a composition was essential to the enfranchisement of a charter. A charter accompanied by such payment, but nothing less, enfranchised an investiture, and indeed the enfranchisement was the result not of the charter but of the payment of composition.¹ The defender was therefore liable for a casualty of composition, none having been paid in respect of the investiture contained in the tailzie of 1849.

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At advising,—

LORD KINNEAR.—It is admitted that the defender is liable in payment of a casualty in respect of his implied entry with the Crown in the lands libelled. The question is, whether he is liable in composition as a singular successor, or in relief-duty as the heir of the investiture.

The last vassal entered with the Crown under the former investiture was William Moray Stirling of Abercairney, who executed the deed of entail under which the defender now holds, on the 27th October 1849. By this deed he disposed the lands to himself, and the heirs of his body, whom failing, to his sister Mrs Home Drummond, whom failing, to Charles Home Drummond, her second son, and the heirs of his body, and failing them, to a certain series of heirs, but under a condition which is not very correctly described as a clause of devolution, that in case any heir succeeding under the deed of entail should also succeed to the estate of Blair Drummond, and should at his death leave, in addition to an older son, a second or younger son, the estate of Abercairney should, upon the death of such heir, descend to his second or younger sons successively in their order, and the heirs of their bodies. In the event so provided for, therefore, the estate is not to be taken by the heir of line, but by a younger brother of the heir of line, or by a descendant of such younger brother.

On the death of the entailer, Mrs Home Drummond was served heir of tailzie and provision to him, and was infeft, but did not enter with the Crown. In 1851 she disposed the lands to her son Charles Home Drummond, afterwards Drummond Moray, reserving her liferent. On her death it appeared that her service was technically defective, and Charles Home Drummond, to whom the succession opened, passing over his mother's service and the title he had acquired from her, made up his title by serving himself heir of tailzie and provision in special to the entailer, William Moray Stirling. An extract of the decree was recorded in the Register of Sasines; and on the passing of the Conveyancing Act, 1874, he was entered with the Crown by the operation of the statute.

No casualty was paid in respect of this entry until 1876. But by that time Mr Drummond Moray, in consequence of the death of his elder brother, had come to be in the position of heir-at-law of William Moray Stirling, the last entered vassal, and it appeared that the Crown discharged the claim for casualty on payment of relief-duty, on the assumption that he was heir *alioqui successor* instead of exacting the composition, for which he was undoubtedly liable as a singular successor.

Mr Drummond Moray died in 1891, and his second son, the defender, suc-

¹ Advocate-General v. Swinton, Nov. 14, 1854, 17 D. 21; Marquis of Hastings v. Oswald, May 27, 1859, 21 D. 871, 31 Scot. Jur. 482; Lockhart v. Denham and Stirling v. Ewart, *supra*, p. 556, note 1; Duke of Hamilton v. Baillie, Nov. 22, 1827, 6 S. 94.

ceeded to him, not by virtue of a devolution, but as his immediate heir of taillie and provision in terms of the destination. The defender is infeft conform to a decree of special and general service duly recorded, and a casualty has thus become payable. No. 105.
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The only ground set forth upon record for claiming a year's rent as composition is that the heir-at-law of the last vassal is not the defender but his elder brother, and the defender is therefore infeft and entered as a singular successor. This is certainly untenable. There can be no question that the defender is the heir of the existing investiture, and he is entered accordingly as heir of taillie and provision, and in no other character. The implied entry which is created by the Statute of 1874 has the same effect "as if the superior had granted a writ of confirmation according to the law and practice" existing at the passing of the Act. Now, there can be no question as to the terms or effect of the charter which Charles Drummond Moray would have been entitled to demand under the former law, provided always that he satisfied the superior's claim for a casualty on entry. He could have obtained a charter confirming his infeftment and all the writs upon which it proceeded, and the effect of such a charter or writ of confirmation would have been to enable all the heirs of entail succeeding to him to enter with the superior in their turn for payment of relief-duty. It was settled law before the passing of the Act that the disponee of an entered vassal might require the superior to grant a charter to himself and any series of heirs he chose to name, or that might be named for him by the granter of the disposition in his favour, and that when by such a charter a certain line of descent had been once admitted into the investiture of the vassal, the persons so favoured must be accepted by the superior as heirs in their order, irrespective of their relation by blood to the immediate grantee or to one another. This is settled by a series of decisions of which *Stirling v. Ewart* may be taken as the final and conclusive authority, and it cannot now be called in question. It is of no consequence, therefore, that the defender, being a younger son, is not the heir-at-law of the last vassal. By the implication of the statute, which is equivalent in law to the superior's own act, he is the heir of the investiture.

But the Crown's demand was supported in argument, and has been sustained by the judgment of the Lord Ordinary, upon an entirely different ground from that which is pleaded on record. It is said that the right of heirs who are not heirs-at-law to enter for relief-duty arises only when the charter admitting them into the investiture has been granted without qualification or reservation and for payment of composition; that if Charles Drummond Moray had been entered by charter or writ of confirmation on payment of relief-duty, the right to exact composition from the first substitute under the new investiture who should not be also the heir of the investiture which it superseded, would have been expressly reserved in such writ or charter; and that the implied entry under the statute cannot confer upon heirs of the new investiture any other or higher right than the superior could have been required to grant under the former law. The Lord Ordinary says that the only answer to this argument, and "the only ground on which the defender maintains that composition is not now exigible in respect of his entry, is that because the Crown, in the receipt granted to Charles Drummond Moray did not insert a reservation to claim composition, it must be held to have enfranchised the destination just as if a charter of confirmation had been granted without reservation or qualification." I agree with the Lord Ordinary that, if the argument is otherwise well founded, this is

No. 105. not a good answer. I do not think the question depends upon the terms of the receipt, but upon the legal operation of the statutory entry. The Act alters the method by which entry is obtained. It is no longer to be effected either by a separate charter granted by the superior, or by the superior's writ engrossed upon the conveyance, but by the recording of the conveyance in the Register of Sasines. But the substantial rights of the superior and vassal are left precisely as they stood before the statute. And, therefore, if it be clear that by the law and practice then existing a disponent could not have insisted upon an absolute and unqualified confirmation, the implied entry must, in my opinion, be subject to all the conditions and reservations by which the superior would have been entitled to qualify an express entry by progress.

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The question, therefore, is whether we are to assume that if the Act of 1874 had not passed, and Charles Drummond Moray had completed his title by entry with the Crown under the old law, the crown charter or writ of confirmation must have been so qualified as to render the defender liable, on his entry, for payment of composition as a singular successor.

Now, it is certain, in the first place, that he was entitled to demand a charter in favour of himself and the heirs of entail under which all the heirs-substitute, however remote from the legal order of succession, would be entitled to enter as heirs of provision for payment of relief-duty; secondly, that the composition or price which the Crown would have been entitled to demand for a charter in these terms was exactly the same as that exigible for a charter to the vassal and his heirs-at-law; and thirdly, that if such a charter had been granted for payment of such composition as the Crown was entitled to exact, no reservation of a right to demand composition from heirs of entail who should not be heirs of line would have been of any avail to the Crown.

But it has been decided in the cases of *Mackenzie v. Mackenzie* and the *Marquis of Hastings v. Oswald*, first, that if the institute under a deed of entail is also the heir of the existing investiture he is entitled to the benefit of his character of heir and to enter for relief, notwithstanding that in order to avoid a forfeiture he has been compelled to make up his title under the entail, which necessarily means that he has entered in form as a disponent or singular successor; and secondly, that the superior who had been compelled to enter the institute for relief-duty might effectually reserve his claim for composition on the entry of the first substitute under the new investiture who should not be the then existing heir of the former investiture. The second proposition was held to be a corollary of the first; because, as Lord Wood explains in the *Marquis of Hastings v. Oswald*, it is "a necessary adjunct" of the doctrine that the heir of a prior investiture is entitled to enter under a new tailzied investiture for payment of relief-duty only. The doctrine thus established is anomalous. But there can be no question that in this Court, at least, it must be treated as settled law. It is therefore maintained on the authority of these decisions that the Crown admitting Charles Drummond Moray for payment of relief-duty would have been entitled to reserve a claim for composition on the entry of a substitute who should not be his heir of line. But the doctrine is inapplicable to this case, because Charles Drummond Moray was not the heir *alioqui successurus* when he entered with the Crown. He was disponent of the last vassal under a deed which displaced the heir of the investiture; and he could not have entered in any other character than that of disponent. It makes no difference that at the time when the casualty was paid he had come into the position of heir-at-law to his uncle,

because the character of the entry implied by the statute must be determined with reference to the date of the registration of his infeftment. He is to be deemed to have been entered as at that date to the same effect as if a writ of confirmation had been granted. But if the extent of his liability were to be determined as at the date of payment of the casualty it would still have been the liability of a singular successor; because the right of the heir *aliouqui successurus* to enter as disponee for payment of relief-duty is available only when the old investiture remains open, so that he might, if he had thought fit, have made up a title by service, and the old investiture had been entirely sopited by the operation of the statute on Mr Drummond Moray's infeftment as disponee. This was decided in *Stuart v. Hamilton*. Charles Drummond Moray, therefore, had no right to demand a charter from the Crown except on payment of a year's rent as composition.

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The question then is whether we are to assume that if it had been necessary or possible to grant a charter by progress in 1876, such a charter would have contained a reservation that the Crown should be entitled to claim composition on the entry of a singular successor. I think this cannot be assumed, for two reasons,—In the first place, the statute leaves no room for speculative reasoning as to the terms of the charter. The vassal who is duly infeft is to be deemed to be duly entered to the same effect as if the superior had granted a writ of confirmation according to the existing law and practice; and that must mean such a writ as would have been granted in ordinary course, in such terms as were usual and necessary for completing the vassal's title in the character in which he was infeft. Now Charles Drummond Moray, who was not the heir of the former investiture, was entered as disponee under a conveyance by the former vassal, with a tailzied destination; and in ordinary course the superior's confirmation must have imported an absolute and unqualified investiture of the disponee and the whole series of heirs in the specified line of descent. There is nothing to suggest that it would have contained any exceptional condition or reservation, except the fact that the payment exacted for entry was less than the sum which the superior was entitled to demand. But that might be accounted for in various ways. He knew that the extreme rights of the Crown were not always enforced on the completion of crown titles; and a vassal might be admitted for relief who was liable for composition, either because the Crown chose to waive its right, or because the crown officers were mistaken as to the extent of their claim. There would be no reservation in either case. It is admitted that the casualty which the Crown chose to demand was duly paid, and it is to be held, under the statute, that a charter was granted in return for the payment. The rights of heirs cannot, in my opinion, be determined by speculation as to clauses which might, or might not, have been inserted in such charter, but by the terms which the charter must have contained if it were granted in ordinary course to a singular successor on satisfaction of the superior's claim.

But, in the second place, I think that the reservation, if it had been inserted, would have been ineffectual. A reservation has no effect in law, except in so far as it saves an existing right, and the defender's case is not rested, as the Lord Ordinary had supposed, upon the superior's omission to reserve a legal claim, but on the stronger ground that he had no claim to reserve. I think this follows from the judgment of the House of Lords in *Stirling v. Ewart*. Composition is not a casualty payable out of the land from time to time. It is the

No. 105. price of the charter. The superior's right to demand a year's rent as the price rests upon the Acts of 1469 and 1669, and upon the Act of George II. But these statutes give the right upon the entry of an adjudger or a disponee, and upon no other occasion. They give no right "upon the succession of anyone claiming under such entry." These propositions being established, the right of an heir of entail to enter for relief-duty depended on the Act of 1685. It was maintained for the superior that an entail which departs from the legal line of succession is, in substance, an alienation to strangers by anticipation, and each substitution which departs from the line of the vassal last entered is a repetition of the alienation, so that every substitute who is not an heir of line as well as an heir of provision under the deed of entail is, in truth, a disponee or singular successor, and bound to pay a composition accordingly. The answer to which the judgment of the House of Lords, affirming the decision of this Court, gave effect is thus expressed in the opinion of Lord Cottenham. The Statute of 1685, "in giving power to make tailzies, gave a right against the lord to give effect to that right; and as the claim in question did not exist before that time, and was not within the reservation" to the superior of casualties of superiority, "and certainly was not given by that Act, there cannot be any legal foundation for it." I think it follows that if composition were exigible by law, as the price of a charter confirming a deed of entail, the claim must have been enforced on the entry of the institute, or not at all. For the superior had no claim except against a disponee, and no remedy, except by withholding a charter. He might enter the institute as disponee, if he pleased, for a lesser price than the law entitled him to exact. But he could not, by entering the institute for relief-duty, when he was entitled to composition, acquire a right which the law did not give him, and which the institute could not give him by contract, to demand composition from the future heirs of entail. For the Act of 1685 had a double effect. It deprived the superior of his right of refusing to give effect to an entail, notwithstanding that it might operate as an alienation, and it brought in a series of heirs who do not represent the institute, and are not bound by his personal contracts. When the charter has once been granted, therefore, in such terms as the superior has thought fit to exact, within his legal right, the right is determined. He cannot control the series of heirs in whose favour the charter will operate, and he has no right by law, and can acquire none by contract, to treat them as singular successors, for whatever reason he may have chosen to treat the institute as an heir.

I am therefore of opinion that Charles Drummond Moray must be held to have been entered to the same effect as if a writ of confirmation had been granted in absolute and unqualified terms. The payment to which the superior was entitled, in respect of his entry, has been satisfied and discharged, and the defender has no concern with the terms on which the discharge was granted. The claim against him is for his own entry, and as he is entered in the character of an heir of provision, the claim is for relief-duty and not for composition.

LORD ADAM and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and found that, in respect of the implied entry with the Crown in the lands held of the Crown, the defender was liable in relief-duty.

DONALD BEITH, W.S.—DUNDAS & WILSON, C.S.—Agents.

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JAMES WILLIAM TURNER, Pursuer (Reclaimer).—*Johnston—Guy.*
 MRS AGNES ELLENOR CONNELL OR GAW, Defender (Respondent).—
W. Campbell—Salvesen.

Feb. 20, 1894.
 Turner v. Gaw.

Succession—Vesting—Conditional institution—Destination over—Heritage—Substitution.—By general disposition and settlement A disposed a share of her heritable and moveable estate to B in liferent allanarly, and to the heirs of B's body in fee, whom failing, to C, and the heirs of his body in fee.

C survived the testator, and was survived by B, the liferentrix, who died unmarried. C left an heir of his body who survived the liferentrix. *Held* that no fee had vested in C, as the heir of his body was a conditional institute.

Observations on the doctrine of vesting subject to defeasance.

MRS JANET ALLISON OR MILLER was at the date of her death infert in certain heritable estate in Dunoon, Argyllshire. By a general disposition and settlement, dated 27th November 1865, she assigned and disposed to "my daughter, Janet Miller, in liferent, for her liferent use allanarly, and to the heirs of her body in fee, whom failing, to my sons, Matthew Miller, John Miller, Alexander Miller, and my daughter Margaret Miller or M'Dougald, equally between them, and share and share alike, and the respective heirs of their bodies in fee," her whole estates, heritable and moveable.

1ST DIVISION.
 Lord Low.

Janet Miller enjoyed the liferent provided to her by the settlement, and died in 1890 without issue.

Matthew Miller, John Miller, and Alexander Miller predeceased their sister Janet, each leaving issue.

Prior to his death in 1883 Matthew made up a title to the one-fourth part *pro indiviso* of the estate in which his mother, the testator, had been infert, and disposed of it to James William Turner, solicitor, Greenock.

After the death of the liferentrix, her sister Margaret and the eldest son of each of her three brothers made up a title each to one-fourth *pro indiviso* share of the heritable estate, and disposed the whole to Mrs Gaw in March 1891.

On 7th December 1892 Mr Turner brought an action against Mrs Gaw for declarator that he was proprietor of one-fourth *pro indiviso* share of the heritable estate as in right of Matthew Miller, and for reduction of the disposition in favour of the defender so far as it conveyed to her more than three-fourths of the subjects.

The pursuer pleaded;—(1) The pursuer's author (the said Matthew Miller) having a right to make up a title to one-fourth share of said piece of ground, and having done so, and thereafter conveyed said one-fourth share to the pursuer, the pursuer is entitled to decree of declarator as craved.

The defender pleaded;—(1) The pursuer's averments are irrelevant. (2) The pursuer not having a valid title to any portion of the subjects libelled, the defender is entitled to be assolizied.

On 2d June 1893 the Lord Ordinary (Low) assolizied the defender.*

* "OPINION.—(After narrating facts)—The question is, whether any right in the fee of the subjects vested prior to Janet Miller's death? The pursuer contends that the fee vested in the sons and daughters called *nominatim*, subject to divestiture in the event (which did not happen) of Janet Miller leaving heirs of her body. The defenders, on the other hand, maintain that no right vested in anyone until it was ascertained by the death of Janet Miller without issue that she had no heirs of her body.

"If the destination had been to Janet Miller in liferent, and her 'issue' or 'children' in fee, that would have been a disposition of the fee capable of taking effect at the death of the testator. If Janet Miller had children in existence at the testator's death the fee would, in the case supposed, have vested

No. 106. The pursuer reclaimed, and argued ;—On the death of the testator one-fourth of the estate vested in Matthew Miller, subject to defeasance in the event of Janet Miller leaving children.¹ That event had not occurred, and the pursuer having received a valid title to the subjects from Matthew was entitled to decree. It might have been different if there had been a trust. Here was no trust, and if the contention of the defender was sound the fee must have been *in pendente*. But that view had been rejected in the case of *M'Lay v. Borland*,² which was not distinguishable from the present case. The distinction drawn by the Lord Ordinary between a destination to "children" and to "the heirs of the body" was not sound.

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Argued for the defender ;—The doctrine of vesting subject to defeasance had no application to the case of a direct conveyance of heritage. It had only been applied in cases of mixed succession settled in trust. Otherwise, if it were applicable to heritage then the substitute might (as being in right of the fee though subject to divestiture) make up a title to and then sell the subjects, and so jeopardise the right of the original institutes, the first objects of the testator's benevolence, for the feudal title being complete in the person of the purchaser there would only remain at most a personal obligation to divest. No difficulty arose from

in them. If Janet Miller had no children at the time of the testator's death, then I think that the result of the more recent authorities is that the persons called *nominatim* would have taken a vested interest in the fee, subject to defeasance or divestiture in the event of Janet Miller having children. The reason why the *nominatim* legatees would have taken such vested interest appears to me to be that the form of the bequest is a conveyance of the fee as at the death of the testator. If there were children of Janet Miller in existence at that date, it cannot be doubtful that the fee would vest in them, because there would in the case which I am supposing be a direct conveyance to them which would immediately take effect. If there were not children of Janet Miller in existence at that date, I think that the principle upon which it would be held that there was contingent vesting in the conditional institutes named is that the intention of the testator was, that failing children of Janet Miller, the conditional institutes should take precisely what her children would have taken, that is, a fee of the estate from the testator's death.

"In the present case, however, even if Janet Miller had had children in existence at the testator's death nothing in my opinion would have vested in them, because the bequest is not to her children but to the 'heirs of her body,' a class which could not be ascertained until her death. The disposition therefore to the 'heirs of the body of Janet Miller' was not intended to take effect, and could not possibly take effect, until her death. But if the disposition to the institutes could only take effect at Janet Miller's death, I do not think that it could be held to take effect at an earlier date as regards the conditional institutes.

"The case may also be regarded as one of conditional bequest. The right of the sons and daughter named was conditional upon Janet Miller dying without leaving heirs of her body, and until that condition was purified I do not think that anything vested in them.

"The pursuer relied upon the case of *M'Lay v. Borland* (3 R. 1124). That, however, was a very peculiar case, and I do not think that any general principle can be deduced from it. The view which was taken by the majority of the Judges of the First Division appears to have been adopted as the only way of avoiding the anomaly of the fee of heritage being *in pendente*. I do not think that there is any question here of the fee being *in pendente*. The conveyance is to Janet Miller for her liferent use alienably, and to the heirs of her body in fee. Under that conveyance it seems to me that, according to a well-settled principle, a fiduciary fee for the heirs of her body vested in Janet Miller."

¹ *Steel's Trustees v. Steel*, Dec. 12, 1888, 16 R. 204 ; *M'Lay v. Borland*, July 19, 1876, 3 R. 1124.

² *Supra*, note 1.

the fee being *in pendente*. The liferentrix held a fiduciary fee for her children.¹ The facts in *M' Lay v. Borland*² were very special, and that case could not form a precedent. But apart altogether from the consideration that the estate was heritable, this case was ruled by *Bell v. Cheape*.³ The right of Janet's brothers was clearly contingent on their surviving her, and there was a conditional institution of the heirs of their bodies if they predeceased her. There was thus a destination over, and not a case of the conditional institution of a class of persons ascertained at the death of the testator, and there was no room, therefore, for the application of the doctrine of vesting subject to defeasance.⁴ Accordingly, nothing having vested in Matthew Miller, the disposition by him to the pursuer carried nothing.

At advising,—

LORD ADAM.—The question in this case is, whether a disposition granted in the pursuer's favour by the late Matthew Miller of one-fourth part *pro indiviso* of the fee of certain subjects is a valid disposition or not. If not, the pursuer has no title to insist in this action. The question depends on whether or not the *pro indiviso* fee thereby disposed was vested in Matthew Miller at the date of the disposition; and that again depends on the construction of a general disposition and settlement, dated 27th November 1865, left by his mother Mrs Miller.

By that deed Mrs Miller disposed to and in favour of her daughter Janet Miller in liferent, for her liferent use alienably, and to the heirs of her body in fee, whom failing; to and in favour of her sons, Matthew Miller, John Miller, and Alexander Miller, and her daughter, Margaret Miller, equally between them, share and share alike, and the respective heirs of their bodies in fee, her whole estate, heritable and moveable. Matthew Miller predeceased the liferentrix, his sister Janet Miller.

I think that this case is ruled by *Bell v. Cheape*, 7 D. 614, and that consequently no fee vested in the sons, Matthew, John, and Alexander Miller, or in the daughter Margaret, *a morte testatoris*, but that their right was contingent on their surviving the liferentrix; that the heirs of their bodies respectively were conditionally instituted to them; and that, therefore, in the event of any of them predeceasing the liferentrix, the heirs of their bodies would take on her death without issue.

If this be so, then Matthew Miller, having predeceased the liferentrix, never had any right to the subjects, and the share which he would have taken had he survived passed to his son Matthew.

It is maintained, however, that the doctrine of vesting subject to divestiture applies in this case, and that a fee vested in Matthew and in the other sons and daughter, subject to divestiture in the event of the liferentrix Janet leaving heirs of her body—an event which did not happen. It appears to me, however, that this is not a case to which that principle applies.

The conditions necessary for its application are thus formulated by the late

¹ Newlands, April 26, 1798, 3 Ross' L. C. 634; *Ferguson v. Ferguson*, March 19, 1875, 2 R. 627.

² *Supra*, note 1, p. 564.

³ *Bell v. Cheape*, May 21, 1845, 7 D. 614, 17 Scot. Jur. 342; *Haldane's Trustees v. Murphy*, Dec. 15, 1881, 9 R. 269; *Steel's Trustees v. Steel*, Dec. 12, 1888, 16 R. 204, Lord President, 209.

⁴ *Steel's Trustees v. Steel*, Dec. 12, 1888, 16 R. 204, Lord President, 208; *Hay's Trustees v. Hay*, June 19, 1890, 17 R. 961; *White's Trustees v. Chrystal's Trustees*, March 2, 1893, 20 R. 460, Lord Trayner, 465.

No. 106. Lord President in the case of *Steel's Trustees v. Steel*, in 16 R. 204,—“I think,” he says, “the result of all the cases on this subject may be summarised thus : Where a fund is settled on daughters of the testator for their liferent use allenerly, and their children, if any, in fee, whom failing, to another person or persons in absolute property, with no further destination, the vesting of the fee in the last-named person or persons will depend ” on certain considerations which he proceeds to point out.

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But the conditions precedent, under which alone certain considerations have to be regarded, do not exist in this case, because the fee is not given in absolute property to the sons and daughter with no further destination. There is the further destination to the heirs of their bodies respectively.

Now, the importance of that further destination comes out very clearly in that case from his Lordship's desiring to correct an error in the report of his opinion in the previous case of *Haldane's Trustees*. He says,—“My words, as reported, are,—‘It cannot be disputed that if the residue of an estate destined to A in liferent, and his issue in fee, and failing his leaving issue, then on the expiry of the liferent to B, no right vests in B till the death of the liferenter without issue. This was authoritatively settled in the case of *Bell v. Cheape*.’ Now,” he goes on to say, “this, as it stands, is not sound law, and nothing of the kind was settled in *Bell v. Cheape*. But the blunder consists in this, that after the words ‘on the expiry of the liferent to B’ there ought to be added ‘and his heirs, executors, and assignees,’ which makes the proposition good law, and truly represents the judgment in *Bell v. Cheape*, for that judgment proceeded on the ground that B's heirs and executors were called as conditional institutes after B, and were entitled to succeed in place of B if he predeceased the death of the liferenter and the term of payment.” So, in this case, the heirs of the body of Matthew were called as conditional institutes after him, and would have been entitled to succeed in his place if he predeceased the liferentrix Janet.

On the authority, therefore, of these two cases, I concur in the result at which the Lord Ordinary has arrived, although I do not concur in the grounds on which he has rested his judgment. I do not think that the decision of the case at all depends on the fact that the destination is to “heirs of the body” and not to “children.” I also wish to say that I doubt whether the doctrine of vesting, subject to divesting, would have been applicable in the present case, even although there had been no ulterior destination to the heirs of the body. It will be observed that it is the case of a direct disposition of a heritable subject, without the intervention of a trust. I have always understood it to be settled law, since the case of *Newlands*, that a conveyance to A for his liferent use allenerly and to his children, or the heirs of his body *nascituri*, in fee vested a fiduciary fee in A for his children, and I do not at present see how a fiduciary fee being vested in one person for that person's children or issue is consistent with a beneficial fee in the same subjects being at the same time vested in another person.

Neither do I at present see why the person in whom the beneficial fee is said to be vested may not make up a title and sell the subjects, and so defeat the rights of children who may come subsequently into existence.

It is not, however, necessary to decide the question in this case, but I desire to reserve my opinion should the case hereafter occur for decision.

LORD M'LAREN.—I concur in all that Lord Adam has said.

In the first place, I assent to the view indicated by Lord Adam that no decision on the vesting of a beneficiary interest under a trust can ever be an authority on the construction of a heritable destination. The fundamental principles applicable to the construction of such destinations are altogether diverse, and inapplicable the one to the other. In a proper heritable destination, of course, the principle of construction is substitution; while in that of a trust destination the principle is always conditional institution. If I leave heritable estate to A in liferent, and to B, whom failing, to C in fee, or it may be to any number of substitutes in succession, the liferent and the fee always, and necessarily, vest concurrently in the liferenter and the first-named fiar; and it makes no difference in the construction what words ("whom failing" or, "on the death of A") are used to connect the names of the different persons who are to take in succession. Accordingly, there can be no suspension of vesting in such a case. The exception which Lord Adam has noticed of a disposition to a parent in liferent, and to his heirs or his issue in fee, introduces a third principle of construction distinct from the two to which I have referred; because, in this case, the parent is a beneficiary to the extent of his own liferent, and he holds in trust for the interest of his children, but, as I take it, universally on the condition that each child takes a vested interest on its birth. I know of no such thing as suspension of vesting under a direct heritable destination in liferent and fee except the necessary suspension until a fiar is born.

The other point on which I have a view is the proposed application of the rule of vesting subject to defeasance. I agree, for the reasons already given, that it is altogether inapplicable to this case; but I think that, even if this were a case of trust, it is not a case for the application of the doctrine, because the necessary condition of vesting subject to defeasance is that, if the original institution, say of issue, were absent or supposed to be absent from the deed, the persons next in order would take a vested interest *a morte testatoris*; and that, as explained by the late Lord President in the passage read, can only be where they are a class of persons definitely ascertained. If they are a class of persons not ascertained, and the period of distribution is postponed, then it is evident that even if there were no original destination to issue, that class could not take a vested interest at death, because the presumption always is that the words of survivorship or conditional institution are referred to the period when the trust expires.

With these observations, which do not differ in any way from Lord Adam's opinion, I concur in the judgment proposed.

LORD KINNEAR.—I concur in Lord Adam's opinion as to the construction of the gift in the general disposition, the effect of which we are to determine. I also agree with him in desiring to reserve my opinion as to the application of the doctrine of vesting subject to defeasance to the case of a direct conveyance to a donee in liferent, and the heirs of his or her body in fee, with a series of substitutions failing heirs of the liferenter's body, which may, of course, operate as conditional institution in the event of no such heirs existing. It does not appear to me to be necessary to decide that question in the present case, and I desire to reserve my opinion upon it.

THE LORD PRESIDENT concurred.

THE COURT refused the reclaiming note.

A. C. D. VERT, S.S.C.—**STURROCK & GRAHAM, W.S.**—Agents.

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REV. PATRICK ARKLEY WRIGHT HENDERSON AND ANOTHER (Wright's Trustees), First Parties.—*Johnston—Macfarlane.*

MISS FLORENCE WRIGHT, Second Party.—*D. Dundas—Constable.*

REV. PATRICK ARKLEY WRIGHT HENDERSON AND ANOTHER, Third Parties.—*Johnston—Macfarlane.*

Succession—Faculties and powers—Power to appoint “under conditions”—Appointment in part ultra vires.—By antenuptial marriage-contract trustees were directed after the death of the survivor of the spouses “to pay over or assign” certain funds to the child or children of the marriage “in such proportions and at such times and under such conditions” as the survivor of the spouses should appoint.

The spouses were survived by three children of the marriage.

The surviving spouse in his trust-disposition and settlement, professing to exercise the power of appointment, directed his trustees to “lay out and invest the third part or share falling to his daughter F.” in their own names, and to pay over the annual proceeds to F. during her life, and “in the event of her being married, and her husband surviving her,” to pay the annual proceeds to him, and upon the death of the longest liver of F. and her husband, then to hold the funds for behoof of F.'s children. Failing children of F., the trustees were directed at the death of the survivor of F. and her husband to pay the funds “to such persons and in such manner” as F. should direct.

In a question between the trustees and F. (who was seventy-five years of age and unmarried), F. contended that the power had been invalidly exercised. *Held* (1) that the appointment was not invalid because it restricted F.'s right to a liferent, with a power to test; and (2) that although the provisions in favour of F.'s husband and children were *ultra vires* and ineffectual, their invalidity did not affect the gift of the power of disposal in the event of F. having no children.

Succession—Vesting—Payment postponed till death of liferenter without children.—A truster by his trust-disposition and settlement directed his trustees to hold a fund for behoof of his daughter F., and of any husband she might marry who should survive her in liferent, and on the death of the survivor, for behoof of their children. Failing children of F., then the trustees were directed at the death of F., or of her husband, if he survived her, to pay the fund to the children of the truster's son W. if any then existing, and failing such children, to pay one half of the fund to W. himself or his next of kin.

W. survived the truster, and died unmarried. At the date of his death F. was his sole next of kin. In a question between F. (who was unmarried, and seventy-five years of age) and the trustees, F. contended that one half of the fund had vested in her subject to defeasance in the event of her having children. *Held* that vesting was postponed until the death of F.

1ST DIVISION. By antenuptial contract of marriage, dated 27th April 1813, entered into between Mr John Wright, of Broom, in the county of Stirling, and Miss Helen Tovey, the latter conveyed to trustees certain sums of money to be held by them for the conjunct liferent use of her and her husband and the survivor, “and after the death of the survivor of the said parties, then the said trustees shall pay over or assign the principal sums vested in them in trust as aforesaid to the child or children to be procreated of the said intended marriage, in such proportions, and at such times, and under such conditions as the said survivor shall direct and appoint, and failing any such direction and appointment, then the said trustees shall, after the death of the survivor of the said John Wright and Helen Tovey, pay over or assign the trust-funds and estate among the children of the said intended marriage, equally, share and share alike, at such times as they may think proper, and, at furthest, at their respective majorities, and until the term of payment of the said shares, the said trustees shall have full power to pay so much of the interest of the sums vested in

them as aforesaid, to the said children respectively entitled to the same, as shall not exceed the interest of their respective shares of the principal sum to which they may be entitled. . . .”

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Mr John Wright survived his wife, and died on 4th March 1861. There were five children of the marriage, three of whom survived their parents, viz., (1) William, who died unmarried in 1886; (2) Hamilton, who married the Rev. Robert Henderson, and died in 1876, leaving two children, viz., the Rev. Patrick Arkley Wright Henderson of Wadham College, Oxford, and of Broom, and Hamilton George Henderson of Allan Park, Stirling; and (3) Florence.

Mr John Wright left a trust-disposition and settlement dated 21st February 1855, by the third purpose of which he, *inter alia*, directed the marriage-contract trustees to pay over the whole of the funds vested in them to the trustees under his settlement to be applied by the latter as follows:—One-third to be paid over to the marriage-contract trustees of his daughter Hamilton, “another third part of the foresaid trust-funds shall be held by my said trustees in the manner hereinafter directed for behoof of my said daughter Florence Wright in liferent, and to the parties after named in fee,” and the remaining third to be paid over to his son William.

By the fourth purpose the truster, *inter alia*, directed as follows:—“Second, that my trustees shall lay out and invest the third part or share falling to my daughter Florence of her mother's fortune . . . and also the further sum of £2000 upon good heritable or other security, taking the securities in their own names, and shall pay over the annual interest or proceeds thereof to my said daughter Florence Wright, during all the days of her life, and in the event of her being married, and her husband surviving her, then the annual proceeds thereof shall be paid to him during all the days of his life, and upon the death of the longest liver of the said Florence Wright and any husband she may marry, then the said trust funds shall be held for behoof of the lawful children of the said Florence Wright . . . and failing children of the said Florence Wright, then at her death, or if married, at the death of the longest liver of her and her husband, the said trust funds shall be paid as follows, viz.:—The share of her mother's fortune aforesaid . . . shall be paid to such parties, and in such manner as my said daughter shall direct by any writing under her hand, and failing such writing, to her nearest in kin equally, and the aforesaid sum of £2000 shall be paid to the lawful children of the said William Wright, my son, equally if he has any lawful children at the period of the death of his said sister Florence without issue, or in the event of her being married, upon the death of the survivor of her and her husband, and failing lawful children of the said William Wright then existing, then the one-half of the said sum of £2000 shall be paid to himself or to his next of kin, and the other half to the children of the aforesaid Hamilton Wright or Henderson, my daughter, share and share alike.

On Mr John Wright's death his trustees paid one-third of Mrs Wright's estate to his son William Wright, another third to the marriage-contract trustees of his daughter Hamilton, and they retained and invested in their own names the remaining third share, together with the sum of £2000, and regularly paid the income thereof to the truster's daughter Miss Florence Wright, in accordance with the directions of his trust-disposition and settlement.

In 1893, when Miss Florence Wright, who was unmarried, was seventy-five years of age, questions were raised by her with regard to her rights in the two funds liferented by her, and a special case was presented to

No. 107. the Court. The parties to it were (1) the trustees under Mr John Wright's settlement; (2) Miss Florence Wright; (3) the two children of the truster's daughter Hamilton. The only questions to which it is necessary to advert were:—"1. Has the power of appointment of the marriage-contract funds of the wife, conferred upon the survivor of the spouses under the antenuptial marriage-contract between Mr and Mrs Wright been well and validly exercised by Mr Wright in his trust-disposition and settlement *quoad* the share appointed to Miss Florence Wright? 3. Did a right to one-half of the fee of the said sum of £2000 vest *a morte testatoris* in the said William Wright? or, on the death of the said William Wright without issue, in his then next of kin? or, is vesting postponed until the death of the said Miss Wright?"

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The second party maintained, in the first place, that with respect to her share of her mother's fortune she was, on the death of her father, vested with a fee therein, under the destination in her parents' marriage-contract; that her father, Mr Wright, was not entitled under the power of apportionment conferred upon him by such marriage-contract, either to limit such estate of fee to an estate of life, or to confer a benefit on grandchildren or other strangers to the power; that the apportionment was accordingly either wholly or partially invalid, and that she was entitled to payment free of the conditions imposed by her father, the testator; and in the second place that, with respect to the half of the fund of £2000, the fee thereof vested in William Wright's next of kin at his death, and that she was vested with the fee thereof as his sole next of kin at that date, though she was not entitled to demand payment of it during her lifetime, or alternatively, that the fee of the said half vested in William Wright.

The first and third parties maintained that the power of appointment had been validly exercised, and the second parties further maintained that no vesting took place until the death of Miss Florence Wright.

The first and third parties argued;—(1) The power of appointment had been validly exercised by Mr Wright. So far as he had restricted his daughter's right to a bare life with a power to test, the present case could not be distinguished from the cases of *Wallace* and *Lennox*.¹ The variation in the expression of the power made no difference. Its meaning and effect were substantially the same. Whether or not the provisions in favour of the daughter's husband and children were *ultra vires* was immaterial, for she was unmarried, and the question did not arise. Besides if they were held to be invalid, the appointment *quoad ultra* would remain unaffected.² In *Mackie's* case³ the marriage-contract trustees were directed to hold for the children in fee. (2) Vesting was clearly postponed until the death of the life-tenant. Before that event it was not certain that she would not have children. There was no room for the doctrine of vesting subject to defeasance, for there was a series of destinations over, the ultimate destination being to a class of persons, the next of kin of William Wright, who were not ascertained at the death of the testator.⁴

¹ *Wallace's Trustees v. Wallace*, June 12, 1891, 18 R. 921; *Lennox's Trustees v. Lennox*, Oct. 16, 1880, 8 R. 14.

² *Wallace's Trustees v. Wallace*, *supra*; Sugden on Powers, 626; *McDonald's Trustees v. McDonald*, March 10, 1874, 1 R. 794, June 17, 1875, 2 R. (H. L.) 125; *Crompe v. Barrow*, 1799, 4 Vesey, 681.

³ *Mackie's Trustees v. Mackie*, July 4, 1885, 12 R. 1230.

⁴ *Steel's Trustees v. Steel*, Dec. 12, 1888, 16 R. 204; *Boyd v. Denny's Trustees*, Dec. 5, 1881, 9 R. 299; *White's Trustees v. Chrystal's Trustees*, March 2, 1893, 20 R. 460, Lord Trayner, 465.

Argued for the second party;—1. A power of appointment such as had been conferred on Mr Wright did not entitle him to limit an estate of fee to an estate of liferent, or to confer a benefit on grandchildren or other strangers to the power.¹ In the cases of *Lennox's Trustees* and *Wallace's Trustees*,² the terms of the power given were much wider than in the present case. Even assuming that the restriction of Miss Wright's interest to a bare liferent with a power to test would have been competent, the truster had gone farther and had sought to confer a benefit on her husband and her children who were strangers to the power. So far, therefore, the appointment was clearly *ultra vires*, and being invalid and ineffectual in part, the whole appointment fell.³

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2. The terms of the destination were almost the same as those in recent cases in which it had been held that vesting took place in the ultimate objects of a series of destinations over, subject to defeasance.⁴ It was unnecessary to consider the effect of a destination to the next of kin of a person who survived the testator before that person's death, for William Wright had died and his next of kin were therefore now a class fixed and ascertained, and when there was an ultimate destination to a class the presumption was in favour of vesting as soon as the individuals composing the class were ascertained.⁵ Miss Wright, being her brother's sole next of kin at the date of his death, had therefore a vested right to the fund.

At advising,—

LORD ADAM.—The first and principal question in this case is, whether a power of appointment, contained in the antenuptial contract of marriage between Mr and Mrs Wright, has been validly exercised *quoad* the share thereby appointed to their daughter Miss Florence Wright, who is the second party to this case.

The fund which is the subject of appointment consists of certain sums of money assigned by Mrs Wright to the marriage-contract trustees. They are directed to hold it in trust for the conjunct liferent of Mr and Mrs Wright, and during the subsistence of the marriage to pay the interest to Mr Wright, and after the dissolution of the marriage, to the survivor, and after the death of the survivor, to pay the principal sums to the child or children of the marriage, "in such proportions and at such times and under such conditions as the said survivor shall direct and appoint," and failing such direction and appointment, then to and among the children of the marriage equally, all as therein specified.

I do not think it can be doubted that, under this direction, the fund in question belonged to the children of the marriage, subject only to its division or apportionment among them by the surviving spouse.

Mr Wright survived his wife and died on 4th March 1861. At his death there were three children of the marriage in life, one son, William, and two daughters, Hamilton and Florence. Hamilton married the Rev. Mr Henderson,

¹ Gillon's Trustees v. Gillon, Feb. 8, 1890, 17 R. 435; Mackie's Trustees v. Mackie, July 4, 1885, 12 R. 1230; Baikie's Trustees v. Onley, Feb. 25, 1862, 24 D. 589.

² *Supra*, p. 570, note 1.

³ Gillon's Trustees, *supra*, Lord Rutherford Clark, p. 442; Baikie's Trustees, *supra*, Lord Curriehill, p. 596.

⁴ Murray v. Gregory's Trustees, Jan. 21, 1887, 14 R. 368, April 8, 1889, 16 R. (H. L.) 10; Wannop, &c., v. Murphy, Dec. 15, 1881, 9 R. 269; Gilbert's Trustees v. Crerar, Nov. 3, 1877, 5 R. 49.

⁵ Steel's Trustees v. Steel, Dec. 12, 1888, 16 R. 204; Williams on Executors, 2, 986.

No. 107. and died in 1876, leaving two sons, who are the third parties to this case. William is also now dead, leaving Miss Florence Wright as sole survivor. She is now over seventy-five years of age, and has never been married.

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Mr Wright left a trust-disposition and settlement dated 21st February 1855, by which he professed to exercise the power of appointment in question.

By the third purpose of the trust he directed the trustees under the antenuptial contract of marriage to pay over the whole trust funds vested in them to his testamentary trustees, who are the first parties to this case. He then directed his testamentary trustees to pay one-third part of these funds, which are the funds subject to appointment, to the marriage-contract trustees of his daughter Hamilton Wright or Henderson; another third part thereof he directed to be held by his trustees in the manner therein directed, "for behoof of my said daughter Florence Wright in liferent, and to the parties after named in fee," and the remaining third part he directed to be paid to his son William.

By this appointment, therefore, the whole fund is divided into three parts, two going to the other children of the marriage, and as regards these there is no dispute. It is in reference to the remaining third that the present questions have arisen.

Now, this share is directed to be held for Miss Wright in liferent, the fee being given "to the persons after named." These persons are to be found in the fourth purpose of the settlement, and if Miss Wright is entitled to a fee of the share, her right thereto must be found in the directions therein contained, as so far a liferent only has been given to her.

By this fourth purpose Mr Wright directs the trustees to invest the fund, and to pay the interest to Florence Wright during all the days of her life. He then provides for two possible events, that of Florence marrying and having children, and that of her not marrying.

In the first of these events, he directs his trustees to pay the produce of the fund to her husband during his life, if he should survive her, and, on the death of the longest liver of her and her husband, to hold the fund in trust for her children, in such manner, and in such proportions, as their parents, or the survivor of them, should direct, and failing such directions, then for the children equally, share and share alike, payable on their respectively attaining majority or being married.

The truster then provides that, failing children of Miss Florence Wright, at her death, or, if married, at the death of the longest liver of her and her husband, the fund in question "shall be paid to such parties, and in such manner as my said daughter shall direct by any writing under her hand, and failing such writing, to her nearest of kin equally."

So far as regards the provisions above mentioned in favour of the possible husband and children of Miss Florence Wright, I think that they are *ultra vires* of Mr Wright. If such persons had come into existence they would not have been objects of the power. The only objects of the power are the children of Mr and Mrs Wright, who alone have a right to share in the fund. So far, therefore, as regards these provisions, I think the appointment is invalid.

But in so far as the appointment provides a liferent of the fund to Miss Wright, with, in a certain event, an absolute right to dispose of the fee, I think that it is a valid appointment. Had these provisions in favour of Miss Wright stood alone,—that is to say, had they not been mixed up with other provisions, which are invalid,—they must have received effect. The last case on the subject

is that of *Wallace's Trustees v. Wallace*, in 18 R. 921, in which the trustees under the antenuptial contract of marriage between Mr and Mrs Wallace were directed, after the death of the survivor of the spouses, to pay over certain funds to and for behoof of the surviving children of the marriage in such shares and proportions, and subject to such conditions, provisions, and limitations, as the spouses or the survivor of them should appoint. No. 107.
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The children of the marriage were, therefore, just as in this case, the only objects of the appointment. The spouses by trust-disposition and settlement directed their testamentary trustees to hold these funds for behoof of their children in equal shares, and to pay to them the income; and as regards the shares of the daughters, the trustees were directed to settle the share of each daughter upon her at her marriage for her sole and exclusive use during her marriage, so that the same should be held for her behoof, with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, to her heirs and executors; and in regard to the shares of any daughter who might not marry, the trustees were directed to pay the same, according to the directions which such daughter might leave by any testamentary deed, and failing such deed, to her heirs and executors.

It was contended in that case by the daughters, who were all unmarried at the time, that the appointment was invalid in respect that the spouses had no power to restrict their right to a liferent with a power to test. The Court, however, following the case of *Lennox's Trustees v. Lennox*, 8 R. 14, held that the appointment was valid.

I think that in this respect the present case cannot be distinguished from these two cases, and must be ruled by them.

The gift of the share, therefore, would not fail because a fee of the share was not given to Miss Wright in terms, but only a liferent, with the power of disposal thereof.

But, as has been pointed out, the fee of the share is first provided to Miss Wright's children, if any, and the power of disposal of the share is only given to her in the event of the failure of children, and the question arises whether the gift of a liferent to the surviving husband and of the fee to the children, in the first place, although altogether *ultra vires*, has the effect of rendering invalid the subsequent provisions or gifts in the appointment, and, if not, what is its effect?

Now I do not think that an appointment is to be considered as altogether invalid because there may be contained in it certain gifts or provisions which are *ultra vires* and cannot receive effect. Of this there is an example to be found in the case of *M'Donald v. M'Donald*, 2 R. (H. L.) 125. In that case the joint donees of the power, Sir John and Lady M'Donald, provided a liferent of the fund, which was the subject of the power, to Sir John. This was *ultra vires*, and it was contended that it rendered the whole appointment invalid. In disposing of this the Lord Chancellor said,—“I certainly do not give any weight to an argument which was addressed to your Lordships in favour of the respondents—that because the joint deed of division purported to give to Sir John M'Donald, in the event of his surviving his wife, a life interest in the whole of the trust property, therefore all that was done by way of appointment subsequently to the giving of that life interest was invalid. There was an attempt to give the whole of the income to Sir John during his life in the event of his surviving Lady M'Donald. In point of fact he did not survive Lady M'Donald.

No. 107. Under these circumstances it appears to me it would be entirely contrary to reason, and as far as I know quite without authority, to hold that an attempted disposition not in any way interfering with that which was legitimately within the object of the power of distribution of the property, and only to take effect in an event which never has happened, should in any way militate against the validity of the subsequent appointment." I think, therefore, that, on the authority of that case, the gift of a liferent of the fund to a possible husband of Miss Wright may be disregarded.

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The next question is as to the effect which the gift of a fee to the possible children of Miss Wright has upon the subsequent gift to her.

I am not aware that there is any decision in the law of Scotland on the subject, but the rule of the law of England seems to be that such a provision, although *ultra vires*, is not to be wholly disregarded, and that it depends upon the event of there being children or not whether the ulterior grant to a proper object of the power shall receive effect. The leading case seems to be that of *Crompe v. Barrow*, 1799, 4 Ves. 681, which resembles in its circumstances the present case very closely. In that case, by a settlement made previous to the marriage of John James, and Mary Barrow, certain funds were assigned to trustees to pay the income to Mary Barrow during her life, and after her decease, upon trust for the children of Mary Barrow by a former, or by the intended marriage, in such shares and proportions, and to be paid at such ages and in such manner as she should direct by her last will and testament, and failing such direction, to the children equally.

Mary Barrow by her settlement directed one moiety of the trust fund to be paid to her daughter, Frances James; and as to the other moiety, she directed the income to be paid to her son Charles, and after his decease, the fee to be paid to his wife and children, as he might appoint, and failing such appointment, equally; and in the event of Charles dying without leaving wife and children, to her daughter Frances James.

As regards this moiety of the fund, the Court declared "that the same is well appointed for the benefit of the defendant, Charles Barrow, for his life, according to the trusts of the said will and appointment, and that the appointment of the said moiety of the said trust premises after his death in trust for his wife and children is invalid, the same not being well appointed by the terms of the power in the said marriage-settlement; and declared that, in case Charles Barrow shall die without leaving a wife or child surviving, the same, according to the said appointment, will belong to the defendant Frances James, her executors and administrators."

In giving judgment the Master of the Rolls said,—“This limitation over to Frances James is, if Charles Barrow should die without leaving a wife or child surviving. It fails as far as it affects to give interests to the children, but is there any occasion to make it fail upon the other point—the gift over to a person who is an object of the power? There are two alternatives—If Charles Barrow leaves no wife or children at his death, then the limitation over, being to a good object, shall take effect. If he does leave a wife and child, then it cannot take effect.”

I know no reason why the law of Scotland should be different from the law of England in this respect, and as it appears to me that this case of *Crompe v. Barrow* is exactly in point, I think we should follow it, and pronounce a similar judgment in this case.

The next question relates to a sum of £1000, half of a sum of £2000, which was Mr Wright's own property, and which he could dispose of as he chose. Mr Wright mixed up this sum with the antenuptial contract fund, and the directions in the deed are so far made applicable to both. Thus he directs his trustees to pay the interest of the joint fund to Miss Wright, and after her death to her husband, if she married and he survived, and upon the death of the longest liver, to hold the trust funds for her children in such proportions as they or the survivor might direct, and failing such directions, for their children equally, the share of a child predeceasing the period of payment without issue accreasing to the survivor. The truster then separates the two funds, and directs that, failing children of Miss Wright, at her death, or if married, at the death of the longest liver of her or her husband, the foresaid sum of £2000 shall be paid to the children of William Wright equally, and failing such children then existing, then one half of the said sum of £2000 to William Wright himself, or to his next of kin, and the other half as there directed.

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It appears to me to be very clear that under this destination no fee vested *a morte testatoris*, or can vest until the death of the liferentrix, Miss Wright, without children, a contingency which has not yet occurred.

It was maintained, however, that a fee vested in William *a morte*, subject to defeasance in the event of Miss Wright leaving children. But that view is quite untenable, because any right which William might ultimately come to have was postponed to that of his children, and was contingent on there being no children of his own in existence at the death of the liferentrix. William could not therefore take a beneficial fee, and such a thing as a fiduciary fee being taken subject to divestiture, I have not heard of. A fee subject to divestiture is only recognised where, failing children, an absolute right of property is given, without ulterior destinations—a state of matters which does not exist here—See *Steel v. Steel*, 16 R. 204.

I think, therefore, that we should find that the vesting of this £1000 is postponed till the death of Miss Wright.

These are all the questions that require to be answered.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—"Find and declare that the power of appointment of the marriage-contract funds of the wife conferred upon the survivor of the spouses under the antenuptial marriage-contract between Mr and Mrs Wright has been well and validly exercised by Mr Wright in his trust-disposition and settlement in so far as regards the share thereof appointed to Miss Florence Wright: Further, find and declare that, as regards the one half of the fee of the said sum of £2000 mentioned in the fourth purpose of Mr Wright's said trust-disposition and settlement, vesting is postponed until the death of the said Miss Wright: Therefore answer the third alternative of the third question in the affirmative, and decern."

MORTON, SMART, & MACDONALD, W.S.—DUNDAS & WILSON, C.S.—Agents.

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WEST HIGHLAND RAILWAY COMPANY, Petitioners (Reclaimers).—

*Lees—Neil J. Kennedy.*EDWARD GORDON PLACE AND ANOTHER, Respondents.—*Murray—Salvesen.*

Lands Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 19), secs. 84 and 86—Interest on purchase-money from date of entering on land—Railway.—Section 84 of the Lands Clauses Act, 1845, enacts that where the promoters of an undertaking desire to enter upon lands to be taken under the Act before the amount of compensation has been fixed, it shall be lawful for them to deposit in bank by way of security a sum to be fixed by a valuator as the value of the lands, and, if required, to give the owner a bond for the amount of such deposit with five per cent interest from the date of the deposit till compensation is paid.

Held (1) that when the owner of lands so entered upon dispenses with the granting of the bond, he is nevertheless entitled to 5 per cent interest upon the compensation from the date of the promoters entering upon his land till the compensation is paid; and (2) that he is entitled to payment of such interest out of the sum deposited by the promoters.

1st DIVISION.
Lord Low.

On 13th December 1893 the West Highland Railway Company presented a petition to the Junior Lord Ordinary, praying for warrant on the Bank of Scotland to pay to them the sums of £1350 and £130, being the sums deposited on 24th December 1889, in security for lands about to be taken from Edward Gordon Place of Loch Dochart, and John Christie, tenant of the farm of Inverhaggernie, both in Perthshire, respectively, for the purposes of the company's undertaking.

It appeared from the petition and answers lodged by Mr Place and Mr Christie that the petitioners availed themselves of the provisions of section 84 of the Lands Clauses Consolidation Act, 1845, and entered on 21st June 1890 upon the lands in question without the consent of the respondents.* A valuation was accordingly made by a valuator appointed by the Board of Trade, and the amounts so ascertained were deposited in bank in the names of the respondents respectively.

Thereafter the amounts actually due to the respondents were settled by arbitration. The oversman in his awards did not deal with the question of interest on the sums awarded.

The petitioners tendered payment of the purchase-money and of the expenses of the arbitration, and interest from the date of the decreets.

* Section 84 of the Lands Clauses Consolidation Act, 1845, provides,—“If the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to or an award made or verdict given for the purchase-money or compensation to be paid by them in respect of such lands: It shall be lawful for the promoters of the undertaking to deposit in bank, by way of security, . . . such a sum as shall, by a valuator appointed by . . . be determined to be the value of such lands, or of the interest therein which such party is entitled to, or enabled to sell or convey, and also, if required so to do, to give to such party a bond under the hand of the secretary . . . with two sufficient securities, . . . for a sum equal to the sum so to be deposited, for payment to such party . . . of all such purchase-money or compensation . . . together with interest thereon at the rate of £5 per centum per annum from the time of entering on such lands until such purchase-money or compensation shall be paid to such party, or deposited in the bank for the benefit of the parties interested in such lands, under the provisions herein contained; and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands. . . .”

In the petition they averred that they had performed the conditions required of them by the Act, and that they were entitled under section 86 of the Act * to receive back the money deposited as security. No. 108.

The respondents averred "that the petitioners did not grant bonds for payment of the purchase-money or compensation, with interest thereon at 5 per cent per annum from the date of entering on said lands till payment of the purchase-money or compensation, as provided by section 84 of the said Act. The respondents have not hitherto demanded such bonds to be granted, nor have they waived their right to require them. They now require them to be granted, or otherwise that interest be paid on the purchase-money or compensation found to be due to them, at the rate of 5 per cent per annum from 21st June 1890, when the petitioners entered on said lands, till payment. The respondents all along relied on the petitioners paying such interest in the same way as if bonds had been granted therefor in terms of the statute. . . . The petitioners have not performed the conditions required of them by the Lands Clauses Consolidation (Scotland) Act, 1845. Instead of offering to pay interest to the respondents from 21st June 1890, the date of entering on the lands, in the same way as if they had granted bonds in terms of the 84th section of the said Act, they have tendered interest only from the dates of the decrees-arbitral, and have refused to make any arrangement with the respondents with regard to their claim of interest for the period prior to the dates of the decrees-arbitral. The respondents respectfully submit that, under the 86th section of the said Act, the Court have the power to, and should order payment to the respondents out of the money deposited in bank, of interest on the purchase-money or compensation payable to them from the date of entering on the lands till payment, at the rate of five per cent per annum; or otherwise, that the interest accrued on the deposits should be paid to the respondents; and that the prayer of the petition should either be refused, or granted only on such conditions as to payment of interest to the respondents as shall be fixed by your Lordships."

The petitioners maintained in argument that the respondents had waived their claim to interest by letter stating that they did not wish bonds to be granted in terms of the Act. This letter was read to the Lord Ordinary, but was not referred to in the Inner-House.

On 26th January 1894, the Lord Ordinary (Low) pronounced this interlocutor:—"Finds (1) That the petitioners, having entered upon the lands belonging to the respondents mentioned in the petition, before an award was given for the purchase-moneys or compensations to be paid by them in respect of said lands, are liable to make payment to the respondents of interest upon such purchase-moneys or compensations from the time of entering upon such lands until the date of payment of such purchase-moneys or compensations, unless the respondents have waived their right to claim such interest, or have otherwise debarred

* Section 86 of the Act provides,—"The money so deposited as last aforesaid shall remain in the bank by way of security to the parties whose lands shall so have been entered upon for the performance of the bond to be given by the proprietors of the undertaking as hereinbefore mentioned; . . . and upon the conditions of such bond being fully performed, it shall be lawful for the Court of Session, upon a like application, to order the money so deposited, . . . together with the accumulation thereof, to be repaid or transferred to the promoters of the undertaking; or if such conditions shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such manner as it shall think fit, for the benefit of the parties for whose security the same shall so have been deposited."

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themselves from claiming it in whole or in part; (2) that if the respondents have not waived their right to claim, or otherwise debarred themselves from claiming interest as aforesaid, they are entitled to an order for payment of the amount thereof out of the moneys deposited in bank by the petitioners, in terms of the 84th section of the Lands Clauses Consolidation (Scotland) Act, 1845, in respect that the petitioners have refused to pay to the respondents interest upon the said purchase-moneys or compensations, prior to the date of the awards mentioned in the petition, fixing the amount of the purchase-moneys or compensations payable to the respondents; and (3) that the petitioners are entitled to an order authorising them to uplift the said deposited moneys, except to the extent of £300 and £60, to meet interest at the rate of 5 per centum per annum upon the purchase-moneys or compensations, from the date when the petitioners entered upon the said lands until the date of the said awards; therefore grants warrant to and ordains the Bank of Scotland to repay to the petitioners, upon production of a certified copy of this interlocutor, the sums contained in the two remaining deposit-receipts specified in the petition to the extent of £1050 and £70, and ordains the balance of the said sums, namely, £300 and £60, to be re-deposited upon two deposit-receipts in the same terms as those previously granted: Ordains the petitioners, within fourteen days from the date hereof, to lodge in process a minute setting forth the facts and circumstances upon which they maintain that the respondents waived their right to interest upon the said purchase-moneys or compensations, or otherwise debarred themselves from claiming the said interest in whole or in part; and decerns; *quoad ultra* continues the cause.*

* "OPINION.—I am of opinion that a proprietor, whose lands are taken compulsorily by a railway company, cannot claim interest on the compensation fixed by an arbiter or a jury from a date earlier than that of the award or verdict, if the company have not previously entered upon the lands. That, I think, must be held to be settled by the judgment of the House of Lords in the case of the *Caledonian Railway Company v. Carmichael* (2 Scotch App. 56).

"The reason why the statute did not make any provision for interest in such a case appears to me to be this. Although by service of the notice to treat, a contract for the sale and purchase of the lands is concluded, yet, until the amount of the compensation is settled, and paid or consigned, as the case may be, the proprietor continues in the enjoyment of the lands, and he is not entitled both to the proceeds of the lands and also to interest upon the price.

"But if the company take advantage of the provisions of the 84th section of the Act, and enter upon the lands before the amount of the compensation is settled, a different state of matters arises. Even in that case when the question of the amount of compensation comes before an arbiter or a jury, the amount of the compensation falls to be fixed in the same way, and under the same statutory provisions, as in a case in which the company had not obtained previous possession of the lands. But, through no fault of either party, a considerable time may elapse before the amount of compensation is fixed, and it would be unjust if, between the time when the company obtained possession and the date of the award or verdict, the proprietor should receive no consideration for being deprived of his lands, and should have neither the lands nor the price of the lands. In such a case it would be equitable that the proprietor should receive interest upon the price of the lands from the date upon which the company obtained possession.

"The statute seems to me to recognise the proprietor's right to interest in such a case in the 84th section. It is there enacted that, if the promoters shall be desirous of entering upon and using lands before an award or verdict, they shall deposit in bank, by way of security, such a sum as shall, by a valuator to be appointed by the Board of Trade, be determined to be the value of such lands,

The petitioners reclaimed, and argued ;—Under the Act the money deposited represented only the capital value of the lands to be taken, the

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and shall also, 'if so required to do,' grant a bond to the proprietor, with two sufficient securities, for a sum equal to the sum so to be deposited for payment 'of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking, in respect of the lands so entered upon, together with interest thereon at the rate of five pounds per centum per annum, from the time of entering on such lands until such purchase-money or compensation shall be paid.'

"If, therefore, a bond in terms of the Act is granted, no question can arise, because in it the company bind themselves to pay interest upon the purchase-money or compensation from the time of entering the lands. But in this case no bond was granted, and a letter was read by the railway company, asking the respondent if he required a bond to be granted, and an answer from him saying that he did not do so. Of course, if the respondent waived his right to interest, there is an end of the matter, but the letters which were read do not, in my opinion, necessarily involve such waiver on the respondent's part. The bond is to be granted for the security of the proprietor, and only if the company are 'required' by the proprietor to do so. If the proprietor has confidence in the sufficiency of the company for whatever sum he may be entitled to claim from them, he may not insist upon a bond being granted, and that, I believe, is what frequently happens. But I do not think that the mere fact that the proprietor does not insist upon a certain security which he might demand being actually granted can affect the amount which the company are liable to pay. Their liability is not affected, although the proprietor's security is lessened.

"It therefore seems to me to lie upon the company here to aver and prove that the respondent waived his right to interest upon the compensation money from the time when they entered upon the lands. They might also perhaps shew (and they indicated that they intended to plead), that the respondent has barred himself from claiming interest for the whole period, by having caused delay in the ascertainment of the amount of compensation.

"The next question is whether the point is competently raised, and can be determined, upon a petition by the company, to uplift the deposited money?

"By the 86th section of the Act, it is provided that, upon the conditions of the bond to be granted in terms of the 84th section being fully performed, it shall be lawful for the Court of Session to order the money to be repaid to the promoters, 'or, if such conditions shall not be fully performed, it shall be lawful for the said Court to order the sum to be applied in such manner as it shall think fit, for the benefit of the parties for whose security the same shall so have been deposited.'

"Now, if it should appear that the respondent intimated to the company that he would not require them to grant a bond, not with the intention of giving up any payment which he would otherwise have been entitled to claim from them, but simply for the convenience of the company, I think that the matter would fall to be dealt with just as if a bond had been granted. But if a bond had been granted, and the company had paid the amount of the compensation, but refused to pay interest thereon, I think that, under the provisions of the section which I have just quoted, I would be entitled to order the interest to be paid out of the deposited fund.

"It therefore appears to me that a portion of the deposited fund, equal to five per cent upon the compensation awarded to the respondent from the date when the company entered upon the lands until the date of the award, should remain in bank until it is ascertained whether, as matter of fact, the respondent waived his right to claim interest, or has otherwise barred himself from claiming interest in whole or in part. I see no reason, however, why the company should not now be authorised to uplift the balance of the deposited money.

"The petition contains no statement of the circumstances upon which the petitioners rely, as shewing that the respondent waived his right to interest,

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words of the Act being "such a sum as shall by a valuator . . . be determined to be the value of such lands." The only case in which interest was due from the date of entering on the lands was when the landowner insisted on a bond being granted. Payment of interest from the date of entering was no doubt a condition of the bond, if a bond was granted, but it was not a condition attaching to the deposited money. Further, the claim for interest was only a possible claim, as they averred that the landowner here had waived his claim, and the question of whether he was entitled to get interest or not could not competently be tried in a petition to uplift.

Argued for the respondents;—The words "conditions of such bond" in section 86 referred back to the bond mentioned in section 84. That bond was to be "tendered or delivered," and the conditions were, in the view of the statute, as much in the tendered bond as in the delivered bond. One of the conditions of the bond was the payment of interest on the purchase price from the date of entering on the lands. The result of the argument of the petitioners would be that, while a landowner who put the railway company to the expense and trouble of delivering a bond would have ample security not only for principal but for interest from the date of entering, a landowner who trusted to the promise of a solvent railway company would not only have no security for interest, but would not be entitled to get interest.

LORD PRESIDENT.—The question mainly argued was whether, where money is deposited under section 84 of the Lands Clauses Act, 1845, and no bond is delivered to the landowner, the railway company are entitled to have the amount of the deposit paid back to them though they have not paid interest on the purchase-money found due. On that general question, which was taken, for the sake of argument, on the footing that the landowner has a claim for interest, the sections stand thus: Section 84 provides that if the promoters of an undertaking are desirous of entering upon lands before the amount of compensation is settled, they may deposit certain money in bank by way of security. Now, the section down to that period does not say for what the money is to be security, but the statute promises the reader to tell him further on. It is erroneous to say that, up to that point, the statute says even that the security is to be for the compensation money; it leaves the thing to be secured, in the meantime, entirely untold. Now, on reading on, it appears to me that the only passage in the Act which can be pointed at as fulfilling that promise occurs thus. The owner is not only secured by the deposit, but by being given, if he likes to take it, a bond, and the statute tells what the obligants in the bond are to bind themselves to, for at that stage it is said in so many words that the amount of the bond shall be the purchase-money, with interest at 5 per cent. Now, the Act says that the bond, having this tenor, is to be delivered or tendered. The owner may take it or leave it, but the man who declines it sees, just as much as he who takes it, what is in the bond; and in the bond it is to appear that interest is secured as well as the purchase-money. Here, then, we have a clear statement of what is to be secured.

or has disentitled himself to claim it. The petitioners are not to blame for that state of the pleadings, because the petition is in the ordinary form, and the question of interest is raised by the answers. It will now, however, be necessary for the petitioners to lodge a specific statement of the circumstances upon which they rest their plea that the respondent is not entitled to interest."

Now, all this becomes even more clear when we look at section 86. That section alone brings the Court of Session into contact with the transaction, and it says that we are entitled to grant warrant for payment of the money "upon the conditions of such bond being fully performed." I ask, "conditions of what bond?" and I answer,—“Of the tendered bond,”—it does not matter whether it has been accepted or dispensed with. Now, this seems quite an intelligent way for the Act to set forth its scheme of security, the only thing at all out of the common being that, instead of beginning by telling what is to be secured alike by the deposit or by the bond, it takes the only time at which the conditions of the obligation come to be written out (*i.e.*, in the bond) as the time for stating them.

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The reason of the thing, it is important to notice, exactly coincides with the conclusion to which I have come, for it would certainly be strange if a landowner, who declined to accept a bond, being satisfied with the deposit, should have no security whatever for interest, while the same man, if he insisted upon getting a bond, should have two securities for interest,—the bond and the deposit. On the question mainly argued to us, then, my opinion is clearly in harmony with the decision of the Lord Ordinary.

The questions raised in the first and second findings of the Lord Ordinary were not so fully argued, but I have heard nothing to lead me to doubt the soundness of the judgment. The case is one of a company taking possession of lands before the amount of compensation is fixed, and I think it clear that interest is due from the date of entry. The case is not similar to, but is just the opposite of, a case in which the award is fixed at the end of the owner's possession. There it is clear that the owner has and can have no claim for interest prior to the award, because up to that time he had been receiving the rents of his lands.

I think that we ought to adhere.

LORD M'LAREN.—The primary obligation of a railway company in cases of compulsory purchase is to make full compensation before entering on the lands, and it is only in the event of the company wishing to enter on the lands in anticipation of the award of compensation that the machinery of secs. 84-86 of the Act comes into operation. I do not think that it would have occurred to any mind, however ingenious, to suggest that there is one case of compensation in which interest is payable, and another in which it is not, had it not been that the amount to be deposited is precisely the sum which is certified to be the value of the lands. That suggested the argument that, so far as the security was concerned, it was only to be security for principal. The argument is altogether fallacious. The reason why only the estimated price is to be deposited is, that it is impossible to say at the time the deposit is made what the amount of interest will be; but the point has not been overlooked by the Legislature, for the owner is entitled to get a bond covering both principal and interest. In sec. 84 it is stated that the deposit is to be in security as therein-after provided. That plainly refers to sec. 86, and when we turn to that section it is as clear as can be that the security is to be for principal and interest. That is made clear by the provision that the company is only entitled to uplift the money if they satisfy the Court that they have performed the conditions of the bond. It is, I think, impossible to confine that position only to cases where bonds have been actually granted; the conditions to be per-

No. 108. formed are the conditions in section 84,—that is to say, payment of principal and interest.

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If in cases where no bond has been granted the company were to be relieved of payment of interest, it would logically follow that they should also be relieved from payment of principal, for principal and interest are put in exactly the same position by the section, but it cannot be intended that a landowner should lose his claim to interest because he is satisfied as to the credit of a perfectly solvent company, and does not demand a bond.

I did not understand from the argument that the alleged waiver was put upon any special circumstances; I thought that it was merely grounded on the fact that a bond was not required. If that is so, I do not see why the respondents should not at once get their money, as I do not think that the circumstance of the omission to take a bond amounts to a relevant averment of waiver.

LORD KINNEAR.—If the promoters of an undertaking do not enter on the lands till the purchase-money is paid or deposited in bank, then it is reasonable that no interest should run prior to the date of payment, for the owner up to that time is left in possession of his land and the railway company of their money. Section 84 of the Act, however, provides for a different set of circumstances. A privilege is there given to the promoter, viz., that he may enter on possession without the landowner's consent, although the compensation has neither been paid nor consigned.

It seems reasonable that the Legislature should provide for payment of interest when the payment of the price of land of which the company has taken actual possession is indefinitely postponed. But I do not think that the matter is left to stand on implication, for payment of interest is expressly provided for in the statute. The 85th section provides that in the event of the promoters entering before payment of the price, they are to give security in two different forms. They are to deposit the amount claimed for the whole lands in their notice to treat, or otherwise the sum determined by a valuator appointed by the Board of Trade, and they are also to give the landowner a bond with two sufficient sureties for payment of the purchase-money or compensation which may be fixed in the manner prescribed by the statute, with interest at the rate of five per cent from the date of their entering upon the land until such purchase-money is paid. The bond which they are thus required to tender does not create the obligation, but only gives effect to an obligation which had previously arisen in consequence of their entering into possession of the lands. The terms of the bond define specifically the obligation which the Legislature intends to impose. But I cannot see any reason to doubt that the obligation remains the same whether delivery of the bond is insisted on or no. It may be that a landowner may discharge his claim for interest, and it is, as I understand, maintained that he has done so in the special circumstances of this case. If so, there will be no obligation to pay interest; but that is a question which remains to be decided. We could not recall the Lord Ordinary's interlocutor, and authorise the railway company to uplift the whole sum deposited, unless we were prepared to affirm the proposition that a mere waiver of the right to insist on delivery of a bond necessarily involves an abandonment of the claim to interest. But it is clear enough that, if the landowner were satisfied with the security of the deposited money, he might refrain from insisting on his right to obtain the additional security of a bond guaranteed by two sureties,

without the slightest intention to give up any part of his claim. If the petitioners can shew that the claim for interest has been discharged, they may be entitled to uplift the whole deposited sum. But that has not yet been shewn, and in the meantime I agree with the Lord Ordinary that a sufficient sum to meet the respondent's claim must be retained.

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LORD ADAM was absent.

THE COURT adhered.

MACRAE, FLETT, & RENNIE, W.S.—GILL & PRINGLE, W.S.—Agents.

THOMAS BUTTAR FARQUHARSON (Inspector of Poor for Parish of Coupar-Angus), Pursuer (Appellant).—*Dickson—A. M. Anderson.*

WILLIAM F. LIDDELL (Inspector of Poor for Parish of Murroes), Defender (Respondent).—*Murray—Kennedy.*

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Feb. 23, 1894.
Inspector of
Coupar-Angus
v. Inspector of
Murroes.

Poor—Settlement—Imbecile pauper—Confinement in private lunatic asylum licensed by the Lunacy Board—Lunacy (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), secs. 75 and 95—Lunacy (Scotland) Act, 1862 (25 and 26 Vict. cap. 54), sec. 7.—Held (1) that the Lunacy Act, 1857, fixes the permanent burden of a pauper lunatic's settlement in the parish of the lunatic's settlement at the date of seclusion in the district asylum, even in cases where the settlement is derivative; and (2) that this liability is not avoided by reason of the lunatic being confined, with the sanction of the Lunacy Board, in a private asylum licensed by the board and not in the district asylum.

Palmer v. Russell, Dec. 1, 1881, 10 Macph. 185, followed.

In June 1892 Farquharson, inspector of Coupar-Angus, brought an action in the Sheriff Court at Dundee against Liddell, inspector of Murroes, for payment of £28, 17s. 11d., being the amount paid by the pursuer (after deducting the proportion of the lunacy grant received by him) as the cost of maintaining a pauper lunatic child named William Stewart, in the Baldovan Institution for the training of imbecile children.

The circumstances out of which the action arose, as disclosed by a proof, were as follows:—The pauper was the illegitimate son of Marjory Stewart, and was born in September 1879. He was a congenital imbecile. In November 1885 Marjory Stewart married John Thow, whose settlement then was in Murroes, the parish of his birth. He was not the father of the pauper. In August 1886 Thow and his wife went to reside in the parish of Coupar-Angus, his settlement still being in Murroes.

In May 1890 the pursuer applied to the Board of Lunacy to sanction the pauper's admission to the Baldovan Institution, the application being accompanied by two medical certificates to the effect that the pauper was capable of deriving benefit from training and treatment in the institution. The Board of Lunacy granted the application, and the pauper was accordingly admitted on 1st July 1890.

The Baldovan Institution was an institution for the training and treatment of imbecile children, which was licensed by, and under the inspection of, the Board of Lunacy,* which repaid a proportion of the cost of maintaining imbecile pauper children there out of a parliamentary grant.

* The Lunacy (Scotland) Act, 1862 (25 and 26 Vict. cap. 54), sec. 7, enacts,—"It shall be lawful for the board to grant licence to any charitable institution established for the care and training of imbecile children, and supported in whole or in part by private subscription, without exacting any licence fee therefor, and such licence may be in name of the superintendent of such institution for the time being."

No. 109. There was a district lunatic asylum for the parish of Murroes, but no special attention was paid at it to the training of imbecile children, and the institution nearest to Murroes where such training could be obtained was the Baldovan Institution.

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On 1st August 1891 Thow, and through him his wife, the pauper's mother, acquired a residential settlement in Coupar-Angus.

The defender, who admitted that his parish of Murroes was liable for the maintenance of the pauper down to 1st August 1891, maintained that this liability ceased at that date, on the ground that the pauper followed his mother in then acquiring a settlement in Coupar-Angus.

The pursuer maintained that Murroes remained liable, notwithstanding the mother's change of settlement, on the ground that, under the Lunacy Acts, the settlement of the pauper at the date of his admission to the Baldovan Institution remained his settlement so long as he should remain in the institution.*

On 15th July 1893 the Sheriff-substitute (Campbell Smith) pronounced this interlocutor:—"Finds that the child whose aliment is the subject-matter of the present action is a bastard and a congenital idiot, and that his settlement is the settlement of his mother: Finds that her settlement is the settlement of her husband, and that his settlement has been since 1st August 1891 in the parish of Coupar-Angus: . . . Finds that pursuer's contention is that after being lodged in Baldovan Institution, the said child's settlement became fixed upon Murroes, and incapable of following the settlement of the person from whom it was derived in respect of the provisions of 20 and 21 Vict. c. 71, sec. 75; but finds that the proved facts do not justify the application of said statute to said child in respect that there was no urgent or necessary cause for declaring him to be a lunatic beyond what had existed from his birth, and because the most probable and credible explanation of his being transferred to Baldovan was that his mother's husband was on the point of acquiring a residential settlement in pursuer's parish of Coupar-Angus: Finds that he had at or before 1st August 1891 acquired such a settlement, and that he has in law acquired said settlement both for his wife and her imbecile child: Therefore sustains pursuer's claim only up till 1st August 1891, as admitted by the defender before this action was raised. . . . *Quoad ultra* assoilzies the defender from the conclusions of the summons, with expenses."

On 2d November 1893 the Sheriff (Comrie Thomson), on appeal, adhered.

* The Lunacy (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), sec. 75, enacts,—"Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly; and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

Section 95 enacts,—"Every pauper lunatic to be detained under the powers of this Act shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated; provided always that under special circumstances it shall be lawful for the parochial board, with consent of the board, to dispense with the removal of any pauper lunatic to such asylum, and to provide for him in such other manner and under such regulations as to inspection and otherwise as shall be sanctioned by the board; and provided further that the provisions of this Act as to the requisite licence and order and returns or reports of the board shall be duly complied with."

The pursuer appealed, and argued ;—The present case was ruled by No. 109. *Palmer v. Russell*.¹ This child had been sent to the Baldovan Institution with the sanction of the Lunacy Board, and as the Baldovan Institution was licensed by the Board, the institution must be taken to be in the same position as the district asylum. The Board of Lunacy having sanctioned the admission of the child to the Baldovan Institution, it was nothing to the point to inquire into the propriety of such admission. Murroes therefore was liable.

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Argued for the defender ;—The case of *Palmer* did not apply. There was no district asylum in that case, here there was. If, however, *Palmer* was intended to lay down any general rule it ought to be reconsidered.² It was inconsistent with the general policy of the Scots poor-law of settlement, which was to keep the family together.

LORD JUSTICE-CLERK.—In this case it being beyond doubt that if the boy, the pauper lunatic, had been lodged in a district asylum the Act would have applied, and that the settlement which he now has would not have changed so long as he remained a lunatic and was detained in the district asylum, the question is whether that is changed by his not having been put into a district asylum, but into an institution which was considered by those who had power to adopt an alternative more suitable for him in the circumstances. In my opinion the principle of the case of *Palmer v. Russell*, December 1, 1871, 10 Macph. 185, applies clearly. In that case it is true that there was no district asylum for the parish in which the pauper lunatic had a settlement, and she was sent to another which was used for those lunatics who would in ordinary course be sent to a district asylum, but I think that the principle laid down there is applicable to this case, and settles that the placing of a pauper lunatic in an asylum which has been selected for him as the best place in the circumstances, instead of in the district asylum, is fulfilment of the statutory requirement. Then section 95 of the Act, taken along with section 75, confirms the view I have stated, because it indicates that some other asylum may, if the authority of the Lunacy Board be obtained, be substituted for a district asylum. That power being given, it seems to me to be a reasonable deduction that such confinement in a selected and authorised institution, is the same thing in legal effect as confinement in the district asylum would be.

If it was thought that the case of *Palmer* ought to be reviewed, we should require to send this case to a full bench, but that case was decided twenty-three years ago, and has been acted upon ever since, so that even if I did not agree with the result, I should not think it proper to throw doubt upon it. But I agree with the decision, and think that we should act upon it in this case.

LORD RUTHERFURD CLARK.—I am of the same opinion.

We are asked to reconsider the case of *Palmer*. I see no reason for doing so. It has stood unchallenged for nearly a quarter of a century, and I think that it must be taken to be a sound exposition of the law until it is reversed by a higher Court.

If we follow that case, there can be no doubt that if the lunatic had been sent to a district asylum the parish of settlement at the date of his admission would continue to be liable for his maintenance so long as the lunacy continued.

¹ *Palmer v. Russell*, Dec. 1, 1871, 10 Macph. 185, 44 Scot. Jur. 110.

² *Milne v. Henderson and Smith*, Dec. 3, 1879, 7 R. 317.

No. 109. But it is said that that consequence does not follow, because he was not sent to a district but to a private asylum called the Baldovan Asylum. He was sent to it with the sanction of the Lunacy Board. In these circumstances, I think that we follow the case of *Palmer* in holding that the Baldovan Asylum is to be taken as an equivalent for the district asylum.

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By the 95th section of the Act it is directed "that every pauper lunatic detained under the powers of the Act shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated." But there is a dispensing power. The parochial board may, with consent of the Lunacy Board, dispense with the removal of the pauper to a district asylum, and provide for him in such other manner as shall be sanctioned by the Lunacy Board. When they exercise that power they are creating an equivalent for the district asylum. To use the words of the Lord President,—“One place of confinement is substituted for another by legal authority, and the same effects will follow.” The words “district asylum” as they occur in the 75th section must be read in connection with the dispensing power, and construed to include any place which shall be substituted by the exercise of that power, otherwise the exercise of the power would affect the liability of parishes, and there is no ground for thinking that the Legislature had any such purpose. The reasons for the rule introduced by the 75th section apply with equal force whether the lunatic be detained in a district asylum or in any substituted place.

LORD TRAYNER.—I agree. Lord Rutherford Clark has expressed the views I hold so exactly that I have nothing to add to what his Lordship has said.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—“Recall the interlocutor appealed against: Find in fact that the parish of Murroes was the parish of settlement of the husband of Marjory Stewart or Thow, the mother of the illegitimate imbecile child at the time when the said child was, with the sanction of the Board of Lunacy, first sent to the Baldovan Institution, an establishment duly licensed for the reception of imbecile children: Find in law that in virtue of the 75th section of the Act 20 and 21 Vict. cap. 71, the parish of Murroes is liable for the expenses of maintaining the said child during the whole period of his confinement as a lunatic: Decern against the defender as inspector of the said parish of Murroes for the sum of £28, 17s. 11d. with interest as concluded for.”

BOYD, JAMESON, & KELLY, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 110. WILLIAM BLACKWOOD AND OTHERS (Mitchell's Marriage-Contract Trustees), Complainers (Respondents).—*Clyde*.
Feb. 27, 1894. ANDREW ALEXANDER GLADSTONE, Respondent (Reclaimant).—*Dickson*—*A. O. M. Mackenzie*.

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Sale—Delivery—Possession—Marriage-contract—Conveyance to marriage-contract trustees retenta possessione.—In December 1883 M's estates were sequestrated, but before a trustee had been appointed a deed of arrangement was executed between M and his creditors and B. By this deed M assigned his furniture to B in consideration of payment of a sum exceeding its value by way of composition to the creditors. B thereafter assigned the furniture to the trustees under M's antenuptial marriage-contract for behoof of M's wife in liferent, and

of the children of the marriage in fee, M's *jus mariti* being excluded. The furniture was allowed to remain in the house then occupied by M and his wife, which belonged to the trustees, and on the spouses removing to another house in 1884 the furniture was taken with them. In 1890 M sold the furniture to G, and G let the furniture on hire to M. The furniture remained with M and his wife. In an action by the marriage-contract trustees to have G interdicted from removing the furniture, *held* (*aff. judgment of Lord Kyllachy*) that the right to the furniture was in the trustees, in respect that since the date of the assignation in their favour M's wife had been in actual possession of it as life-rentrix, and that the trustees had accordingly been in civil possession through her, and that G therefore had no title to it, and interdict *granted*.

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THIS was a note of suspension and interdict at the instance of the marriage-contract trustees of Mr and Mrs T. Sawers Mitchell to have Andrew Alexander Gladstone interdicted from removing certain furniture from the house 17 Dalhousie Terrace, occupied by Mr and Mrs Mitchell.

1ST DIVISION.
 Ld. Kyllachy.

Mr T. Sawers Mitchell was sequestrated in 1883, but before a trustee was appointed a deed of arrangement under sec. 38 of the Bankruptcy Act, 1856, was entered into between him, his creditors, and Mr Blackwood, his father-in-law, by which, *inter alia*, Mr Mitchell assigned and made over to Mr Blackwood all the household furniture in No. 24 Merchiston Park, where he was then living, and Mr Blackwood undertook to pay his creditors a composition of 1s. 6d. in the pound. The deed of arrangement was subsequently approved by the Sheriff, and the sequestration declared at an end in January 1884.

Mr Blackwood thereafter executed a deed of assignation dated January and May 1884, whereby he assigned and made over the furniture to the trustees under the antenuptial contract of marriage of Mr and Mrs Mitchell (dated 1871), declaring that the trustees were to hold it for behoof of Mrs Mitchell, "and exclusive of the *jus mariti* and right of administration of her husband, . . . which *jus mariti* and right of administration are hereby renounced by him accordingly, but that only in liferent, for the liferent use of the said Mrs Mitchell, and for behoof of her children, or such of them as she may prefer thereto by any writing under her hand, in fee, with power to the second parties to sell the same and apply the proceeds in like manner."

The transaction was not accompanied by any removal of the furniture from the house 24 Merchiston Park, which belonged to the marriage-contract trustees. At Whitsunday 1884, that house having been sold, Mr and Mrs Mitchell removed to 17 Dalhousie Terrace, taking the furniture with them. This house was subsequently acquired by the trustees in May 1891. On 11th July 1890 Mr Mitchell sold the furniture to the respondent Mr Gladstone at the price of £130, granting him an assignation thereof; and on the same date Mr Mitchell hired the furniture from the respondent at the rate of £10 for every three months, payable in advance. Mr Mitchell having fallen into arrears with the payment of the hire the respondent raised an action against him for delivery of the furniture, and on 29th July 1892 obtained a decree from the Sheriff.

The marriage-contract trustees then raised the present suspension and interdict on 12th August 1892.

The respondent, *inter alia*, averred;—"No delivery to the complainers followed upon said pretended assignation, and Mr Mitchell continued actual, and ostensible, and reputed owner of the furniture, . . . From Whitsunday 1883 to Whitsunday 1884 the said Mr Mitchell had possession of said furniture in a house in Merchiston Park, Edinburgh, of which he was tenant; and since Whitsunday 1884 he has had possession of said furniture in a house in Dalhousie Terrace, of which he has all along been, and still is, tenant."

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The complainers pleaded ;—(1) The complainers are entitled to interdict as craved, in respect that the furniture in question is their property, and that the respondent unwarrantably asserts right thereto.

The respondent pleaded ;—(3) The articles mentioned in the prayer of the note having been the property of the said Thomas Sawers Mitchell, and the property therein having never effectually passed to the said William Blackwood, or to the other complainers, the complainers have no right thereto in competition with the respondent, a *bona fide* purchaser from Mr Mitchell.

On 1st June 1893 the Lord Ordinary (Kyllachy) granted interdict.*

* "OPINION.—The question in this case is whether certain furniture, which formerly belonged to Mr T. S. Mitchell, and still remains in the house occupied by him and his wife and family, belongs to the complainers, the marriage-contract trustees of Mr and Mrs Mitchell, or, on the other hand, to the respondent Mr Gladstone. The marriage trustees claim the furniture as having become their property under a certain transaction which took place when Mr Mitchell became bankrupt in the year 1884. Mr Gladstone claims it as having been sold, and constructively delivered, to him by Mr Mitchell in the year 1890.

"The facts which are, I think, sufficiently admitted or instructed by documents, appear to be these :—Mr Mitchell was sequestrated in 1884, but, before a trustee was appointed a deed of arrangement, under the 38th section of the statute, was entered into between him and his creditors, and his father-in-law, Mr Blackwood. By that deed of arrangement, which appears to have been duly carried through, the furniture in question was transferred to Mr Blackwood, on payment by him of a sum exceeding its value, in the shape of a composition of 1s. 6d. per pound paid to the creditors. Mr Blackwood thereupon executed a deed, whereby he transferred the furniture to the complainers, the marriage-contract trustees of his daughter (the bankrupt's wife), to be held by them for her in liferent and her children in fee. The transaction was not accompanied by any removal of the furniture, but the house in which it remained, and which continued to be occupied by the bankrupt and his family, was the property of the marriage-contract trustees, and that house having been sold, the furniture was subsequently removed to another house, also belonging to the trustees, and also occupied by the bankrupt and his family. And in this house it has since remained.

"In 1890 Mr Mitchell, having got into difficulties, appears to have borrowed, or at least obtained, £130 from the respondent, Mr Gladstone, and, by deeds passing between them, Mr Mitchell sold to the respondent the furniture in question, at the price of £130, and, on the other hand, the respondent hired the furniture to Mr Mitchell, at the hire of £10 per quarter. This hire having of late fallen into arrear, the respondent has taken proceedings to obtain delivery of the furniture, and the present note of suspension and interdict has been presented by the marriage-contract trustees, in order to assert what they allege to be their prior right.

"Upon these facts, which as I have said are, I think, not in controversy, I am of opinion that the complainers' title is preferable. I do not, I confess, see how, either at common law or under the Mercantile Law Amendment Act, the respondent can plead successfully that he has any better title than the complainers. If the complainers have only a *jus ad rem*, I do not at present see how the respondent is in a better position, and, as between two personal titles, the prior title is preferable.

"But I am disposed to be of opinion that the complainers are proprietors of the furniture, and that although no actual delivery took place in 1884, there was yet such a change of possession as was tantamount to delivery. In other words, I think that, in pursuance of the deed of arrangement, Mr Mitchell ceased in law to possess the furniture, and that the possession as well as the right has since been with the complainers, who have possessed directly as

The respondent reclaimed, and argued;—Delivery was necessary to transfer the property of moveables.¹ But constructive delivery was

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owners of the house, and indirectly through their beneficiaries, the wife and children.

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"Had Mr Mitchell's sequestration proceeded to the appointment of a trustee, there could, I think, have been no doubt as to his divestiture. The act and warrant of the trustee would under the statute have operated as delivery of the furniture, and the complainers, as taking through the trustee, must, I suppose, have had the benefit of that delivery. It is not, however, so clear whether mere sequestration had the same effect. Sequestration is only equivalent to a completed poinding, and the complainers' right is probably therefore no higher than if they had acquired under (*e.g.*) a sale by a poinding creditor. In such circumstances it may perhaps be doubted whether the bankrupt was divested by the mere force of the diligence. I prefer therefore to take the case just as if the complainer had bought for a fair price from the bankrupt himself, he selling with consent of his creditors, and under circumstances which established beyond doubt the truth and *bona fides* of the transaction. Or, to simplify the case still further, I prefer to consider it as if the deed of arrangement had been made directly with the bankrupt's wife and children, who, having separate funds, and owning the house in which they all lived, had acquired the furniture at a fair price duly paid to the bankrupt's creditors.

"Now, I do not stop to consider what would have been the effect of such a transaction under the Mercantile Law Amendment Act. I do not at all doubt that the deed of arrangement embodied what was in effect a sale. But it may perhaps be doubted whether the Mercantile Law Amendment Act protects a purchaser, not merely against the diligence of the seller's creditors, but against the acts of the seller selling to a second purchaser and giving delivery. In my view, the common law is here sufficient for the complainers' case.

"It will not, I suppose, be disputed that if two persons jointly occupy the same house, the furniture of which belongs to one of them, such furniture may be effectually transferred by the one occupant to the other, and may be so without any overt change in the use which they respectively make of it. The contract being clear and unreserved, the legal possession in such a case necessarily follows the title, and is held to pass to the purchaser, who obtains all the possession of which the circumstances admit. So far as the seller retains any natural possession, he does so not as proprietor but on a new and subordinate title, which may either be hire or gratuitous use, or whatever else the parties arrange. It is perhaps superfluous to quote authorities, but *Macdougall v. White-law*, 2 D. 500, and *Fyfe v. Woodman*, 4 D. 255, both recognise the above principle as applied in the one case as between a sister and brother and in the other as between a father and daughters. Nor is the case of *Anderson v. Buchanan*, 11 D. 270 (supposing it to be still authoritative), at all to the contrary. In fact both the decisions I have referred to were there accepted as good law.

"But if the parties stand in the relation of husband and wife, or if the transaction takes place between the husband on the one hand, and his wife and children, or trustees for his wife and children, on the other, does it make any difference? No doubt the truth and good faith of the transaction must in such a case be more jealously scrutinised, but if that be established beyond doubt, and if the wife and children have separate estate, or if the price is paid by friends or relations on their behalf, I know of no disability which attaches in such matters to either wife or children. They buy the furniture and pay for it. They obtain all the possession of which the circumstances admit. In the present case the house is already theirs. They are now the owners both of the house and furniture, and the husband is no longer in possession of the furniture any more than he previously was in possession of the house.

"Had the complainers, the marriage-contract trustees, acquired not for the

¹ Erskine Inst. ii. 1, 18; Distillers Co. v. Russell's Trustee, Feb. 9, 1889, 16 R. 479, Lord President, 486.

No. 110. sufficient, even though the seller continued in possession of the subjects, if his right to possession depended on a new and subordinate title acquired from the purchaser under a known contract, *e.g.*, lease.¹ The subjects in question had therefore been effectually transferred to the reclaimer. The prior transaction with the marriage-contract trustees had not divested Mitchell of the property, for the assignation to them had not been followed by delivery. They were not entitled to found on constructive possession through Mrs Mitchell, for the doctrine of *Orr's Trustee v. Tullis*¹ had not been extended to cases of husband and wife.² It made no difference that the transfer was to marriage-contract trustees.³ *Hewat's* case³ was not distinguishable from the present. The note should therefore be refused.

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The complainers argued;—The effect of the deed of arrangement and subsequent assignation in 1884 to the complainers was to completely divest Mitchell of all right of property in the furniture, so that he had nothing to transfer to the respondent in 1890. They had possession of the furniture, for it was in a house belonging to them, and they had had the only use of it which it was possible for them to have, that, namely, through the wife. Her use depended in no way upon her husband's right, but was attributable solely to the trustees' title. If, under the assignation, the trustees had held for Mitchell in *liferent*, then his continued possession would have been on a new and subordinate title, and the cases relied on by the reclaimer would have applied directly in favour of the complainers.⁴ It could make no difference that they held for the wife. The case of husband and wife was not different from relatives living together, and in the case of the latter it had been held that a transfer of the furniture of the house in which they resided was effectual.⁵ All that it was necessary to shew was that the transaction was *bona fide*. The case of *Hewat's Trustees*⁶ was merely an example of the rule that a conveyance

wife and children exclusively, but for the husband in *liferent* and the wife and children in fee, it could not, I suppose, have been said that the position of the latter was more favourable. In certain views it might be thought to be less so. But can it be doubted, on the authorities, that in that case there would have been a sufficient change of possession? The husband would in that case have been still in possession, but it would have been possession on a new and limited title, and according to the case of *Orr v. Tullis* that is enough. Indeed that this is so is necessarily conceded by the respondent, because his own title, at least so far as rested at common law, is necessarily dependent on the doctrine that delivery is not necessary when the seller continues to possess under a contract of hire or other new title of possession.

"On the whole therefore I am of opinion that the complainers are here entitled to interdict in terms of their prayer, and I see no reason why the complainers should not have their expenses."

¹ *Orr's Trustee v. Tullis*, July 2, 1870, 8 Macph. 936, Lord Justice-Clerk, 946, 42 Scot. Jur. 566; *Robertsons v. M'Intyre*, March 17, 1882, 9 R. 772; *Darling v. Wilson's Trustee*, Dec. 16, 1887, 15 R. 180.

² *M'Laren on Wills*, i. 418; *Campbell v. Stewart*, June 13, 1848, 10 D. 1280, 20 Scot. Jur. 428; *Brown v. Brown's Trustee*, Dec. 19, 1850, 13 D. 373, 23 Scot. Jur. 176; *Shearer v. Christie*, Nov. 18, 1842, 5 D. 132, 15 Scot. Jur. 19; *cf.* *Edmond v. Mowat*, Nov. 4, 1868, 7 Macph. 59, 41 Scot. Jur. 32.

³ *Hewat's Trustees v. Smith*, Jan. 27, 1892, 19 R. 403.

⁴ Cases in note 1, *supra*, also *Liddell's Trustee v. Warr & Company*, July 18, 1893, 20 R. 989; *Scott's Trustee v. Scotts*, Feb. 20, 1889, 16 R. 507.

⁵ *Macdougall v. Whitelaw*, Jan. 29, 1840, 2 D. 500; *Fyfe v. Woodman*, Dec 14, 1841, 4 D. 255.

⁶ *Supra*, note 3.

of moveables by a husband to his wife *retenta possessione* would not give her a preference over his creditors. No. 110.

At advising.—

Feb. 27, 1894.
Mitchell's
Trustees v.
Gladstone.

LORD ADAM.—In this case the complainers, who are the marriage-contract trustees of Mr and Mrs Mitchell, seek to have the respondent interdicted from removing certain articles of furniture from the house 17 Dalhousie Terrace, presently occupied by Mr Mitchell.

Both parties claim to be proprietors of the furniture, and both claim to derive right to it from Mr Mitchell, to whom it formerly belonged.

The material facts of the case appear to be these: Mr Mitchell was sequestrated in 1883, but proceedings were taken under the 38th section of the Bankruptcy Act, and the sequestration put an end to by a deed of arrangement approved of by the Sheriff.

By this deed of arrangement, which is dated in December 1883, and which is entered into between Mr Mitchell, of the first part, Mr Blackwood, Mr Mitchell's father-in-law, of the second part, and certain creditors of Mr Mitchell, of the third part, Mr Mitchell assigned to Mr Blackwood, *inter alia*, the furniture in question, and, in consideration of this assignation, Mr Blackwood bound himself to pay a composition on the debts owing to Mr Mitchell's creditors.

This deed was followed by a second deed, dated in January and May 1884, entered into between Mr Blackwood, of the first part, the complainers, as trustees under the marriage-contract of Mr and Mrs Mitchell, of the second part, and Mr Mitchell, of the third part, by which, on the narrative of the sequestration and deed of arrangement, Mr Blackwood assigned to and in favour of the complainers the furniture in question, to be held by them for behoof of Mrs Mitchell, exclusive of the *jus mariti* and right of administration of her husband, but for her liferent use only, and for behoof of her children in fee; and, in consideration of this assignation, the complainers discharged Mr Blackwood of all claims competent to them under the deed of arrangement.

I cannot doubt that this was a perfectly *bona fide* transaction, and that, by the first of these deeds Mr Blackwood purchased the furniture from Mr Mitchell and his creditors, and that by the second deed he validly assigned it to the marriage-contract trustees to be held by them for behoof of Mrs Mitchell in liferent and her children in fee.

At the date of the sale the furniture was in a house in Merchiston Park, which was occupied by Mr Mitchell and his wife and family. At Whitsunday 1884 they removed to a house in Dalhousie Terrace, taking the furniture with them, and they are still in occupation of that house. The respondent alleges that Mr Mitchell was tenant of these houses, and, for the purposes of this case, I assume that he was so.

The complainers purchased the house in Dalhousie Terrace in May 1891, but prior to that date Mr Mitchell sold, or professed to sell, the furniture to the respondent for the sum of £130, conform to assignation in his favour, dated 11th July 1890. By letter of hire, of the same date, Mr Mitchell hired the furniture from the respondent for one year certain, at the rate of £10 for each three months, payable in advance.

It is on these two documents, followed, as he alleges, by the possession of the furniture by Mr Mitchell, as having hired it from him, that the respondent claims right to it, and he denies the complainers' right to it, on the ground that they had never received delivery of it from Mr Mitchell, but that it had

No. 110. remained all along in his possession, and was still in his possession, when he, the respondent, acquired it.

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It is true that the furniture, at the time of the sale to Mr Blackwood and the complainers, was in possession of Mr Mitchell, and that the complainers never received actual delivery of it from him; nevertheless, I am of opinion, with the Lord Ordinary, that they have acquired the full right of property therein.

I think that the case is ruled by the principles laid down in the case of *Orr's Trustee v. Tullis*, 8 Macph. 936, and followed in the subsequent cases of *Robertsons v. McIntyre*, 9 R. 772, and *Darling v. Wilson's Trustees*, 5 R. 180.

In the case of *Orr's Trustee* the articles sold were in possession of the seller at the time of the sale. The seller continued in the uninterrupted natural possession of them, having hired them from the purchaser. There was no actual delivery of them to the purchaser. The articles sold were subsequently claimed by the creditors of the seller, but the Court held that the seller was not in possession under his original title of owner, but under his subsidiary title of hirer, that consequently the purchaser was in constructive possession of them through him, and that that was sufficient to confer the complete right of property on the purchaser, although there had been no actual delivery.

The Lord Justice-Clerk said, in giving judgment,—“It is not correct to say that some corporeal act, some change in the actual situation or custody of moveables sold, is necessary to pass the property. That is only true where possession has not been obtained by the purchaser. That is manifestly not true when possession has been attained.” Then, after giving some illustrations of this, he goes on to say,—“But what shall be said if the seller in parting with the ownership himself acquires a subordinate title of possession. Shall his continued possession be ascribed to his former ownership, or to his new title? Although this is not a new question, I have found it difficult, and, so far as I know, it has hitherto been undecided in Scotland.” “There is a clear distinction,” he says, “between cases in which possession is simply continued by the seller, and those in which a new title of possession, specific and determinate, with known rights and limits, is acquired by him.” “It may be true that in the case of goods sold, remaining in the custody of the seller, there is a presumption of simulation raised against any inferior title flowing from the buyer, which he may pretend. But this presumption will be stronger or weaker according to circumstances, and if the good faith of the transaction is clearly proved will altogether disappear. In such a case the question of possession must be judged according to the legal title of the parties.”

Now, applying these principles to the facts of the present case, it is clear that there was no simulation or want of good faith in the transaction with which we have to deal, and that the result is that, when Mr Mitchell sold the furniture to the respondent, he was not in possession of it under his original title of owner, and in fact was not in possession of it at all. The facts are that Mrs Mitchell was entitled to the liferent of the furniture, that the complainers were bound to give her the possession and use of it, and that they did so. Her husband's *jus mariti* and right of administration with respect to it were excluded, and any use or control he had of it arose from the fact that he was living with and occupying the same house as his wife.

I accordingly think that Mrs Mitchell has been in the actual possession of the furniture throughout, that she has had that possession not as owner, but from the complainers under the specific and determinate subsidiary title of life-

rentrix of the furniture; that the complainers have been all along in the civil possession of the furniture through Mrs Mitchell, and that that was sufficient to give them the *plenum dominium* of it. It follows that when Mr Mitchell professed to sell the furniture to the respondent, he could give him no title to it.

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On these grounds, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN.—I wish only to add that I think this case is solved by the application of the same principle as has been given effect to in the case of *Mitchell v. Heys & Sons* (*infra*, p. 600), viz., that the possessor of moveable property can in general give no higher right to an assignee than he has himself acquired from the true owner. The house of Mr Mitchell was not a market for sale, and the fact that Mrs Mitchell allowed her husband the joint use of the furniture for domestic purposes did not entitle the reclamer, Gladstone, to assume in a question with Mrs Mitchell, either that the property was her husband's, or that he had a power of sale. It would be otherwise if Mr Mitchell had been a furniture dealer, and his wife's furniture had been put into his shop and apparently exposed for sale.

LORD KINNEAR and the LORD PRESIDENT concurred.

THE COURT refused the reclaiming note, and of new interdicted, &c.

MITCHELL & BAXTER, W.S.—ROBERT BROATCH, L.A.—Agents.

ROBERT PHILIP WOOD AND ANOTHER (Marriage-Contract Trustees of Mr and Mrs Bruce), Pursuers and Nominal Raisers.

JAMES WYLLIE GUILD (Bruce's Trustee), Real Raiser and Claimant (Reclamer).—*Dickson—Moffat.*

ROBERT PHILIP WOOD AND ANOTHER (Marriage-Contract Trustees of Mr and Mrs Bruce), Claimants (Respondents).—*Mackay—*

J. H. Stevenson.

MRS ROBERTA CADELL OR BRUCE, Claimant.—*Johnston—Kermack.*

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Bruce's Trustees v. Bruce's Trustee.

Marriage-contract—Husband and Wife—Jus mariti—Trust.—By antenuptial marriage-contract executed in 1855 a wife conveyed the whole funds payable to her under her father's settlement to trustees for the purpose, *inter alia*, that the revenue of £5000 (being the portion of the funds available at the date of the contract) should be paid to herself exclusive of the *jus mariti* and right of administration of her husband, the clear revenue of the remainder to be held for the joint behoof of the spouses and paid to them on their joint receipt. The husband expressly renounced his *jus mariti* and right of administration, in so far as the capital of the whole funds and the revenue of the £5000 were concerned, but the deed was silent as to the husband's rights with respect to the revenue of the remainder of the funds. *Held* that the husband's *jus mariti* and right of administration did not affect funds conveyed to the trustees by the antenuptial contract of marriage or the revenue thereof.

Husband and Wife—Marriage-contract—Joint estate—Revenue to be held for joint behoof and paid on joint receipt of spouses—Spouses living separate—Husband's sequestration.—An antenuptial marriage-contract contained a direction that a certain fund was to be held by trustees "for the joint behoof of the spouses, and paid to them on their joint receipt." Under an arrangement between the husband and wife, the trustees for some time paid over one-half of the income to each, but the husband's estate having been sequestrated, they refused to make any payments except on the joint receipt of the wife and the husband or his trus-

No. 111. *tee. Held that the wife and the husband's trustee were entitled each to receive payment of one-half.*

Feb. 27, 1894.
Bruce's Trustees v. Bruce's Trustee.

1st DIVISION.
Ld Stormonth-Darling.

By antenuptial contract of marriage, dated 26th July 1855, entered into between George Cadell Bruce and Miss Roberta Cadell, the latter conveyed to trustees her whole share of the residue of her father's estate (which ultimately amounted to about £10,000), with the exception of £1000, which she assigned directly to Mr Bruce. In particular, she conveyed the sum of £5000, being, with the sum of £1000, the portion of that estate available at the date of the contract. This estate the trustees were directed to hold for, *inter alia*, the following purpose,—“First, that during the joint lives of the said intended spouses the clear revenue of £5000 of the trust funds is to be paid to the said Roberta Cadell, exclusive of the *jus mariti* and power of administration of the said George Cadell Bruce, for whose debts and deeds, and to whose control the same shall not in any way be liable or answerable, and the clear revenue of the remainder of the trust funds is to be held for the joint behoof of the spouses, and paid to them on their joint receipt.” The deed also contained a declaration, “that the means and estate above conveyed by the said Roberta Cadell, as aforesaid, in so far as the capital of the trust funds and estate is concerned, and the revenue of the £5000 thereof specially before mentioned, are and shall be exclusive of the *jus mariti* or right of administration of the said George Cadell Bruce, her promised spouse, and the same shall not be affectable by his debts or deeds, legal or voluntary, nor by the diligence of his creditors.” In an earlier part of the deed, Mr Bruce did “herely renounce, discharge, and overgive his *jus mariti*, power of administration, and every other right and claim which he as husband of the said Roberta Cadell might have to the funds and effects and means and estate hereinafter conveyed in trust, and that in so far as the capital of the funds and estate is concerned, and the revenue of £5000 thereof specially after mentioned; declaring that the same shall not be affectable by his debts or deeds, legal or voluntary, nor by the diligence of his creditors.”

After 1876 the spouses lived separate. In 1877 the marriage-contract trustees, with the acquiescence of Mr and Mrs Bruce, divided the part of the free revenue of the trust funds which under the deed was directed “to be held for the joint behoof of the spouses and paid to them on their joint receipt” into two equal shares and paid one half to Mr Bruce and the other half to Mrs Bruce on their separate receipts.

Mr Bruce's estates were sequestrated on 2d November 1880, and James Wyllie Guild, chartered accountant in Glasgow, was appointed trustee thereon.

After Mr Bruce's sequestration the trustees continued to pay to Mrs Bruce the one half of the income. The other half they retained in their own hands, paying thereout the interest due by Mr Bruce on a heritable bond, and also certain premiums of insurance on his life. The balance was accumulated from year to year.

This system of division, which had been intimated to Mr Wyllie Guild, was continued down to 1891 without challenge on his part, but in June of that year he took exception to it and claimed that the whole current income, as well as the accumulations, should be paid to him. The trustees accordingly retained the whole of the income in question in their own hands.

On 26th February 1892 an action of multiplepoinding was brought by Mr Wyllie Guild in the name of the marriage-contract trustees as pursuers and nominal raisers against himself and others, including Mr Bruce, as defenders, for the purpose of determining the rights of parties “to the clear revenue of the remainder of the trust funds” in the hands of the

marriage-contract trustees after setting apart the clear revenue of the £5000. The fund *in medio*, after a dispute as to the amount thereof had been decided, consisted (1) of the accumulations of income in the hands of the trustees up to Whitsunday 1891; and (2) of the whole income accruing between that term and Martinmas 1891.

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Claims were lodged by Mr Wyllie Guild, as trustee in Mr Bruce's sequestration, and by the marriage-contract trustees.

Mr Wyllie Guild averred, *inter alia*,—"The *jus mariti* of the said George Cadell Bruce was not excluded as regards the fund *in medio*. Mrs Bruce refuses to sign a joint receipt."

He claimed "the whole fund *in medio*; or, otherwise, the whole fund *in medio* so far as representing accumulations of income up to Whitsunday 1891, and one-half of the fund *in medio* so far as representing income accrued subsequent to said term."

The marriage-contract trustees averred,—"The *jus mariti* of the said George Cadell Bruce does not affect that part of the fund *in medio* which consists of revenue accrued on the said remainder of the trust funds during the half year ending at Martinmas 1891. The claimants are not liable to be called upon to pay the revenue of the said remainder of the trust funds except on production of a joint receipt for the same, signed by Mrs and Mr Bruce, or by Mrs Bruce and the real raiser in Mr Bruce's right."

They claimed the revenue which had accrued during the half year ending at Martinmas 1891, or otherwise one-half of the revenue accrued during the said half year.

On 1st March 1893 the Lord Ordinary (Stormonth-Darling) pronounced the following interlocutor:—"Ranks and prefers the claimant James Wyllie Guild as trustee on the sequestrated estates of George Cadell Bruce to the fund *in medio*, in terms of his claim, in so far as representing accumulations of income up to Whitsunday 1891: *Quoad ultra* repels the said claim of the claimant James Wyllie Guild: Ranks and prefers the claimants Robert Philip Wood and George Miller Cunningham as the surviving and accepting trustees on the antenuptial contract of Mr and Mrs Bruce, in terms of the first alternative of their claim, and deems: Finds the said claimant George Cadell Bruce liable to the said claimants Robert Philip Wood and George Miller Cunningham in expenses in the competition."*

* "OPINION.—This is a question which turns on the construction of the antenuptial marriage-contract between Mr and Mrs George Cadell Bruce, dated 26th July 1855.

"The lady had a fortune, derived from her father, which turned out to be of the value of about £10,000. Of this she reserved £1000, which went absolutely to her husband. All the rest she conveyed to trustees, subject to a declaration that the whole capital and the revenue of £5000 thereof should be exclusive of the *jus mariti* and right of administration, and not affectable by the debts or deeds of her intended husband, nor by the diligence of his creditors. Only £6000 was payable at the date of the contract, which explains the special reference to the sum of £5000. As regards the income of that sum, the trustees were to pay it to the wife, exclusive of the husband's rights, and the clear revenue of the remainder was to be held by the trustees for the joint behoof of the spouses, and to be paid to them on their joint receipt. It is with regard to this portion of the income that the present question arises.

"Since 1876 the spouses have lived separate. In 1877 the marriage-contract trustees, acting on the advice of counsel, and with the acquiescence of Mr and Mrs Bruce, divided this portion of the income into two equal shares, and paid one half to Mr Bruce and the other half to Mrs Bruce on their separate receipts. Mr Bruce was sequestrated on 2d November 1880, and the sequestration still

No. 111. The trustee on Mr Bruce's estate reclaimed.

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After parties had been partly heard on the reclaiming note a con-

sults. The system of division adopted in 1877 continued without challenge on the part of the trustee in the sequestration down to the summer of 1891. I formerly decided, in a question as to the amount of the fund *in medio*, that the trustees were not bound to bring into the fund the amount of revenue which they had paid to Mrs Bruce under the arrangement of 1877, down to the raising of the present action. But I have now to decide the much more difficult question—what are the rights of the parties under the contract, apart from any arrangement.

"The trustee in the sequestration claims the whole of the revenue which has accrued on this portion of the trust-estate at and since Martinmas 1891, on the ground that it falls under the *jus mariti*. He says, with force, that the right attaches to all property of the wife from which it is not distinctly excluded, and that the precision with which it is excluded from the income of the £5000 and from the capital of the whole shews clearly that it was not intended to be excluded from this portion of the income. He also says that property settled by marriage-contract belongs either to the husband or the wife; that there is no such thing as a joint right of property between spouses; and that, as the money is not claimed as separate estate of the wife it must be the property of the husband.

"The marriage-contract trustees, on the other hand, claim to hold this portion of the revenue until a joint receipt is presented to them in terms of the contract. I have come to be of opinion that their claim ought to be sustained.

"I have endeavoured (I hope with success) not to allow myself to be influenced by some observations which I made in deciding the former question, and which probably went further than was necessary for the decision of the point then before me. The present question is solely one of interpretation of the contract; there is not much light to be derived from decided cases, and I own that I have found the question difficult.

"The *jus mariti* is a right of comprehensive and stringent application, but the law has developed very considerably with respect to it, and all in the direction of relaxing its stringency. Thus, in Lord Stair's time, it was thought that it could not be renounced or excluded at all. Then it was thought that, at all events, express words of exclusion were necessary. But now it is settled, not only that the right may be excluded, but that the exclusion may be implied if the implication be clear. Indeed the right itself rests to some extent on implication, that is to say, on the legal fiction of an assignation constituted by marriage. Where, therefore, the alleged exclusion is contained in an antenuptial contract, all that sound principle requires is that the wife shall be shewn to have thereby dealt with her property in a way inconsistent with the assignation which the law would otherwise imply. To quote Lord Mackenzie's words in the case of *Rollo v. Ramsay*, 11 S. 134,—'The legal assignation of the wife's moveable fortune by marriage to the husband never can be suffered to have existed at all, in contradiction to a conveyance contained in the antenuptial contract on which the marriage proceeds.'

"What, then, is the effect of the contract here? It excludes the *jus mariti* from the capital of the wife's whole fortune, and if it had stopped there, probably that would have been held to imply an exclusion from the income also—*Robertson*, 13 S. 442; *Hutchison*, 4 D. 1399. The deed goes on, however, to deal specially with the income of the sum of £5000, which is excluded from the husband's rights just as carefully as the capital. With regard to the income in question here, a different provision is made. Nothing is said about the *jus mariti*, but it is to be held by the trustees for the joint behoof of the spouses, and to be paid to them on their joint receipt. Probably the intention was that the money should be used for household expenses; and, possibly, that the husband's right of administration should not be excluded. But if it were to be held that a provision of this kind let in the operation of the *jus mariti* it would follow that the husband could demand payment on his own receipt,

descendence and claim was lodged for Mrs Bruce, in which she alleged that since 1876 Mr Bruce had contributed nothing to her support, and she claimed (1) the whole fund *in medio*, and alternatively either (2) the revenue accruing during the half year ending at Whitsunday 1891, or (3) one-half thereof. Mr James Wyllie Guild having died, Mr William Auld Guild was appointed trustee on Mr Bruce's estate. No. 111.
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Argued for the trustee;—There was no exclusion in terms of the *jus mariti quoad* this part of the income of the estate, and the fact that that right was distinctly and expressly excluded from the income of the £5000, as well as from the whole capital, shewed very clearly that it was not intended to be so excluded. The *jus mariti* was a right very strongly founded in law, and according to the older cases¹ could only be excluded by direct and explicit words; and although it had been more recently held that there might be implied exclusion, the implication must be undoubted. The expressions used here did not warrant such an inference. It could not be maintained that the fund was intended to be an alimentary provision to the wife, for she already had the revenue of the £5000 secured to her. No doubt the income in question was only to be paid over on a joint receipt. That might in the ordinary case have indicated a joint right, but in the case of husband and wife such a right could not exist. The interest of the wife would pass *jure mariti* to her husband. In any event the Lord Ordinary's judgment could not stand, for that would produce a deadlock, and defeat the purposes of the trust. The trustee was entitled, therefore, to payment, if not of the whole at anyrate of one-half of the fund. The trustees as such had no right or interest to oppose the claimant.

Argued for the marriage-contract trustees;—These defenders as holders of the fund were bound to protect it against anyone who did not shew a good title to it. That was the case with Mr Bruce's trustee, who founded

because, the money being his, he would be entitled to get it, and he could not compel his wife to sign the receipt. Therefore I apply to this provision Lord Mackenzie's language in *Black v. Pearson*, 3 D. 504 (at p. 511),—‘If the husband's *jus mariti* is to apply to these funds, every word of that conveyance is contradicted.’ That is to say, the words of a solemn contract to which the husband was a party, and made when the parties were perfectly free to contract, must be held *pro non scriptis*. It seems to me that any result is to be preferred to that.

“Counsel for the trustee in the sequestration argued that, even if the income had been directed to be paid to the wife on her own receipt, the *jus mariti* would have attached. I cannot assent to that view, because I think the whole question, whether under a marriage-contract or under the will of a stranger, is one of intention. Such a construction would be opposed to the cases of *Hunter v. Smith* in 1793, and *Stables v. Murray* in 1789, reported in *Fraser on Husband and Wife*, vol. i. pp. 786-7. The trustee in the sequestration cannot in my opinion succeed unless he shews that holding for joint behoof and payment on joint receipt are consistent with and equivalent to an absolute right of property in the husband.

“It is urged against the claim of the marriage-contract trustees that it brings about a deadlock. But I understand that it is the husband's trustee, and not the wife, who is causing the deadlock, by declining to continue the arrangement for a division of the income into two equal parts. With that, of course, I have nothing directly to do. The short, and as I have come to think the sufficient solution of the question, is to hold that, whatever may be the result, the marriage-contract trustees are entitled to demand a joint receipt, and are not bound to pay until such a receipt is presented to them.”

¹ *Cuthbertson v. Pollok*, 1799, Hume's Dec. 206; *cf. Smith v. Frier*, Feb. 7, 1857, 19 D. 384, Lord Curriehill, 393, 29 Scot. Jur. 178.

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entirely on the *jus mariti*. That right might be excluded by implication,¹ and it was so excluded here. The very existence of a marriage-contract, which was meant to protect the wife, afforded a strong presumption that it was intended to be excluded,² and the provision as to the joint receipt was absolutely incompatible with the existence of the *jus mariti*. It was quite possible for a right to be vested jointly in spouses.³ In no view could the *jus mariti* have effect until the income was reduced into the possession of the spouses. Further, until a joint receipt was forthcoming the trustees were not entitled to part with any part of the estate, for the deed quite clearly made the delivery of a joint receipt a condition precedent to the parties getting the money. Accordingly they were not entitled to pay one half to Mrs Bruce and the other half to Mr Bruce's trustee on separate receipts.

Mrs Bruce adopted the argument of the marriage-contract trustees as to the exclusion of the *jus mariti*, and maintained further that she was entitled to the whole income *ad sustinenda onera matrimonii*, Mr Bruce having since 1876 failed in his marital obligation to support wife and family. In any view she was entitled to receive payment of one-half of the fund, so that the evident purpose of the trust-deed might not be frustrated.

At advising,—

LORD M'LAREN.—The question under this reclaiming note relates to the right to the income of a part of Mrs Bruce's estate which was conveyed to trustees by marriage-contract dated 26th July 1855. The material facts are very distinctly stated by the Lord Ordinary in the first and second paragraphs of his judgment, which I take the liberty of incorporating with my opinion:—

“The lady had a fortune, derived from her father, which turned out to be of the value of about £10,000. Of this she reserved £1000, which went absolutely to her husband. All the rest she conveyed to trustees, subject to a declaration that the whole capital and the revenue of £5000 thereof should be exclusive of the *jus mariti* and right of administration, and not affectable by the debts or deeds of her intended husband, nor by the diligence of his creditors. Only £6000 was payable at the date of the contract, which explains the special reference to the sum of £5000. As regards the income of that sum the trustees were to pay it to the wife, exclusive of the husband's rights, and the clear revenue of the remainder was to be held by the trustees for the joint behoof of the spouses, and to be paid to them on their joint receipt. It is with regard to this second portion of the income that the present question arises.

“Since 1876 the spouses have lived separate. In 1877 the marriage-contract trustees, acting on the advice of counsel, and with the acquiescence of Mr and Mrs Bruce, divided this portion of the income into two equal shares, and paid one half to Mr Bruce and the other half to Mrs Bruce on their separate receipts. Mr Bruce was sequestrated on 2d November 1880, and the sequestration still subsists. The system of division adopted in 1877 continued without chal-

¹ *Rollo v. Ramsay*, Nov. 28, 1832, 11 S. 132, 5 Scot. Jur. 125; *Black or Dannie v. Pearson*, Feb. 9, 1841, 3 D. 504; *Robertson v. Robertson*, Feb. 10, 1835, 13 S. 442; *Commercial Bank of Scotland v. Black*, 14 Scot. Jur. 528; *Irvine v. Connors's Trustees*, March 8, 1883, 10 R. 731; *Hutchinson v. Hutchinson's Trustees*, 4 D. 1399, 14 Scot. Jur. 466; *M'Dougall v. City of Glasgow Bank*, June 20, 1874, 6 R. 1089.

² *Anderson v. Buchanan*, June 2, 1837, 15 S. 1073, at 1084.

³ *Forrester v. Milligan*, July 1, 1830, 8 S. 992.

lence on the part of the trustee in the sequestration down to the summer of No. 111. 1891."

The trustee in the sequestration now claims the whole income which has accrued on the second mentioned portion of the money settled in trust by Mrs Bruce at and since the term of Martinmas 1891, alleging that he has right to it *jure mariti*.

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If the trustee's view of the effect of the contract be well-founded this will be a unique case in the history of the *jus mariti* of a trust being constituted by a wife for the conservation of that ancient and now abolished right. There are few principles, if any, in the law of property better settled than this, that an antenuptial conveyance of the wife's estate to trustees excludes the *jus mariti*, and that any interest which a husband may claim under such a trust is derived not from the assignation of marriage but from the agreement of the parties that the wife's estate shall be applied as the trust purposes direct. The law is so stated in the judgment in *Rollo v. Ramsay*, from which the Lord Ordinary quotes; and I agree with his Lordship that it suffices to exclude the *jus mariti* that the wife in her antenuptial contract has "dealt with her property in a way inconsistent with the assignation which the law would otherwise imply."

Passing to the construction of the words of the contract, we have to consider what is meant by this direction,—“And the clear revenue of the remainder of the trust funds is to be held for the joint behoof of the spouses, and paid to them on their joint receipt.”

Under this provision the income is certainly given to the spouses jointly, and not in equal shares, as was indeed natural and proper in a contract of marriage in which *consortium vite* was contemplated. But it is also certain that under this provision the interests of the spouses in the joint estate are equal. As the spouses are separated under a voluntary agreement, and the fund can no longer be used and enjoyed as a joint estate, either the fund—I mean the income—must be divided, or we must accept the self-contradictory proposition, that neither spouse can claim any benefit from a fund which belongs to them jointly. I am not aware of any exception to the rule of law which permits the division of a joint estate which cannot be specifically enjoyed by the joint owners. There is a distinction between joint interests and interests in severalty or shares. In the case of a proper joint interest each owner is supposed to be seized of the whole estate, so that on the death of one of them the fee expands. But this distinction, the latest exposition of which is to be found in the case of *Paxton's Trustees*, 13 Rettie, 1191, is, in its practical effect, confined to questions of succession, and would not, in my apprehension, impede the right of one of the joint owners to sue for a division of the subject. In the present case, it is found in fact that while the spouses were living separate the income of the fund was divided between them at their desire, and this arrangement was continued until it was challenged by the reclamer in the interest of creditors.

I may here observe that, even if there were a good theoretical objection to the alteration of the mode of enjoyment of this joint fund at the desire of one of the parties against the wishes of the other, that objection would not affect the judgment which I propose, but would strike at the claim of the trustee. When Mr Bruce's creditors came into possession of his interests under the marriage trust, the state of possession of this fund was that of division of the income between the spouses. This is accordingly the *melior conditio* which the law will support against the claim of one of the parties to alter the mode

No. 111. or form of possession. But I believe your Lordships agree with me that it is not necessary to found on this consideration, because Mrs Bruce is entitled to have her just and equal interest in the fund assigned to her in the only form in which she can receive that benefit, by having one-half of the income paid over to her.

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According to my opinion, the Lord Ordinary has rightly preferred the marriage trustees to the income in question, but it will be necessary to add a declaration that the trustees are to hold the income in trust for payment of one half thereof to Mrs Bruce, including arrears, so long as the spouses shall continue to live separate, and for payment to the trustee on Mr Bruce's sequestrated estate of the other half of the income, including arrears, so long as the estates of the said George Cadell Bruce shall be under sequestration, and thereafter to Mr Bruce himself.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find and declare that under and by virtue of the antenuptial contract of marriage . . . the claimants, Robert Philip Wood and George Miller Cunningham, as surviving and accepting trustees thereunder, are bound to make payment of the income of the funds and estate conveyed to them by the said Mrs Roberta Cadell or Bruce, so far as said fund exceeds the sum of £5000 (that accrued or may accrue for the period subsequent to Whitsunday 1891), as follows, viz.:—So long as the said George Cadell Bruce and Mrs Roberta Cadell or Bruce continue to live separate, of one half thereof to the said Mrs Roberta Cadell or Bruce, and of the other half thereof to the trustee on the sequestrated estates of the said George Cadell Bruce, so long as said estates shall be under sequestration, and thereafter to the said George Cadell Bruce himself, but subject to deduction from the last-mentioned half of the premiums of insurance paid or to be paid by said trustees on the policies of insurance on the life of the said George Cadell Bruce, conveyed to them by said contract of marriage; and under reference to and subject to the foregoing finding and declaration, adhere to the Lord Ordinary's interlocutor of 1st March 1893, except as regards the finding of expenses; and, as regards said finding, recall said interlocutor, and decern: Find the claimant, William Auld Guild, as trustee on the sequestrated estate of the said George Cadell Bruce, liable to the said claimants Robert Philip Wood and George Miller Cunningham in the expenses of the competition," &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—MYLNE & CAMPBELL, W.S.—Agents.

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Mitchell v.
Heys & Sons.

WILLIAM MITCHELL, Pursuer (Reclaimer).—*C. J. Guthrie—M'Clure.*
Z. HEYS & SONS AND OTHERS, Defenders (Respondents).—*Dickson—Salvesen.*

Retention—General lien—Fraud—Lessee holding himself out as true owner—Rollers for calico printing—Custom of trade.—"W. M. let out on hire to M. J. & Co., calico printers, certain copper rollers, on an agreement that the rollers should be marked with his name, and that in the event of M. J. & Co. parting with the custody of the rollers to any third person they should be delivered under a receipt bearing that they were "received from W. M." M. J. & Co., who had no printing works of their own, in accordance with a custom in the trade, sent their cloth with the rollers to be printed by H. & Sons, to whom they falsely

represented that the rollers were their own property. M. J. & Co. having become insolvent, H. & Sons refused to deliver the rollers to W. M., on the ground that by an admitted custom of trade calico printers employed to print for others had a general lien over the cloth and rollers sent to them. *Held (rev. judgment of Lord Low)* that as M. J. & Co. had no power to subject W. M.'s rollers to the lien of H. & Sons, and as W. M. had done nothing to mislead H. & Sons into the belief that the rollers were the property of M. J. & Co., he was entitled to recover them.

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IN September 1895 William Mitchell, Glasgow, raised an action against Z. Heys & Sons, calico printers, Barrhead, and against Messrs Mitchell, Johnston, & Company, calico printers, Glasgow, for their interest, concluding for declarator that 902 copper rollers, stamped "W. M.," presently in the possession of the defenders, belonged to him, and for an order for their delivery to him.

1st DIVISION.
Lord Low.

In 1885 Messrs Mitchell, Johnston, & Company hired a number of copper rollers from the pursuer. These rollers, according to the agreement between the parties, were to be used by Mitchell, Johnston, & Company in their business at a certain rent, and were to be engraved with such patterns as the borrowers thought fit, but for no other purpose. By the sixth head the borrowers were to have "no claim of property to the engraving on any copper roller," and by the seventh head the whole of the rollers were to be kept distinctly numbered and marked with William Mitchell's name "in order to identify them as" his "property, and in the event of the borrowers parting with the custody of the rollers to any third person, they were to be delivered on Mitchell's" behalf under the following receipt:—"Received from William Mitchell."

That agreement expired in 1889, and on 10th March of that year another agreement with similar conditions was entered ~~into~~ between the parties, and Mitchell, Johnston, & Company further agreed to add new rollers to William Mitchell's stock to provide against loss of copper in turning off old patterns from his rollers, and to mark and number these new rollers in the same manner as those lent by him.

As Mitchell, Johnston, & Company had no calico printing works of their own, they, in conformity with a common custom in the trade, employed other firms who had printing works, among them Z. Heys & Sons, to print for them, and sent their cloth and William Mitchell's rollers to them for that purpose.

In June 1892 there were 902 rollers belonging to Mitchell in the hands of Heys & Sons.

In that month Mitchell, Johnston, & Company became insolvent, and Mitchell applied to Heys & Sons for delivery of the rollers. Heys & Sons, however, refused to deliver them, on the ground that they had a right to retain them in security of a general balance of £4529 due to them by Mitchell, Johnston, & Company, whereupon Mitchell raised the present action against Heys & Sons.

The pursuer averred,—The defenders were well aware that the initials "W. M." represented the name of the pursuer, that he was the William Mitchell referred to in the receive-notes, that the rollers were the property of the pursuer, and were delivered to them as such, and that Mitchell, Johnston, & Company had no rights therein except such as were made with the pursuer by agreement.

The defenders averred;—(Stat. 3) "The rollers in question were the property of Mitchell, Johnston, & Company. The pursuer in any event knew that Mitchell, Johnston, & Company had full possession and control of the said rollers, and that they dealt with them as their own property, and were in the practice of sending the said rollers to these defenders,

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inter alia, in order that these defenders might engrave the same, and use them for printing cloth for or on the orders of Mitchell, Johnston, & Company, and he intended all along that this should be done." (Stat. 4) "The pursuer knew all along that by the usage and custom of the calico printing trade in Glasgow, all rollers delivered to calico printers actually engaged in printing (as these defenders are) were delivered and received on the footing that the engravers and printers (as these defenders were) should have a general lien thereon for their whole account for engraving and printing. He knew that these defenders regularly advertised and intimated this on their business papers, and that all rollers sent to them by Mitchell, Johnston, & Company were sent by them and received by these defenders, subject to this general lien as aforesaid. The pursuer was also all along aware that the said copper rollers were being sent to these defenders for engraving and printing as aforesaid, subject to said general lien. . . ." (Stat. 5) "The pursuer never disclosed that the rollers in question were his private property. On the contrary, he concurred with Mitchell, Johnston, & Company in representing to, *inter alios*, these defenders that the rollers were the property of Mitchell, Johnston, & Company, and in Mitchell, Johnston, & Company and these defenders dealing with the said rollers throughout, on the footing that this was so. . . . He all along knew (as was the fact) that these defenders received the said rollers on the footing and in the belief that they were the property of Mitchell, Johnston, & Company, and engraved them and used them for printing cloth, for and on the employment of Mitchell, Johnston, & Company, on this footing and belief." (Stat. 6) "By the usage and custom of the calico printing trade in Glasgow, these defenders have a general lien on the said rollers for the sums due to them for engraving and printing done on the employment of Mitchell, Johnston, & Company."

The pursuer pleaded, *inter alia*;—1. The said rollers being the property of the pursuer, he is entitled to decree of declarator as concluded for.

The defenders pleaded, *inter alia*;—3. In respect these defenders have a lien on the said rollers as condescended on, they should be assoilzied. 4. The defenders should be assoilzied, in respect (3) The rollers were delivered to Mitchell, Johnston, & Company by the pursuer in order that they might deal with them as their property; *et separatim*, that they might deliver them to these defenders to be engraved and printed from subject to said general lien.

Proof was allowed. The following facts were proved or admitted: By the custom of the calico printing trade in Glasgow, printers employed to do printing for others had a general lien over the rollers and cloth sent to them, by their customers; further, the defenders by notice on their business paper intimated to all their customers, including Messrs Mitchell, Johnston, & Company, that all rollers sent to them were subject to the above lien.

There was a considerable body of evidence led by the defenders to shew that, by custom of trade, the above lien applied to all rollers, whether they belonged to the persons who sent them to the printer or to third parties, but the pursuers adduced evidence to the opposite effect.

With regard to the receive-notes sent to the defenders by Mitchell, Johnston, & Company, it was proved that, when rollers were first sent, the receive-notes were in terms of the agreement, *i.e.*, they bore that the rollers were sent by William Mitchell; the defenders having, however, objected to the terms of these notes, Messrs Mitchell, Johnston, & Company altered them and made direct representations to the defenders that

they were in fact the owners of the rollers. It was not proved, and was denied by the pursuer, that he had any knowledge of this change in the receive-notes, or of the representations by Messrs Mitchell, Johnston, & Company. It was proved that the defenders believed that the rollers were the property of Mitchell, Johnston, & Company, and that the work was done by them on that footing.*

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It was proved that of the 902 rollers claimed in the action 125 had been the property of Mitchell, Johnston, & Company when they were sent to the defenders' works, and had subsequently been transferred to the pursuer in terms of the agreement of 1889.

On 7th March the Lord Ordinary (Low) pronounced this interlocutor:—"Repels the pursuer's pleas, sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns."†

* Z. Heys deponed,—“When I met the partners of Mitchell, Johnston, & Company in Wellington Street to arrange terms and prices for printing, one of the special conditions laid down with regard to our dealing was that they were to supply us with their own copper and their own cloth. These are the only terms upon which we print to anyone. They said they were not to do any business in jobbing, but were to be calico printers entirely, the same as the houses we printed for. . . . When we began business with them my understanding was that the copper and cloth they were to send to us was to be their own. These continued to be the terms until the stoppage took place. . . . From beginning to end my belief was that that cloth was all their own.”

† “OPINION.—. . . It is established beyond doubt that the pursuer was not a partner of Mitchell, Johnston, & Company, and that he was not interested in that firm. It is also established that the property of the rollers which are in dispute is in the pursuer.

“It is further admitted that, according to the universal custom of the trade, calico printers, who, like the defenders, are actually engaged in printing, have a lien over all rollers belonging to a customer for the general balance due by that customer.

“The means relied on by the pursuer, in the agreements by which he hired rollers to Mitchell, Johnston, & Company, for securing that his rollers should not be subject to a lien for accounts incurred by Mitchell, Johnston, & Company, were two in number. He stipulated in the first place that his initials should be stamped upon each roller, and in the second place that the receive-notes should be in his name. [His Lordship here referred to the evidence which he held to shew that the precautions taken by the pursuer were not sufficient to put the defenders on their guard against supposing that the rollers belonged to Mitchell, Johnston, & Company, and that Mitchell & Company led the defenders to believe that the rollers were their property.]

“In these circumstances, the question of law to be determined is whether the defenders are entitled to the lien over the rollers which they claim.

“In regard to the 125 rollers which were the property of Mitchell, Johnston, & Company when they were sent to the defenders, I do not think that there is any doubt, because the defenders could not be affected by a subsequent change of ownership of which they had no notice.

“I am also of opinion that the defenders are entitled to retain the other rollers. . . .

“Both parties referred to the judgment of the House of Lords in *The London Joint Stock Bank v. Simmons* (Appeal Cases, 1892, p. 201), as laying down principles of law applicable to the present case. The question there was as to the right of the bank to retain negotiable securities for payment of a balance due by a broker who had fraudulently pledged the securities with them, as against the true owner. The House held that the bank was entitled to retain and realise the securities, having taken them for value and in good faith, and there being no circumstances to create suspicion.

“There were three questions in the case—(1) Whether the securities belonged

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The pursuer reclaimed, and argued;—The Lord Ordinary was wrong. It was admitted that the rollers (with the exception of the 125 trans-

to the party claiming them from the bank; (2) whether they were negotiable instruments; and (3) whether the bank took them in good faith. The judgment proceeded upon an affirmative answer to all these questions.

“The decision, therefore, goes no further than this, that the *bona fide* pledgee for value of a negotiable instrument can retain it for the debt for which it was pledged against the true owner. The same rule, I apprehend, also applies to the impeding of documents of title, such as an indorsed bill of lading, or a delivery-order upon a warehouseman, or of goods held under such documents of title. But the rule does not in my judgment necessarily apply where what is pledged is a corporeal moveable not the property of the pledger, and of which he has the bare possession, without any document of title. In such a case it is not sufficient to prove that the pledgee took the article in good faith and in the absence of circumstances calculated to excite his suspicion.

“In *The London Joint Stock Bank v. Simmons*, Lord Herschell thus states the law,—‘The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner no title is acquired against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner.’

“It therefore seems to me that the question here is, whether the pursuer so acted as to mislead the defenders into the belief, or so as to make them liable to be misled into the belief, that Mitchell, Johnston, & Company were owners of the rollers.

“Upon this question the case of *Brown v. Marr* (7 R. 427) was referred to. In that case a retail jeweller fraudulently obtained articles of jewellery from wholesale dealers upon contracts of ‘sale and return,’ and pawned them. It was held, in a question between the wholesale dealers and the pawnbrokers, that the latter were entitled to retain the jewellery. There was a great deal of discussion as to the true nature of a contract of ‘sale and return,’ and opinions were expressed upon the point, but I think that all the Judges were of opinion that it was sufficient for the decision of the case that the retail jeweller, having undoubtedly authority to sell the jewellery, could also pledge it, and that of the two innocent parties dealing with him, that party (viz., the wholesale dealers) who had put it in his power to commit the fraud must suffer.

“Lord Justice-Clerk Moncreiff, when dealing with this view of the case, said,—‘Lord Stair says (i. 14, 5), “Property or dominion passes not by conditions or provisions, but by tradition, or other ways presented in law.” From which it follows that possession or some symbol of tradition, are the only true indications of property in moveables. Thus, it is held in England, that when tradition or possession has been obtained by fraud, and has been used to induce transactions with third parties, of two innocent parties he shall suffer who has enabled the wrongdoer to commit the fraud. This is simply another way of saying that a purchaser or pledgee is not bound to look beyond the ostensible title of possession, and that if the true owner has knowingly conferred this ostensible title, although induced thereto by fraud, a *bona fide* purchaser cannot be required to restore what he has bought on the ground of latent stipulations between the seller and his author.’

“I have already pointed out that one ground of judgment in *Brown v. Marr* was, that the owners of the watches had put them into the hands of the retail dealer (Marr) with authority to sell them, which involved authority to pledge them. I think, however, that there was another important element in the case, namely, that Marr was a dealer in jewellery, and was known by the pawnbrokers to be so. Now, suppose that the pursuers, the wholesale dealers, had been right in one of their contentions, namely, that Marr did not get the watches for

ferred after they were sent to the defenders' works) were the property of the pursuer, Mitchell, Johnston, & Company only having right to them

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'sale or return,' but merely 'on approbation,' I am not sure that the result would have been affected. Because if a person puts goods into the hands of another whose business it is to sell goods of that description, I think that a third party purchasing from the possessor, in good faith, for value, and in the ordinary course of trade, would get an unchallengeable title.

"That view is in consonance with the opinions expressed by Judges of high authority in the case of *Pickering v. Bush* (15 East. 38). In that case one Swallow was a broker and sale-agent. Pickering purchased hemp through Swallow. The hemp was transferred, at the desire of Pickering, in the books of the wharfinger, from the name of the seller to that of Swallow, as regarded one parcel, and to the name of Pickering or Swallow as regarded another parcel. The question was, whether Swallow could give a good title to a purchaser. He had contracted for the sale of hemp, and having none of his own to deliver, had transferred Pickering's hemp to the purchaser. It was held that the purchaser from Swallow was entitled to the hemp in a question with Pickering. Lord Ellenborough said,—'Strangers can only look to the acts of the parties, and to the external indications of property, and not to the private communications which may pass between a principal and his broker, and if a person authorises another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is to be afterwards tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principal in respect of the subject-matter, and there would be no safety in mercantile transactions if he could not.' In this same case *Le Blanc, J.*, said,—'The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it.' Then, after referring to the circumstances of the case, he added,—'This is distinguishable from all cases where goods are left in the custody of persons whose proper business it is not to sell.'

"There are two cases, one in England and the other in Scotland, the circumstances of which are very like those in the present case. The English case is *Weldon v. Gould* (3 Espinasse, 268). The circumstances are thus stated in the report:—'The plaintiff had delivered calicoes to one Pearce, to have them printed; he delivered them to the defendant, who was a calico printer; the defendant did not know that the goods did not belong to Pearce, and he kept the goods for the balance of a general account between Pearce and him.'

"Lord Kenyon decided in favour of the defendant. I confess that I am unable to see any material distinction between the circumstances of that case and the present.

"The Scotch case is *Lesly v. Hunter* (M. 2660, and *Elchies voce Hypothec*, No. 18). The defender Hunter was a bleacher, and he was employed to whiten certain cloth by George and Archibald Arnot, weavers. The Arnots' name was stamped upon the cloth. They got delivery from Hunter of a portion of the cloth, promising to pay for the bleaching of the whole cloth when they uplifted the remainder. The Arnots became bankrupt, and Lesly, who was proved to be the owner of part of the cloth remaining in Hunter's hands, claimed delivery of that part upon paying the expense of bleaching it. Hunter, upon the other hand, claimed a lien over the cloth for the whole account due to him by the Arnots. Hunter had taken the cloth in the belief that, having the Arnots' name stamped upon it, it belonged to them. The Court held that Hunter was not entitled to the lien which he claimed, but Lord Elchies states that the judgment was carried only by the casting vote of the President.

"If, therefore, the circumstances of that case are substantially the same as those of the present, it is plain that it is an authority directly in the pursuer's favour.

"The reports of this case are somewhat meagre, and the Session papers, so far as they have been preserved, do not add much to the information given in

No. 112. as hirers. That being so, the way in which the hirer dealt with the
 Feb. 27, 1894. rollers could not make any difference in the right of a person receiving
 Mitchell v. them from him, and no custom of trade could give the third party a right
 Heys & Sons. of lien over them. The only ground upon which the third party, the
 defenders here, could successfully claim a lien, was if the lessor of the
 goods had done something which entitled them to believe that in point
 of fact the goods belonged to Mitchell, Johnston, & Company, or that they
 had a right to treat the goods as they did.¹ It was not necessary for a
 person letting goods on hire to take any precautions against fraud on the
 part of the lessee, and the person to whom the goods were sent by the
 lessee was not entitled to assume an unlimited title in his customer,
 where the possession might fairly be ascribed to a limited title only.
 The case of *Lesly* was really an authority in the pursuer's favour, as
 the Lord Ordinary was in error in saying that the person to whom
 the cloth was entrusted by the owner was not entitled to get it bleached.
 The Session papers in the case shewed that the Arnots had authority
 given to them to send the cloth to be bleached. The cases relied on
 by the defenders, and commented on by the Lord Ordinary, were
 distinguishable from the present, because in them unlimited authority
 was given. In *Brown v. Marr, Barclay, & Company* (7 R. 427), the

the reports. It appears that the Arnots had woven the cloth for Lesly from
 yarn supplied by him, and he gave evidence that he had not authorised the
 Arnots to put their name on the cloth. It does not, however, appear whether
 Lesly had authorised the Arnots to get the cloth bleached, or whether it was the
 custom of the trade for weavers to get cloth which they had been employed to
 weave bleached for their customers. If the Arnots had no authority, express
 or implied, to get the cloth bleached, I can well understand that Hunter could
 not claim a lien for the general balance, because Lesly had in that case done
 nothing which was calculated to mislead him into the belief that the cloth
 belonged to the Arnots. Further, there is no note of the opinions of the
 Judges. I am thus unable to regard the decision as giving much assistance in
 the present case one way or the other.

"It therefore appears to me that, except the judgment of Lord Kenyon in
Weldon v. Gould, there is no authority directly in point; but a consideration of
 the whole authorities (so far as I know them), and of the principles which may be
 deduced therefrom, leads me to the conclusion that the defenders must prevail.

"The ordinary practice of the trade is for job calico printers to have their
 own rollers, which they send along with the cloth to printers who have works,
 and who do the actual printing process. Further, by the admitted custom of
 trade, printers have a lien over the rollers of their customers. The pursuer
 knew the ordinary practice of the trade, and the inveterate custom as to lien,
 and in that knowledge he gave his rollers to Mitchell, Johnston, & Company
 for the very purpose of being sent by them to printers. By so acting the
 pursuer put it into the power of Mitchell, Johnston, & Company, while using
 the rollers for no other purpose than that for which they had authority to use
 them, to mislead printers to whom they were sent, and he also rendered the
 printers, to whom the rollers were sent, very liable to be misled. In such cir-
 cumstances, I am of opinion that the defenders, who held the rollers in the
bona fide belief, induced by the representations of Mitchell, Johnston, & Com-
 pany, that they were the property of the latter, are entitled to retain them even
 against the pursuer. To hold otherwise would, in my judgment, not only be
 contrary to sound principle, but would be most prejudicial to the interests of those
 engaged in this and similar trades."

¹ *London Joint Stock Bank v. Simmons*, L. R. [1892], A. C. 201—(see Lord
 Herschell's opinion); *Marston v. Kerr's Trustee*, May 13, 1879, 6 R. 898;
Murdoch & Co. v. Greig, Feb. 6, 1889, 16 R. 396; *Martinez y Gomez v. Allison*,
 Jan. 23, 1890, 17 R. 332; *Lesly v. Hunter*, 1752, M. 2660; *Bell's Prin.*, secs.
 1315-1317.

contract was for sale or return, and there there was a power given to sell the goods, which implied the minor power of pledge. Cases of principal and agent such as *Pickering v. Bush* (15 East. 38) were not in point, as an agent for sale had been held to have a power of pledge, but even in such cases there was authority for the pursuer's contention.¹ It was not denied that if the owner of goods put into the hands of the person to whom he entrusted them a document which enabled him to commit a fraud by representing himself as the true owner, he would not be entitled to get them back from a third party into whose hands they had come; and such were the cases of *Pochin & Company* (7 Macph. 622), *Vickers*, 9 Macph. (H. L.) 65, *Babcock*, L. R., 4 Q. B. D. 394, and *Rose v. Spavens*, 7 R. 925. These were also cases of principal and agent, and, on that ground as well, not in point. *Weldon v. Gould* (3 Esp. 268) was a case of agency; and further, it was not in conformity with the later decisions in *Marston's* case (6 R. 898), and *Pickering's* case (15 East. 38). It could not be said in this case that the pursuer had given Messrs Mitchell, Johnston, & Company any facilities for imposing on the defenders, and no obligation lay on him to intimate to the defenders that the rollers were his property. On the contrary, he had done everything in his power to guard his ownership by having the rollers marked with his initials, and having the receive-notes made out in his name, and these two facts were amply sufficient to put the defenders on their inquiry as to the ownership of the rollers. It was clear that the defenders had doubts as to whether the rollers were in point of fact the property of Mitchell, Johnston, & Company, because they had insisted in a change on the form of the receive-notes, and they should have pushed their inquiries further by asking the direct question. They were not, therefore, in a position to be able to plead that they were the innocent victims of a fraud.²

Argued for the defenders;—The general lien here claimed was a well-known one, and was not disputed by the pursuer; neither was the view of the facts taken by the Lord Ordinary attacked by him. He knew from the outset that the rollers, if they passed into the hands of persons in the position of the defenders, would be subject to a general lien; and further, he knew that Mitchell, Johnston, & Company were not themselves calico printers, and that they would be obliged to send their cloth, with the rollers, to be printed elsewhere. In these circumstances, unless there was some special stipulation excluding the lien, the pursuer was bound to intimate to the defenders that the rollers were his property. What he did, in point of fact, was quite insufficient to meet that obligation. The initials on the rollers did not necessarily shew ownership, and the receive-notes only shewed the custodier of the rollers as being William Mitchell. The pursuer had therefore placed Mitchell, Johnston, & Company in a position to mislead the defenders, and that being so the rollers could effectually be pledged, whoever was the true owner. The defenders were one of two innocent parties (the pursuer being the other) who had been injured by the fraud of a third party, and in such cases that person must suffer who had given opportunity to the third party to commit the fraud.³ The case of *Weldon v. Gould*⁴ was a direct authority

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¹ Cooke & Sons v. Eshelby, 1887, L. R., 12 App. Cas. 271.

² Raphael v. Bank of England, 1855, 17 Scott. 161, and 25 L. J., C. P. 33.

³ Brown v. Marr, Barclay, & Co., Jan. 8, 1880, 7 R. 427; Babcock v. Lawson, 1879, L. R., 4 Q. B. D. 394; Pochin & Co. v. Robinson and Marjoribanks, March 11, 1869, 7 Macph. 622, 41 Scot. Jur. 334; Vickers v. Hertz, March 20, 1871, 9 Macph. (H. L.) 65, 43 Scot. Jur. 346; Rose v. Spavens, June 15, 1880, 7 R. 925; Macdonald v. Westren, July 19, 1888, 15 R. 988.

⁴ Weldon v. Gould, 3 Esp. 268.

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in favour of the defenders. That was, no doubt, a case of principal and agent, but the equitable considerations which ruled there were equally applicable in the present case. If any obligation of inquiry was on the defenders, they had fulfilled it by going to Mitchell, Johnston, & Company, their customers.¹ There was no custom of hiring of rollers in the calico printing trade, and therefore the English cases, in which effect was given to the rights of the true owner where such a custom existed were not in point.² The view of the facts in *Lesly's* case (M. 2660) was the right one. There was no evidence there that authority to send the cloth to the bleachers had been given, and therefore the case did not apply.

At advising,—

LORD KINNEAR.—This is an action for delivery of certain copper rollers belonging to the pursuer, and presently in the possession of the defenders. The defenders Messrs Heys & Sons, who are calico printers, claim right to retain the rollers by virtue of a lien created by a contract with the now insolvent firm of Mitchell, Johnston, & Company. It is admitted that the rollers in question are the property of the pursuers, from whom they were hired by Mitchell, Johnston, & Company for the purpose of being used in printing. Mitchell, Johnston, & Company were calico printers, who had no print works of their own, and it appears to be a common practice in the trade for printers in that position to send their cloth and rollers to the print works of others that the rollers may be used in printing patterns on the cloth. The rollers in question having been hired from the pursuer, were put into the hands of the defenders by Mitchell, Johnston, & Company to be engraved with patterns and used in printing according to the common practice, and the defenders claim to hold the rollers as well as the cloth for a general balance arising upon their account for engraving and printing. It is admitted, as the Lord Ordinary says, that according to the custom of trade, calico printers who, like the defenders, are actually engaged in printing, have such a lien over the rollers and cloth belonging to their customers. In addition to the general usage, it is admitted that a special contract was constituted between the defenders and their customers, including Mitchell, Johnston, & Company by a notice printed on the business papers passing between them, that all rollers sent to the defenders were subject to a general lien for their whole account for engraving and printing. I have not observed any paper in these terms in the voluminous print which has been laid before us, but it was admitted at the bar that the defenders' statement to this effect is correct, and further, that the subsequent course of dealing had established the assent of Mitchell, Johnston, & Company to the terms expressed in the defenders' notice. We must take it, therefore, that by usage of trade, and also by a special contract, the defenders have a valid lien which would admittedly be effectual as regards the rollers now in question if these were the property of Mitchell, Johnston, & Company. But whether it be inferred from usage, or expressed in terms, this is a lien which rests upon contract, and to make it available against the pursuer, who was no party to the contract, it must be established either that he authorised Mitchell, Johnston, & Company to subject his property to a lien for their debt, or that he is barred by conduct or

¹ *Cooke v. Eshelby*, 1887, L. R., 12 App. Cas. 271—(see Lord Chancellor); *E. of Sheffield v. London Joint Stock Bank*, 1888, L. R., 13 App. Cas. 333.

² *Crawcour v. Salter*, 1881, L. R., 18 Ch. Div. 30.

representations from exercising his rights as owner. Evidence has been adduced for the purpose of proving that the defenders have by custom of the trade a lien over cloth and rollers belonging to third parties. But that cannot be the effect of any custom of trade, and the evidence ought not in my opinion to have been admitted. Usage may determine the incidents of a contract, or explain its terms as between the contracting parties. But whether it affects the rights and property of others is a question to be determined by the settled rules of law, and not by the understanding or opinions of traders.

There can be no question as to the extent of Mitchell, Johnston, & Company's right under the contract of hiring between them and the pursuer. There were two agreements—one in 1885, and a second in 1889—and by both it was stipulated that the lessees were to use the copper rollers in their business of calico printers, but that they should be used for no other purpose whatever. They were to have no claim of property to the engraving in any roller, but the same should belong exclusively to the lessor, subject to a right of use during the currency of the hire; and it was further stipulated that the whole of the said copper rollers should be kept distinctly numbered, and also marked with the lessor's name, in order to identify them as his property, and that in the event of the lessees parting with the custody to any printer or other third person, they should deliver them to such person under a receipt which should bear expressly that they were received from William Mitchell—that is, from the pursuer by name, and not from Mitchell, Johnston, & Company. So far as this contract goes, therefore, there can be no question that Mitchell, Johnston, & Company had no authority to pledge the pursuer's property directly or indirectly, or to hold themselves out as the true owners of his rollers. There may be a question whether the stipulated precautions for identifying his property were in fact sufficient, but there can be none that as between the contracting parties the lessees had no authority to hold themselves out as owners of the hired rollers, but, on the contrary, were required to make it apparent to printers and others, in whose custody the rollers might be placed, that they did not belong to the lessees but to the pursuers.

The difficulty arises from a direct breach of this condition. This appears from the evidence of the defender Mr Heys, whose testimony, the Lord Ordinary tells us, is entitled to credit. This witness depones that when the terms of dealing were arranged between him and Mitchell, Johnston, & Company, it was laid down "as a special condition that they were to supply us with their own copper and their own cloth. These are the only terms on which we print to anyone. . . . These continued to be the terms until the stoppage took place." The obvious purpose of this stipulation was of course that the defenders' lien should attach to all the copper, as well as to all the cloth, which might be put into their hands by Mitchell, Johnston, & Company; and that firm by assenting to the defenders' terms, and by the course of dealing which followed upon their assent, undoubtedly represented that the rollers now in question were their own, and bound themselves on that footing to submit to the lien. In these circumstances I do not think it necessary to consider a question which the Lord Ordinary has discussed, whether the markings on the rollers, and the terms of the receive-notes which were asked and obtained from the defenders, would of themselves have been sufficient to shew that the rollers were not the property of their customers. I am disposed to think that when a customer takes receive-notes for cloth in his own name, and for copper rollers in the

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No. 112. name of another, he gives a very significant indication that the rollers are not his own. But the defenders called for an explanation of this peculiarity and were satisfied by the answer they received. They therefore relied on the stipulation they had made, and upon the representation of their customers that they were acting in accordance with their contract. The question is, whether they can plead their contract with Mitchell, Johnston, & Company in answer to the pursuer's demand for delivery of his property.

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The general rule is perfectly well settled that the possessor of corporeal moveables can give no better title to a purchaser or pledgee than he has himself acquired from the owner. If this rule is applicable, the pursuer must prevail, and the defenders have, in my opinion, shewn no sufficient reason for excluding its application.

I agree with the Lord Ordinary that the doctrine of law upon which this question must be decided is that stated by Lord Herschell in the passage which he has quoted,—“The general rule is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner.” It is to be observed, upon this statement of the law, that it is not enough that the person taking the property should be misled. He must be misled by the act of the rightful owner; and what is meant by a misleading act of the owner is further defined by his Lordship's reference to the doctrine of personal estoppel. Estoppel has been defined by Lord Cranworth in the case of *Jordan v. Money* in language which was cited with approval by Lord Selborne in the later case of the *Citizens Bank of Louisiana v. The National Bank of New Orleans*, L. R., 6 E. and I. App. 360,—“Where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act in that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.” If this be so, the doctrine of personal estoppel would appear to be identical with our own doctrine of personal bar; and according to the definition two things must be established in order to raise the plea. The party against whom it is taken must have made representations by words or conduct concerning existing facts, with the intention of inducing another to act in the belief that these representations were true; and the party raising the plea must in fact have contracted or altered his position, in reliance on the truth of the representations. It appears to me that neither of these points has been established. The conduct which is said to amount to a representation on the part of the pursuer is that he put his property into the hands of Mitchell, Johnston, & Company, without taking precautions to inform third parties that he was himself the true owner. But this was not done with the intention of inducing Mitchell, Johnston, & Company to deal with it as their own, or of inducing third persons to transact with them in that belief. The intention of the contract of hiring was the very reverse. It is said that by empowering his lessees to send his copper rollers to a printer for the specific purpose for which they were hired, he authorised or allowed them to represent that the rollers

were their own. But there is no presumption of law that all the copper rollers in the possession of a jobbing printer are his own property. They may be borrowed or hired. And accordingly Mr Heys' evidence shews that the defenders did not in fact rely upon any inference of ownership arising from possession, but thought it necessary to stipulate expressly that all the copper sent to them by Mitchell, Johnston, & Company should be their own. He says that these are the only terms on which they print for anyone. But there would be no occasion for such terms if the defenders did not suppose that otherwise rollers might be sent to them that did not belong to their customers. The conclusion is, in the first place, that the pursuer made no representation by words or conduct on which he intended that the defenders should act; and secondly, that they did not in fact rely upon any representation of his, but solely on the false representations of his lessees.

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It is said that Mitchell, Johnston, & Company had an ostensible authority to deal with the pursuer's rollers as their own; and the defenders' counsel appealed to the cases in which it has been held that the authority of an agent is to be measured by the extent of his usual employment, and not by his private instructions. The rule applies where an agent is carrying on a public business and deals with goods entrusted to him in the ordinary course of that business. But a rule for determining the extent of an agent's authority cannot apply to a case where there is no relation of principal and agent. Mitchell, Johnston, & Company were in no sense the pursuer's agents. They had a definite right of use for a specific purpose. In the exercise of that right, they might deal with the lessor's property to the extent of the interest they had acquired under a contract of hiring. But they had no authority to make any contract on his behalf, or to affect in any way the right with which he had not parted. I see no ground on which it can be held that they could subject the pursuer's property to a lien, which would not equally support a pledge or sale. But I do not understand it to be maintained that they could have pledged the rollers for their own debt, or that they could have given a good title to a purchaser.

I am therefore of opinion that the case falls within the general rule stated by Lord Herschell, and not within the exception.

The cases cited by the defenders' counsel do not appear to me to create any difficulty in the application of the general rule of law. It is obvious that the decisions as to negotiable instruments have no bearing. It is settled law that such instruments, passing from hand to hand, like the ordinary currency of the country, may be retained by those who acquire them in good faith and for value, notwithstanding any defect of title in the persons from whom they are acquired. The cases in which principals have been held bound by the contracts of their agents are inapplicable for the reason already given. But it may be right to examine more carefully the three decisions which the Lord Ordinary has cited in his opinion.

Weldon v. Gould, 3 Esp. 268, was a decision at *nisi prius*, and the facts are very briefly reported. But, as I understand the statement, the plaintiff had put calicoes into the hands of one Pearce, as an agent to contract with the defendant or others for the printing of the calicoes, and the agent contracted in his own name. Lord Kenyon likened the case to that of a factor for sale, and cited *George v. Claget* as an authority in point. Now, *George v. Claget*, 2 Smith's L. C. 113, has been much discussed in more recent cases. The rule which it establishes is thus stated by Mr Justice Willes in *Turner v. Thomas*, L. R., 6

No. 112. C. P. 613—"Where a factor sells in his own name to a third person, who buys without notice that he is dealing with an agent, the latter has ordinarily a right to be put in the same position as if the factor were the real principal in the transaction, and may set up against the concealed principal any defence which he may have against the factor. That rule is founded upon principles of common honesty. Where one satisfies his contract with the person with whom he has contracted, he ought not to suffer by reason of its afterwards turning out that there was a concealed principal." The same distinguished Judge says, in *Semenza v. Brinsley*, 18 C. B. (N. S.) 467, that "in order to make the defence a valid defence within the rule, it seems obvious that the plea must shew that the contract was made by a person whom the plaintiff entrusted with the possession and ownership of the goods, that he sold them as his own, in his own name as principal, with the authority of the plaintiff, and that the defendant then believed him to be the principal in the transaction." The case is explained in the same way by the learned Lords who decided *Cooke v. Eshelby* in the House of Lords, L. R., 12 App. Cas. 271. It is true that their Lordships point out that the authority of the agent to appear as the contracting party may be inferred from conduct. But whether the agent's authority is expressed or implied, the rule which these cases illustrate appears to be, that where the agent of an undisclosed principal is allowed to contract in his own name, the persons with whom he contracts are entitled to consider him as to all intents and purposes the principal. But to bring the rule into operation a contract must have been made on behalf of the principal which the latter has right to enforce. It is inapplicable to a contract made by a lessee on his own behalf for delivery of goods which do not belong to him, and which he has no title to dispose of.

Pickering v. Bush is discussed by Lord Blackburn in *Cole v. The North-Western Bank*, L. R., 10 C. P. 364, and I think it will be useful to quote what his Lordship says, not only for his statement of the point decided, but also for his comment upon the passage cited by the Lord Ordinary from the judgment of Lord Ellenborough,—"In *Pickering v. Bush*, the plaintiff, the true owner, had purchased the goods through Swallow, who pursued the public business of broker and an agent for sale, and the goods were, at the plaintiff's desire, transferred into the name of Swallow. It was held that this proved that Swallow had an implied authority to sell, and consequently that the defendants were justified in buying of Swallow and paying him the price. Lord Ellenborough goes somewhat further. He says,—'If a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principal in respect of the subject-matter, and there would be no safety in mercantile transactions if he could not.' It is to be observed, however, that the other Judges based their judgment on the ground that the circumstances proved in fact an implied authority to Swallow to sell, and that Lord Ellenborough limits his more extensive doctrine to the case of a person 'authorising another to assume the apparent right of disposing of property in the ordinary course of trade,' or in other words, 'entrusting it to an agent whose business it is to sell,' and on *Wilkinson v. King* being cited in the argument, he says,—'That was the case of a wharfinger

whose proper business was not to sell, and to whom the goods were sent for the mere purpose of custody,'—from whence it may be inferred that he limited his general doctrine to cases in which, as in that before him, the goods were entrusted to an agent whose ordinary business it was to sell, in the course of his business as such agent, and because he was such agent." No. 112.
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Neither of these decisions appears to me to be applicable to a case where the person from whom goods are acquired is not in possession either as owner or as agent, and has no authority, express or implied, from the true owner to make any contract on his behalf.

Brown v. Marr, 7 R. 427, depends upon a different principle, which seems to me altogether inapposite. A retail dealer had obtained articles of jewellery from wholesale firms on contracts of sale and return on pretence that he meant to trade with them, and without attempting to trade he straightway pawned them with various pawnbrokers. The main ground of judgment was that by such a contract all the substantial rights of ownership pass to the buyer. He has an option to return the goods within a stipulated time instead of paying the price. But whenever he exercises any right of property as by selling or pledging the goods, the option ceases, and accordingly the title he may give to third persons dealing with him in good faith does not depend upon any authority derived from the vendor on sale and return, but upon his own absolute right of property. The Lord Ordinary observes that the same judgment would have been given if the contracts had been sales on approbation, but if so, it would have been based upon precisely the same reasoning, for Lord Moncreiff points out that the two forms of contract differ in this respect only, that in a sale on approbation the goods may be returned if not approved which on sale and return may be returned if not sold, and in both the sale becomes absolute and the right to return is lost if the goods are retained beyond a stipulated or beyond a reasonable time, and therefore, if the contracts had been honestly obtained, there could be no question of the buyer's power to pledge in respect of his right of property, which, even if it were not absolute from the first, being subject to a resolute condition, necessarily became absolute as soon as he thought fit to determine the condition. The difficulty was that the contract had been obtained by fraud. But the answer is that contracts obtained by fraud are valid until they are rescinded, and therefore that they cannot be rescinded to the prejudice of rights and interests acquired by third parties in good faith and for value.

Lord Moncreiff may seem to lay down a wider doctrine in the passage cited by the Lord Ordinary, but his Lordship's observations must be read with reference to the case he was considering. The principle to which his Lordship refers,—that where one of two innocent parties must suffer by the fraud of a third, the loss must fall upon him who has enabled the wrongdoer to commit the fraud,—has been applied in cases where the wrongdoer has not merely been entrusted with goods or documents of title, but has also been clothed with an apparent authority to dispose of them. Where there is no such authority, the rule is that stated by Lord Cairns in *Cundy v. Lindsay*, L. R., 3 App. Cas. 463, that where it is necessary to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both must fall, the Court "can do no more than apply ; rigorously the settled and well-known rules of law."

For these reasons I am of opinion that the defenders are not entitled to

No. 112. retain the rollers which are admittedly the pursuer's property. But it appears that 125 of the rollers which he claims were bought by the pursuer from Mitchell, Johnston, & Company, and were not delivered to him but had been sent to the defenders in the ordinary course of business by the vendors before the sale to the pursuer, and are still in their possession. I agree with the Lord Ordinary that the right thus acquired by the defenders cannot be affected by a subsequent contract of sale. So far as regards these rollers the defenders should be assoilzied, and the pursuer should have decree for delivery of the remainder.

LORD ADAM concurred.

LORD M'LAREN.—If there had been any difference of opinion among your Lordships I should have had no vote, as I was not present on the last day on which the case was argued, but I heard an excellent argument in the two opening speeches, and I should like to say that I entirely concur in the principles of law laid down by Lord Kinnear, and their application to the facts of the case.

The LORD PRESIDENT concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and ordained the defenders to deliver to the pursuer 777 of the copper rollers.

MORTON, SMART, & MACDONALD, W.S.—F. J. MARTIN, W.S.—Agents.

No. 113. MRS CARTER-CAMPBELL, Petitioner (Reclaimer).—*Johnston—Howden.*
Feb. 27, 1894. MRS LAMONT-CAMPBELL, Respondent (Respondent).—*Rankine—Pitman.*
Carter-*Process—Entail—Petition to fix widow's annuity—Competency.*—An heir of
Campbell v. entail cannot by way of summary petition obtain the judgment of the Court
Lamont- on a question as to the extent to which the estate is burdened by a bond of
Campbell. annuity granted by a former heir to his widow.

1ST DIVISION. BY a deed of entail executed by the trustees of John Campbell, of
Lord Low. Possil, in accordance with directions contained in his trust-disposition and settlement, power was given to the heirs of entail succeeding to the lands of Possil and others to infest their wives or husbands in a liferent annuity out of the rents of the entailed estate, providing that the annuity should not exceed a third part of the rents or free yearly value of the lands. C. N. Lamont-Campbell, heir of entail in possession, died in 1893, having, on the narrative of the deed of entail and of the Act of Parliament, 5 Geo. IV. cap. 87,* provided an annuity to his widow, Mrs Lamont-Campbell, equal to but not exceeding one-third part of the free yearly value of the lands, and a question having arisen between the widow and Mrs Carter-Campbell, the succeeding heir of entail, as to what constituted the free rent, the latter presented a petition in the Bill-Chamber to have the amount of the widow's annuity fixed.

Mrs Lamont-Campbell lodged answers, but took no objection to the application being made by way of summary petition.

The Lord Ordinary (Low) having pronounced an interlocutor determin-

* By the Act 5 Geo. IV. cap. 87, sec. 1, it is enacted that it shall be lawful to every heir of entail in possession of an entailed estate to "infest his wife in a liferent provision out of his entailed lands and estates by way of annuity, provided always that such annuity shall not exceed one-third part of the free yearly rent or yearly value of the estates after making certain deductions."

ing the items to be included in the free yearly value of the lands, the petitioner reclaimed. The Court, without considering the questions raised by the parties, *ex proprio motu* recalled the Lord Ordinary's interlocutor, and dismissed the petition as incompetent.

J. & F. ANDERSON, W.S.—COOPER & BRODIE, W.S.—Agents.

No. 113.
Feb. 27, 1894.
Carter-
Campbell v.
Lamont-
Campbell.

JAMES BELFRAGE AND OTHERS (Tait's Trustees), First Parties.—
Macfarlane.

BRYDEN MONTEITH AND OTHERS, Second Parties.—*Sym.*

MRS JANE TAIT OR BELFRAGE, Third Party.—*Macfarlane.*

JAMES FRANCIS MACKAY AND OTHERS (Christie's Trustees), Fourth Parties.—*Burnet.*

MISS JANE BELFRAGE, Fifth Party.—*Macfarlane.*

No. 114.
Mar. 7, 1894.
Monteith v.
Belfrage.

Succession—Testament—Construction—"Survivor."—A testator directed his trustees to hold the residue of his estate for his sisters *nominatim*, equally in liferent, and for their children respectively in fee, "declaring that, in the event of the decease of one or more of my said sisters without children, her or their shares shall be held by my said trustees for the liferent use of the survivors and their children in liferent and fee as aforesaid."

In a competition with respect to the share of residue which had been liferented by one of the testator's sisters who had died childless, *held* that the word "survivors" in the clause above quoted ought to receive its natural meaning, and consequently that the share set free by the death of the childless sister fell to the testator's surviving sister and her children, in liferent and fee respectively, the children of a sister who had predeceased taking nothing.

Ward v. Lang, July 13, 1893, 20 R. 949, *followed*.

ANDREW TAIT, baker in Edinburgh, died on 6th February 1849, 2ND DIVISION. leaving a trust-disposition and settlement, dated 30th January 1849, by which he, "for the love, favour, and affection which I have and bear for my relatives after mentioned," disposed his whole estates, heritable and moveable, to trustees, for the following purposes:—"First, for payment of my whole just and lawful debts . . . Second, that my said trustees, or the trustees acting for the time, may have and hold the residue of the means and estate hereby conveyed, or at their discretion convert the same into cash, and in either case take the destination of the means and estate, or proceeds thereof, to themselves, for the liferent use of my sisters, Jane Tait or Belfrage, Christina Tait or Stenhouse, Ann Tait, and Margaret Tait, equally, and for their children respectively in fee: And declaring that in the event of the decease of one or more of my said sisters without children, her or their share shall be held by my said trustees for the liferent use of the survivors and their children in liferent and fee as aforesaid." The deed contained no further destination of the testator's estate.

The testator was survived by his four sisters. Ann Tait died unmarried on 24th March 1856, and on her death the share of his estate which had been liferented by her was liferented by her three sisters equally.

Margaret Tait (Mrs Monteith) died on 18th February 1892, survived by three children, among whom the fee of the share liferented by her was divided.

Christina Tait (Mrs Stenhouse) died on 18th March 1893, without leaving issue.

A question then arose as to the disposal of the share set free by the death of Mrs Stenhouse, and a special case was presented.

The parties were (1) the testator's testamentary trustees; (2) Mrs

No. 114. **Monteith's children ; (3) Mrs Jane Tait or Belfrage, the testator's only surviving sister ; (4) William Christie's trustees, who were the representatives of Andrew James Belfrage, a son of Mrs Belfrage ; and (5) Jane Belfrage, Mrs Belfrage's only other child.**
 Mar. 7, 1894.
Monteith v. Belfrage.

The questions in the case turned upon whether the word "survivors" in the clause of Mr Tait's settlement above quoted was to receive its natural meaning, or was to be construed as equivalent to "others."

The third party maintained that the word "survivor" ought to receive its natural meaning, and consequently that she, as the sole survivor of the testator's sisters, was entitled to the liferent of the whole share which had been liferented by Mrs Stenhouse. The fourth and fifth parties concurred in this contention, and maintained further that they were entitled to the fee of that share equally between them.

The second parties maintained that "survivors" was to be read as equivalent to others, and therefore that the fee of one half of that share fell to them in the same way as if their mother had survived Mrs Stenhouse, and that this one-half was divisible among them immediately ; or alternatively, that the fee of this one-half of the share had vested in them subject to a liferent in Mrs Belfrage, the third party.

Argued for the third and fifth parties (the fourth parties concurring in the argument) ;—The weight of recent authority was in favour of taking the word "survivor" in its natural meaning, and not as being equivalent to "others."¹ *Paterson's Trustees*² was special. The gift there was to two brothers and the survivor, and the issue of the survivor, all in fee ; and where the destination was of this description there might be room for the argument that the testator could not reasonably have intended the issue to take or not to take according to the accident of whether their parent died second or first ; but where, as here, the earlier generation took a liferent only, the testator may well have supposed that the children of those who predeceased a childless liferenter, by coming sooner into the enjoyment of the fee of the share liferented by their parent, were compensated for not sharing in the share set free by the death of the childless liferenter. Then in *Paterson's Trustees*, looking to the terms of the destination over, there would have been resulting intestacy if "survivor" had received its natural meaning.

Argued for the second parties ;—The testator proceeded on the narrative of the love, favour, and affection which he bore for his relatives after mentioned, and these were the only persons benefited by his settlement. It was therefore improbable that he should have dealt with them so unequally and capriciously as to make the right of the issue to depend on whether their parent died first or second. It was on the ground of this improbability that the Court proceeded in the recent case of *Paterson's Trustees*.³ That case ought to be followed here.⁴

LORD JUSTICE-CLERK.—In this case counsel for the third and fifth parties referred us to the case of *Ward v. Lang*, which seems quite indistinguishable from the present. I think, therefore, that our decision must be to the same effect.

LORD YOUNG.—There may be some difficulty in distinguishing *Paterson's*

¹ *Forrest's Trustees v. Rae*, Dec. 20, 1884, 12 R. 389 ; *Hairsten's Judicial Factor v. Duncan*, July 14, 1889, 18 R. 1158 ; *Ward v. Lang*, July 13, 1891, 18 R. 949.

² *Paterson's Trustees v. Brand*, Dec. 9, 1893, *supra*, p. 253.

³ *Paterson's Trustees v. Brand*, *supra*, per the Lord Justice-Clerk, at p. 256.

⁴ *Additional Authority.*—*Ramsay's Trustees v. Ramsay*, Dec. 21, 1876, 4 R. 243.

Trustees from *Ward v. Lang*, but I think that it is impossible to distinguish this case. I think, therefore, that we must follow *Ward v. Lang*, which proceeds upon a rule, which, as Lord Rutherford Clark observed in *Paterson's Trustees*, is the settled rule of construction.

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LORD RUTHERFURD CLARK.—I also think that we must follow *Ward v. Lang*, and give to the word “survivor” its ordinary meaning.

LORD TRAYNER.—I agree. If necessary, I do not think it would be impossible to distinguish this case and also *Ward v. Lang* from *Paterson's Trustees*.

THE COURT answered the questions to the effect that the liferent of the share formerly liferented by Mrs Stenhouse accresced and belonged to the third party, and that the fee of the whole of the said share vested in the fourth and fifth parties.

W. & J. BURNES, W.S.—JAMES F. MACKAY, W.S.—Agents.

JAMES STEVENSON, Petitioner.—*Maconochie*.
MRS FLORENCE LOUISA GIBBS OR STEVENSON, Respondent.—*Ure*—*McLennan*.

No. 115.
Mar. 7, 1894.
Stevenson v.
Stevenson.

Custody of children—Appeal—Execution pending appeal—Prayer for further order—Parent and Child.—It is incompetent in a petition for interim execution of a judgment pending an appeal to the House of Lords to add a prayer for any further or other order in the proceedings.

A wife having presented an appeal to the House of Lords against a judgment of the Court ordaining her to deliver up the children of the marriage to their father, the husband presented a petition craving the Court “to allow execution to proceed upon the said judgment notwithstanding the appeal,” and also “to grant warrant to messengers-at-arms and other officers of the law to take into their custody the persons of the said children, wherever they may be found, and deliver them into the custody of the petitioner.”

The Court *granted* the prayer for execution pending appeal, there being no reason to believe that the interests of the children would be prejudiced thereby, but *quoad ultra* refused the prayer of the petition as incompetent.

(ANTE, p. 430.)

1ST DIVISION.

On 3d March 1894 Colonel James Stevenson of Braidwood presented a petition to the Court, in which he stated that his wife had appealed to the House of Lords against a judgment of the Court, dated 30th January 1894, ordaining her to deliver up the children of the marriage into the custody of the petitioner. He therefore prayed the Court “to allow execution to proceed upon the said judgment notwithstanding the appeal, to the effect of enabling the petitioner to obtain the custody of his children . . . in terms thereof; and also to grant warrant to messengers-at-arms and other officers of the law to take into their custody the persons of the said children, wherever they may be found, and deliver them into the custody of the petitioner, or any person or persons he may appoint to have and keep their custody, and authorise and require all Judges Ordinary in Scotland and their procurators-fiscal, to grant their aid in the execution of this warrant, and recommend to all magistrates in England and elsewhere to give their aid and concurrence in carrying this warrant into effect; or to do otherwise in the premises as to your Lordships shall seem proper.”

Mrs Stevenson opposed the granting of the prayer.

The petitioner argued;—The prayer for execution pending appeal was

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in accord with precedent.¹ The children would have been with the petitioner if they had not been surreptitiously removed by the respondent, and he was entitled, therefore, to have them restored to him until the question of their custody was determined. That would be to maintain the true *status quo*. Orders in terms identical to those of the second part of the prayer had been granted in many cases.² In the circumstances here such a warrant was essential to the effectual execution of the former order of the Court, and to prevent its ultimate evasion by the respondent in the event of her appeal being unsuccessful.

The respondent argued;—(1) The natural home of the children was with their mother, for they had not been born in their father's house, and in the course of their lives had resided but a very short time with him. There was no suggestion that the respondent intended to remove them out of England, and she had lost no time in appealing. In these circumstances, the ordinary rule should be followed, and the *status quo* maintained pending the appeal.³ (2) The interests of the children would be prejudiced if the petition were granted, for their health was delicate, and according to a letter which was produced from a qualified medical man, such as made it very undesirable that they should leave the south of England and travel north in winter. (3) The latter part of the prayer was quite inappropriate, for the order asked by it was only granted when a respondent was in open defiance of the Court. Besides, it was unprecedented and incompetent to include in a petition for execution pending appeal a prayer for an entirely new order, and that part of the prayer not being alternative to the first part, the whole petition fell to be refused.

LORD PRESIDENT.—In determining the question now before us we must have regard to the circumstances under which the order we pronounced on 30th January became necessary.

Mrs Stevenson admitted in her answers to the petition presented by her husband that the reason why the children were in England and not in their father's house was that she, by a trick played upon their father, had taken them from his home, alleging one purpose, but really intending to keep them away permanently.

We are now asked by the father to restore them to his custody, pending the appeal to the House of Lords. If we grant this request, we shall just be placing the children where they would have been if the question had been raised and tried on the footing on which it ought to have been tried. I am in favour therefore of granting interim execution. I would certainly not have acceded to the request of the petitioner, if there had been any reason to believe that the interests of the children would be injured by delivering them into the custody of their father. But all we are told—and that somewhat vaguely—is that their health is delicate, and would be liable to suffer in the event of their coming to Scotland for what is called the winter. Now, I have no doubt that Colonel Stevenson, when the children are handed over to him, will have

¹ Symington v. Symington, June 11, 1874, 1 R. 1006, and Session Papers; Symington, &c. v. Symington, July 6, 1877, 4 R. 993.

² Earl of Buchan v. Lady Cardross, May 27, 1842, 4 D. 1268, 14 Scot. Jur. 415; Leys v. Leys, July 20, 1886, 13 R. 1223; Hutchison v. Hutchison, Dec. 13, 1890, 18 R. 237.

³ Gray v. Low, March 12, 1859, 21 D. 723, 31 Scot. Jur. 385; Kirkcaldy District Committee, &c. v. Howard, July 20, 1893, 20 R. 1123.

regard to the condition of their health, and will not take them to any climate No. 115.
which would be likely to prove hurtful.

Apart from that consideration, no ground has been urged by the respondent Mar. 7, 1894.
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which tends to throw doubt on the soundness of the conclusion that we shall best respect the principle of maintaining the *status quo* by restoring the children to the home from which they were surreptitiously removed.

As to the form of the petition, I think the petitioner has adopted a wrong style as regards the latter part of it. The latter part, by which I mean the part beginning "and also to grant warrant to messengers-at-arms," seems appropriate enough where a search has to be made. The invocation of Judges Ordinary and their procurators-fiscal shews that, in the cases to which that style is adapted, some extraordinary measures require to be adopted. The proper course will be to let the order run which is under appeal. That order is in the form craved by the petitioner in his original petition. It is now for the petitioner to work out that order, and for the respondent to obtemper it.

LORD ADAM.—I am of the same opinion. It appears to me that the prayer of the petition is somewhat unusual. The petition professes to be one for interim execution pending appeal, but it really goes beyond that. As regards the first part of the prayer, I am of your Lordship's opinion that it may be granted, for we were told by the lady herself that she had removed the children from their father's house for what was apparently a temporary purpose, but really with the intention of keeping them permanently away. Then, further, nothing has been set forth which satisfies me that such an order as is asked by their father would, if granted, prove prejudicial to the children themselves. It is indeed said that their health would suffer if brought to Scotland, but there is no reason to doubt that the petitioner will take all proper care if he gets their custody, and it does not necessarily follow that if he gets the order prayed for he will bring them down to Scotland, if to do so is really hurtful to them.

As regards the remaining conclusion of the petition, I am not for granting that. It is not appropriate in a petition for interim execution pending appeal. The lady should have an opportunity of obeying the order which the Court is about to pronounce. If she refuses, then it will be for the petitioner, if so advised, to take other steps, and it may be that the remaining conclusion of the petition may then be an appropriate order to ask. But I hope that the respondent will obey the order of the Court.

LORD M'LAREN.—I agree with your Lordship in the chair, both as to the granting of the application in general, and also as to the limitation of the order to be pronounced. While our former order is under appeal to the House of Lords no further steps are possible. All we can do is to grant execution pending appeal. That is the only thing which by statute we are entitled to do, and the execution is necessarily limited to the original order. I should think it incompetent to go beyond the original order in response to a petition for execution pending appeal.

LORD KINNAR concurred.

THE COURT pronounced this interlocutor :—"Grant the prayer of the petition, in so far as it craves the Court to allow execution to proceed upon the interlocutor of 30th January 1894, to the effect of enabling the petitioner to obtain the custody of his children"

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(the children were here named), "in terms thereof, notwithstanding the appeal by the respondent to the House of Lords, and decern: *Quoad ultra* refuse the prayer of the petition as incompetent."

MACONOCHIE & HARE, W.S.—J. MURRAY LAWSON, S.S.C.—Agents.

No. 116.

Mar. 7, 1894.
M'Bride v.
Caledonian
Railway Co.

JOHN PETER M'BRIDE, Pursuer (Appellant).—*Comrie Thomson—Deas.*
CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—
Murray—Ure—Clyde.

Right in security—Title to sue—Reparation—Injury to property—Evidence that a disposition ex facie absolute was really in security.—In 1880 A, the owner of house property, granted for onerous causes and considerations an *ex facie* absolute disposition thereof to a bank to which he owed £2500. The bank was infest. On 25th January 1889 the bank entered into an agreement with A that on his paying to them the sum of £500 they would reconvey the property to him, but that in the event of his failing to make this payment the agreement should be null.

In the course of the year 1890 the property was damaged by the operations of a railway company in the adjoining street.

In March 1893 the bank reconveyed the property to A on the narrative that the disposition granted by A in 1880, although *ex facie* absolute, was only in security, and that A had now paid the £500 in terms of the agreement.

Subsequently A raised an action against the railway company for the damage done to the property in 1890.

The railway company pleaded no title to sue, in respect that the property did not belong to A at the time the damage was alleged to have been done, and that his only interest therein was the personal obligation of the bank to reconvey it to him.

Held that it had been proved that A's disposition in 1880 was in security merely, and that as he had not been divested of the radical right to the subjects he had a good title to sue.

Issue—Reparation—Statutory powers—Negligence.—Form of issue to try a question whether a railway company had exercised its statutory powers negligently to the damage of adjoining property.

1st Division.
Sheriff of
Lanarkshire.

(ANTE, vol. xix. p. 255.)

In December 1880 John Peter M'Bride, metal merchant, Glasgow, being indebted to the Clydesdale Bank, Limited, granted a disposition in their favour "heritably and irredeemably," of the subjects Nos. 39 to 55 M'Alpine Street, Glasgow. The disposition was duly recorded in the Register of Sasines.

By a subsequent agreement with the bank, dated January 1889, which proceeded on the narrative that M'Bride was due to the bank a sum of £1541, and that the bank held "an absolute conveyance" of the M'Alpine Street property, "formerly belonging to him," the bank undertook, on Mr M'Bride making full payment to them of the sum of £500 in the manner therein stipulated, to "reconvey and surrender to him their interest as it then may be in the said" subjects, and to discharge M'Bride of his whole debt.

Thereafter by a disposition and reconveyance dated 1st March, and recorded in the Register of Sasines 15th June 1893, the bank on the narrative that M'Bride had, by disposition dated December 1880, disposed to them the subjects after described, and "considering that although said disposition was *ex facie* absolute, it was truly granted in security of an advance of £2500 made by us to him: And now, seeing that he has made payment to us of certain sums of money, which we have agreed to accept

in full satisfaction of said advance, and of all interest due thereon, and he has requested us to reconvey said subjects to him, which it is right and proper we should do: Therefore we do hereby dispoise and reconvey to and in favour of the said John M'Bride," heritably and irredeemably, the M'Alpine Street property, and "all our right, title, and interest, present and future, in or to the same." No. 116.
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M'Bride v.
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Between December 1889 and June 1890 the Caledonian Railway Company had completed the construction of a large sewer in M'Alpine Street, under the provisions of sec. 41, subsec. (L), of the Central Glasgow Railway Act, by which it was provided that for the construction of such sewers as the one in question the Corporation of Glasgow should be bound to communicate their powers to the railway company.

In May 1893 Mr M'Bride raised an action in the Sheriff Court at Glasgow against the Caledonian Railway Company concluding for £5500, in respect of loss and damage (including loss of business) sustained by him because of the operations of the defenders in connection with the construction of the sewer.

He described in detail the method adopted by them, and averred that they had "culpably and negligently interfered" with and injured his property in M'Alpine Street, and that their operations were conducted in a "reckless, negligent, and unskilful manner."

The defenders (who denied the averments of fault), *inter alia*, referred to the titles of the subjects and stated that "the pursuer was not heritable proprietor of the said subjects at the time the alleged injury was done."

The defenders pleaded;—(1) No title to sue.

On 13th September 1893 the Sheriff-substitute (Spens) allowed a proof.

The pursuer appealed for jury trial, and proposed the following issue:—"Whether, in or about the period from 1st January to 10th May 1890, the pursuer was the heritable proprietor of the subjects forming Nos. 39 to 55 M'Alpine Street, Glasgow, and the occupier of Nos. 39 to 41 thereof; and whether, through the fault of the defenders in their operations in M'Alpine Street aforesaid, the said subjects were injured, to the loss, injury, and damage of the pursuer both as proprietor and occupier of the said subjects?"

Argued for the defenders;—The pursuer had no title to sue, for he was not proprietor of the subjects at the date when the injury was said to have been done. The bank was then the *ex facie* absolute disponee and owner, with a property title in no way qualified. The agreement of 1889 did not affect the right of property in the bank. It was at most a *pactum de retrovendendo*. Any claim for damages was therefore vested originally in the bank, and was only capable of transmission by express assignation,¹ and the pursuer produced no such deed. Even taking the agreement of 1889 to be equivalent to an absolute disposition with a back-letter, the legal position of the bank remained the same. It was not a trustee or security-holder merely, but the proprietor.² If an issue were granted it should be so framed as to make it clear to the jury, that although damage had resulted to the property through the operations complained of, the defenders were not liable in damages unless negligence was proved against them.

Argued for the pursuer;—The pursuer had a title to sue for damages,

¹ Caledonian Railway Co. v. Watt, July 9, 1875, 2 R. 917, Lord President, 921.

² Wylie v. Duncan, 1803, M. 10,269; Heritable Reversionary Co., Limited, v. Millar, July 14, 1891, 18 R. 1166, August 9, 1892, 19 R. 43, at 44, 49; National Bank, &c. v. Union Bank, &c., Dec. 18, 1885, 13 R. 380, Dec. 10, 1886, 14 R. (H. L.) 1, Lord Watson, 4.

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because he had all along had the real beneficial interest in the subjects.¹ Whatever may have been the form of the bank's titles it was merely a security-holder, the substantial right of property being in the pursuer. A question of this kind must be decided according to the actual not the apparent position of parties. Further, and assuming that the right to claim damages had originally vested in the bank, the terms of the deed of 1893 were sufficiently wide to carry it to the pursuer.

At advising,—

LORD PRESIDENT.—The defenders' plea to title was argued on the ground that, at the time of the alleged injury, the buildings were the property of the Clydesdale Bank and not of the pursuer. I need not say that the defenders are right in maintaining that the mere fact that the pursuer is now the proprietor will not give him a title to sue for damages on account of injury done to the buildings if at the time of the injury they did not belong to him. The damage is of course sustained by the person or persons who at the time have interests in the property, the value of which interests are diminished.

In the present case the titles are before us, and, in my opinion, the terms of the disposition and reconveyance of 1st March 1893 put an end to the defenders' argument; for that deed, granted by the Clydesdale Bank, declares that the disposition of 1880 (upon which the defenders' argument rests), although *ex facie* absolute, was truly granted in security of an advance of £2500. The bank were therefore all along, and at the time of the alleged injury, nothing but security-holders. Now it is quite plain that a man who has borrowed money on a house may in fact sustain loss if the house is injured, and the circumstance that the security-title is put in the form of an absolute disposition does not in law prevent his recovering damages for such loss, the true rights of parties being duly instructed. Upon that point there is therefore no question to be put to the jury, and we can shew this by describing the subjects in question in the issue as the pursuer's property.

As regards the form of the issue, I think there is force in the defenders' suggestion that it should be so framed as to keep the jury in mind that the mere fact that the defenders conducted operations which resulted in the houses being injured is not of itself a ground of liability. It is true that, scientifically speaking, the word "fault" which was proposed by the pursuer is accurate enough as a description of the negligence and unskilfulness which constitute the ground of action alleged on record. But the jury will be less likely to miss the point if the question which they have to try is explicitly put before their eyes, and in the present instance this can be done without prolixity.

The issue which I propose is as follows:—"Whether, on or about the period from 1st January to 10th May 1890, the defenders carried on operations for the construction of a sewer in M'Alpine Street, Glasgow, opposite the pursuer's property there, in an unskilful and negligent manner, in consequence of which the pursuer's property was injured, to his loss, injury, and damage? Damages laid at £5500."

The record discloses that the damages claimed are in part for loss of business.

¹ Lindsay v. Giles, Feb. 27, 1844, 6 D. 771, 16 Scot. Jur. 357, 1 Ross' L. C. (Land Rights), 479; Whyte v. Murray, Nov. 16, 1888, 16 R. 95; Geddes v. Quistorp, Dec. 21, 1889, 17 R. 278; Bell v. Gow, Dec. 19, 1862, 1 Macph. 183, 35 Scot. Jur. 151.

It was not suggested that any separate issue was required for this item of No. 116. damage, of which adequate notice is given on record.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT repelled the plea to title, and approved an issue in the terms proposed by the Lord President.

CLARK & MACDONALD, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

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M'Bride v.
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JOHN J. JACOBS & COMPANY, Pursuers (Reclaimers).—*Dickson—Burnet.*

ARCHIBALD M'MILLAN & SON, LIMITED, Defenders (Respondents).—*Johnston—C. K. Mackenzie.*

No. 117.

Mar. 8, 1894.
Jacobs & Co. v.
M'Millan &
Son, Limited.

Agent and Principal—Shipbroker—Commission.—Circumstances in which it was held that a shipbroker who had first introduced to a firm of shipbuilders the name of a person who afterwards bought a ship from them was not entitled to any commission, the introduction having in no way contributed to bring about the sale.

ON 12th June 1893 John J. Jacobs & Company, shipbrokers, London, brought an action against Archibald M'Millan & Son, Limited, shipbuilders, Dumbarton, concluding for payment of £290, as the amount of commission alleged to be due by the defenders to the pursuers in respect of the contract for building a sailing vessel, which the defenders had constructed for M. S. Bielich, an Austrian shipowner.

In May 1890 Bielich entered into negotiations with the pursuers through their manager Brosinovich for the purchase of a sailing vessel. The pursuers brought under his notice, among other vessels, the "Formosa" which had been built by the defenders, and suggested that he should have a similar vessel built for himself by the defenders, who were described in one of the pursuers' letters as "the celebrated builders M'Millan of Dumbarton." The pursuers obtained a quotation from the defenders for such a vessel, but in the end no contract resulted from these negotiations, and on 21st May the pursuers wrote to the defenders that Bielich, whose name they did not give to the defenders, could not then make up his mind.

On 29th July Bielich wrote to the pursuers, asking them "to let me know at what price you could build a sailing vessel, steel or iron, by good and well-known builders, of 1000 tons register, . . . I am decided to build if the price is reasonable."

The pursuers then on 1st August wrote to the defenders,—“Referring to our letter of 21st May, our friend, Mr M. S. Bielich of Austria, has now decided to build an iron or steel barque of 1000 T. regr. . . . We shall be glad if you will . . . state . . . lowest cash price, covering 2½% commission here, which please cover by separate note without referring to same in your general letter . . . should your price be satisfactory, we shall no doubt be able to place the order in your hands.”

The defenders replied on the 4th August,—“In reply to your esteemed inquiry of 1st inst., we beg to inform you that our present price for a steel barque of about 1000 tons net register . . . is £12,150. . . . This offer is made subject to approval of plans, and to a specification to be mutually arranged, as well as subject to the adjustment of terms and conditions of sale. Hoping to be favoured with the order.”

The defenders also wrote on the same date to the pursuers,—“In our

2ND DIVISION.
Ld. Wellwood.

No. 117. quotation to you of this date for proposed vessel we have reserved a commission of $2\frac{1}{2}$ per cent for you, payable on delivery of the vessel.”
 Mar. 8, 1894. On 25th October the defenders contracted to build a vessel for Bielich,
 Jacobs & Co. v. which was in all material respects the same as that described in their
 M'Millan & Son, Limited. quotation to the pursuers of 4th August.

The pursuers founded on the foregoing circumstances, and averred;—(Cond. 7) “The pursuers believe and aver that they were the first to mention Mr Bielich’s name to the defenders, and that the contract effected by the defenders with Mr Bielich was the direct result of the recommendation of the defenders to him, and that they are therefore entitled to commission as charged, in terms of the undertaking by the defenders already mentioned, as well as by the custom of trade among brokers in the same line of business as the pursuers. According to that custom the shipbroker who introduces a purchaser to the seller of a vessel is entitled to receive from the seller or builder of the vessel sold, through or in consequence of the introduction or recommendation, a commission of $2\frac{1}{2}$ per cent upon the purchase price. . . .”

The defenders answered,—(Ans. 7) “Admitted that, according to custom, when the relation of buyer and seller has been directly caused and brought about by a broker, a commission of varying amount is generally paid. Denied that the contract in the present case was the direct result of the pursuers’ recommendation of the defenders to him, and that the pursuers are entitled to a commission, either under contract or by custom. . . . On the contrary, the defenders dealt with Mr Bielich as the client of Messrs Galbraith, Pembroke, & Company.”

The defenders pleaded;—(2) The pursuers not having been the *causa causans* of said contract, are not entitled to commission.

A proof disclosed the following facts in addition to those already narrated:—Besides obtaining the quotation contained in the defenders’ letter of 4th August, the pursuers obtained quotations from Russell & Company, shipbuilders, Port-Glasgow, and from the Grangemouth Dockyard Company. To both these firms the pursuers named Bielich, and from both they asked for a commission of $2\frac{1}{2}$ per cent. On 5th August they sent the three quotations to Bielich, placing Russell & Company first, the Grangemouth Dockyard Company second, and the defenders third, that being the order according to price, the lowest being stated first.

Bielich continued to correspond with the pursuers with regard to the purchase of a vessel, and constantly changed his mind as to the kind of vessel which he wanted to have. It did not appear that in the course of this later correspondence the pursuers ever mentioned the defenders’ name to Bielich, or that, beyond forwarding their quotation to him, they took any steps to effect a contract between them and him. On the other hand, the correspondence shewed that the pursuers wished to secure the order either for Russell & Company or the Grangemouth Dockyard Company.

The pursuers did not acknowledge the receipt of the defenders’ letter containing their quotation.

Besides writing to the pursuers on 29th July, Bielich also wrote in similar terms, on the same day, to Galbraith, Pembroke, & Company, shipbrokers, London, who on 1st August communicated with the defenders among other shipbuilders, but without giving Bielich’s name. The defenders replied on 4th August that they could build a vessel of the kind specified for £11,850. Galbraith, Pembroke, & Company did not forward this quotation to Bielich, it not being the lowest which they had obtained. On 16th October Bielich (who during August and September had been negotiating through a Liverpool firm of brokers

for the building of a vessel by the defenders) wrote to Galbraith, Pembroke, & Company,—“As I have not made as yet my arrangements for building a vessel in iron, and wishing to arrive at a settlement, please inform me at what price Messrs M'Millan & Son of Dumbarton are now prepared to build an iron vessel of about 1100 tons register.” Galbraith, Pembroke, & Company in consequence, on 17th October, wrote to the defenders (being the first occasion on which they mentioned Bielich's name to the defenders),—“Referring to your letter of the 4th August last, Mr Bielich is now here and asks us to get your lowest quotation for a steel barque about 1100 tons net register, with date of delivery, and we shall be glad if you would kindly let us have it by return of post.” The defenders replied that £12,850 was their price. Some correspondence then followed between Galbraith, Pembroke, & Company and the defenders, with the result that on 25th October the defenders contracted to build a sailing vessel for Bielich of 1000 tons for £11,600. The pursuers then wrote to the defenders claiming their commission. The defenders declined to recognise the claim, and subsequently paid a commission to Galbraith, Pembroke, & Company.

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With regard to the custom of trade respecting shipbrokers' commissions, Mr J. I. Jacobs, of the pursuers' firm, deponed that in his opinion the introduction of a buyer to a shipbuilder entitled the broker making the introduction to his commission—“Subject to the contract being effected, whether through us or other brokers, if the builder accepts the name of the buyer from us it is tantamount to saying that he will pay us a commission. . . . So long as it is an offer of serious business, and we have anything founding a right to go to the builder and ask a quotation, we say that if the builder accepts the name from us he is bound to pay us a commission. . . . If the shipbuilder has a name submitted by more than one broker, it is the custom for the builder to intimate to the other brokers that he has already had the name submitted from somebody else, and to say that he cannot accept the name from them, or that he only accepts it under reserve, subject to the business coming through them.”

Victor Ressich, shipbroker, Leith, a witness adduced by the pursuers, deponed in cross-examination,—“(Q.) Is this a correct statement of the custom, that the broker who introduces a purchaser to the seller of a vessel is entitled to receive from the seller or builder of the vessel sold through or in consequence of the introduction or recommendation, a commission? (A.) Yes, that is generally the case. It is correct. (Q.) Then it is not the introduction alone by itself that entitles the broker to a commission from the builder? (A.) Certainly it is. (Q.) Not the introduction alone? (A.) The correspondence, and the whole affair. If you introduce, correspond, and give all the ins and outs, then you earn your commission, not otherwise.”

Frederick Gardiner, shipbroker, Glasgow, a witness for the defenders, deponed,—“As regards the conditions upon which a broker is entitled to claim commission, according to my understanding of the custom of trade, the broker, if he introduces a buyer to a builder and closes the contract, is entitled to a commission. That is one instance. If he introduces a buyer to a builder, and by some action of his contributes to the conclusion of the contract, again I would say he is entitled to a commission. But he must have done something which contributed to a certain degree to bring about the business, otherwise he would not be entitled to it. (Q.) Then, according to your understanding, the mere introduction is not sufficient? (A.) It is very difficult to speak in general terms, because the circumstances of each case vary so widely; but if a buyer were intro-

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duced to a builder, and then within a few days that buyer and builder were brought together again by a different broker, I would say that the first broker properly had a claim to a commission, unless it was shewn that he had no authority or right in the first instance to apply to the builder, but he must shew that his action contributed to the conclusion of the contract, and that the contract would not have reached the builder unless he had intervened."

On 6th February 1894 the Lord Ordinary (Wellwood) assoilzied the defenders.*

* "OPINION.—When a shipbroker introduces a buyer to a builder and business results from the introduction, the broker is entitled by custom of trade to a commission, to be paid by the builder. Bare proof of introduction is not sufficient; it must be shewn that, in a reasonable sense and to a material extent, the contract or sale which followed was due to the introduction. On the other hand, it does not necessarily disentitle the broker to his commission that the contract or the details of the contract have been carried through and arranged not by him but by the buyer or another broker employed by the latter. Such, stated in general terms is, as I understand, the custom of trade in regard to brokers' commission. But it is plain from the bare statement of it that each case must be judged of on its own circumstances, and in judging whether commission is due or not in a case in which the contract has not been made or completed by the broker who first introduced the buyer, it is material to inquire into the actings of the broker, not only before the introduction but between the date of the introduction and the completion of the contract, and also the grounds, if any, which the builder may have had for supposing that his negotiations with or through the first broker had fallen through when he came to deal with the buyer or the second broker.

"As the broker's commission depends on business being done, it is only right that after he has introduced a client to a builder he should be protected against the buyer thereafter depriving him of his commission by going behind his back, availing himself of the introduction, and completing the contract with the builder either without the intervention of a broker or through another broker. If such a thing were to occur within a short time of the original introduction, I do not understand it to be disputed that the builder would be liable to pay the first broker a commission, as he would virtually be in bad faith in concluding the contract direct with the buyer or through another broker. But, on the other hand, it would be hard on a builder if a broker by merely naming a client to him and asking for a quotation should be able to tie the builder's hands for months afterwards, although he took no steps to bring the client and the builder together, and actually was engaged during that time in trying to place the business in the hands of other builders.

"The present dispute is certainly due in a great measure to the conduct of the buyer, a Mr Bielich, an Austrian. . . . Bielich seems to have been a very troublesome client. He frequently changed his mind. At one time he said he wished to build a ship; at another he wished to buy a second-hand ship, and then he changed his mind again. Moreover, he frequently changed his brokers, or employed several brokers at the same time, and there are some grounds for suspecting that this was not unconnected with the share of commission which this or that broker was disposed to give him. But whatever view may be taken of Bielich's conduct, that will not solve the present question, unless it can be clearly shewn that the defenders were in bad faith in dealing with Bielich through Galbraith, Pembroke, & Company, after the introduction by the pursuers on 1st August 1890. . . .

"On 29th July Bielich wrote to Brosinovich asking him to let him know at 'what price you could build a sailing vessel, steel or iron, by good and well-known shipbuilders, of 1000 tons register,' &c. The result of this order was that the pursuers obtained for Bielich quotations from various builders, amongst them the defenders, to whom they wrote on 1st August 1890. On that date

The pursuers reclaimed, and argued ;—The broker who first introduced No. 117. a possible purchaser to a shipbuilder was entitled to his commission if a

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the pursuers, in addition to writing to the defenders, wrote in precisely similar terms to two other firms of shipbuilders, viz., Messrs Russell & Company, Port-Glasgow, and the Grangemouth Dockyard Company. To both firms they named Bielich, and from both firms they asked a covering commission of two and a-half per cent. From all three firms they obtained quotations, and on 5th August Brosinovich, who conducted the correspondence on behalf of the pursuers, forwarded those quotations to Bielich, who was abroad, placing Russell & Company first, the Grangemouth Dockyard Company second, and the defenders third, that being the order according to price, the lowest being stated first. Now, so far as appears from the evidence, that was the last step that was taken by the pursuers in the way of bringing Bielich and the defenders together. They did not even acknowledge the defenders' letter sending the quotation. I find no letters from the pursuers to the defenders between 1st August and 28th October 1890, by which time the contract had been completed through Galbraith, Pembroke, & Company, and I find no evidence that even when Bielich was in this country in September and October 1890 the defenders' names were ever brought under his notice either by Brosinovich or the pursuers.

"Not only so, but it appears from the correspondence that in many communications which passed between the pursuers and Bielich, or letters written by the pursuers on Bielich's behalf in August, September, and October 1890, they were endeavouring to secure the business, not for the defenders but for other shipbuilders, in particular Russell & Company, of Port-Glasgow. . . .

"Now, in these circumstances I think that the defenders were entitled to assume that all chance of business being done through the pursuers was, with the assent of the latter, at an end. The defenders had not even received an acknowledgment of their quotation, and that of itself was almost enough to justify their action. But besides that there was complete silence on the part of the pursuers for nearly three months, and although it is impossible to specify any fixed time on the elapse of which a claim for commission would be lost, I think that in this case the lapse of three months following upon the pursuers' failure to acknowledge the defenders' quotation or to take any steps to bring Bielich and the defenders together is sufficient to disentitle the pursuers now to claim commission from the defenders.

"I have hitherto dealt with the actings of the pursuers and the defenders, which are probably sufficient for the disposal of the case. But if regard is to be had to Bielich's conduct and what influenced him in contracting with the defenders through Galbraith, Pembroke, & Company, I cannot affirm that he was to any material extent influenced by the pursuers' introduction, such as it was. He knew all about the defenders from other sources.—[His Lordship then referred to the negotiations between Bielich and the Liverpool brokers, above mentioned.]

"A good deal of evidence has been led on both sides in regard to the custom of trade with which I cannot agree. On the one hand, I cannot agree with the view of some of the defenders' witnesses that an introduction is necessarily to count for nothing unless the broker who introduces the buyer carries through the contract, or at least does some of the work connected with it. But, on the other hand, I cannot agree with some of the pursuers' witnesses, who speak as if it were enough for a broker to introduce the client and obtain a quotation, and then sit with his hands folded, and if a contract is entered into some months afterwards, but not through him, to claim his commission. If this view were well founded, a broker, on being applied to by his client to obtain quotations from well-known builders on the Clyde, it being certain that the buyer intended to do business with one or other of the builders on the Clyde, might obtain quotations from all the building firms of repute, naming the client, and thus ensure his commission in any event without taking any further steps to bring the buyer and builder together.

"The evidence which I consider of greatest weight in the case is that of the

No. 117. contract followed between the shipbuilder and the possible purchaser. That rule was proved by the evidence here, and had been recognised in previous cases.¹ If the pursuers had been the only brokers concerned it could hardly be doubted that they would have been entitled to their commission; the fact that Galbraith, Pembroke, & Company had intervened did not derogate from the pursuers' right, but merely imposed on the defenders' the duty, if they wished to protect themselves, on receiving Bielich's name from Galbraith, Pembroke, & Company, of intimating to them that they already had Bielich's name from another broker. Even taking the defenders' view of the law, the pursuers were entitled to prevail, for by their recommendation of the defenders to Bielich they had materially led to the contract being concluded.

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Argued for the defenders;—The mere introduction of a purchaser's name to a seller was not enough to entitle the broker making the introduction to a commission. The broker must do something to bring about the contract. The contract must be the direct result of the introduction.² The pursuers had failed to shew that the contract between the defenders and Bielich was the result of their introduction.

At advising,—

LORD YOUNG.—It is not disputed, and it is clear, that if the pursuers, Jacobs & Company, procured the contract between the defenders and Bielich in terms of the quotation of 4th August, the pursuers would have been entitled by this letter, and also by the custom of trade, to a commission of $2\frac{1}{2}$ per cent. The question is, did they procure the contract in terms of that quotation? If they did they must prevail in this action, if they did not they must fail. The Lord Ordinary has held upon the evidence that they did not, and I am of opinion with the Lord Ordinary that they did not. They did not acknowledge the quotation. I do not attach very great importance to that, and anything about it may be dropped out of the case. They did no more in the matter. They heard even no more of the matter until after the contract was completed on the 25th October, and it was then that for the first time they came forward and said—"Oh, that contract has been effected through us; we were the brokers who effected it, and we are entitled to the commission in terms of the letter." Now, I think that that is an untenable position. What importance Bielich attached

defenders' witness, Frederick Gardiner, who gave his evidence with great clearness and moderation, and at the same time with judicious caution. His evidence is in accordance with the views upon which I have proceeded. It is plain from the answers which he gives as to custom of trade, that, in his opinion (and I think it is sound), in each case it is a jury question, depending upon circumstances, whether the broker has or has not earned his commission.

"It appears from the evidence that in some cases the commission is divided between the broker who first introduces the buyer and the broker through whom the contract is ultimately completed. I fancy that these are usually cases of arrangement or compromise. But even if in the absence of arrangement such a division could be enforced in a Court of law, I do not think that in this case there are sufficient grounds for awarding the pursuers a modified commission."

¹ *Cunard v. Van Oppen*, 1859, 1 Fos. and Fin. 7, 6; *Wilkinson v. Alston*, 1879, 48 L. J. Q. B. 733; *Mansell v. Clements*, 1874, L. R., 9 C. P. 139; *Walker, Donald, & Co. v. Birrell, Stenhouse, & Co.*, Dec. 21, 1883, 11 R. 369.

² *Green v. Bartlett*, 1863, 32 L. J., C. P. 261; *Moss v. Cunliffe & Dunlop*, March 20, 1875, 2 R. 657; *White v. Munro*, July 11, 1876, 3 R. 1011.

to their recommendation of M'Millan as compared with the recommendation of other people I do not know. I shall assume that he had some confidence in their judgment, and did attach some importance to it, but the commission is due to those who recommend a shipbuilder and whose recommendation is acted upon. The commission is due in law, sense, and according to the custom of trade, to the broker through whom a contract is effected. There may be a dozen brokers recommending the same shipbuilders as being likely to build a desirable vessel at a low price, but it does not follow that all these are entitled to commission. Only the one who effects the contract is entitled to it. Now, M'Millan & Son were of opinion that this contract in October was not effected by or through the instrumentality of the pursuers, from whom they had heard nothing,—with whom they had had no communication whatever since they applied for the quotation, the receipt of which they had never acknowledged in the month of August preceding. I think that that was a just conclusion on their part, and that they were entitled accordingly to give a commission which I assume to be due,—but I have not to determine that,—to Galbraith, Pembroke, & Company, through whom the contract was effected, and who had also applied for and received a similar quotation in the month of August preceding.

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My opinion, therefore, upon the whole matter upon this very simple case, as I conceive it,—with very few facts in it, and very little law in it,—is in accordance with the judgment of the Lord Ordinary, which I therefore think ought to be adhered to.

LORD RUTHERFURD CLARK.—I am of the same opinion.

LORD TRAYNER.—I am of the same opinion. On the 2d August the defenders received two letters of the same date—1st August,—one from Jacobs & Company, the pursuers, and the other from Galbraith, Pembroke, & Company, asking for a quotation for building a certain vessel. They sent replies to each of these letters, and as far as the pursuers are concerned the negotiations for that vessel there ceased. The pursuers did not acknowledge receipt of the quotation. What they did does not appear from the letters, but there their connection with the matter ceased. On the other hand, Galbraith, Pembroke, & Company, having communicated the quotation which they had received from M'Millan & Son to Bielich, heard no more from him upon the subject until the following month of October, when he resumed communication with them in regard to this particular vessel for which they had asked and obtained a quotation from the defenders in the month of August. On 17th October Galbraith, Pembroke & Company resumed correspondence with the defenders, and their letter of 17th October is this:—"Referring to your letter of 4th August last Mr Bielich is now here, and asks us to get your lowest quotation for a steel barque about 1100 tons net register, with date of delivery," and so on.

From that date, 17th October, until the 25th October, when the contract was concluded, Galbraith, Pembroke, & Company busy themselves in the matter of the contract, and ultimately bring the parties together, and get the contract completed. In these circumstances I think it clear that the contract which was executed by M'Millan & Son was brought about through the agency of Galbraith, Pembroke, & Company, and through no other intermediary, and they are therefore, as the Lord Ordinary has held, entitled to

No. 117. the commission; and that Jacobs & Company are not entitled to any commission, in respect they had no direct influence in bringing about the contract.

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LORD JUSTICE-CLERK.—I am of the same opinion.

THE COURT adhered.

CLARK & MACDONALD, S.S.C.—C. & A. S. DOUGLAS, W.S.—Agents.

No. 118. DUNCAN FORBES AND OTHERS, Pursuers (Reclaimers).—*Johnston—M'Lennan.*

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WELSH & FORBES, Defenders (Respondents).—*Murray—Mackenzie.*

Contract—Right in security—Assignment to bond and disposition in security—Unconditional offer and acceptance—Implement—Defect in bond.—The holders of a bond and disposition in security having advertised the security subjects for sale, the firm of A & B, who had a reversionary interest in the subjects, in consideration of the bondholders having agreed to withdraw the subjects from sale, bound themselves, by letter, personally to take an assignation of the bond and to pay the amount therein with interest. This was agreed to by letter, and the subjects were withdrawn from sale. Thereafter A & B refused to implement the contract, on the ground that they had discovered that the bond was not a valid security over the subjects *quoad* the interest, and that its validity in this respect was an implied condition of their obligation. In an action at the instance of the holders of the bond against A & B for implement of the contract, *held* that A & B were bound to take over the bond whether it was defective or not.

Right in security—Bond and disposition in security—Bond for indefinite sum—Rate of interest not specified.—*Held* by Lord Low (Ordinary) that a heritable bond for a principal sum "with interest," the rate not being specified, did not constitute a valid security *quoad* the interest, as bearing to impose a burden of indefinite amount.

Opinions in the Inner-House reserved.

1ST DIVISION.
Lord Low.

DUNCAN FORBES AND OTHERS, the holders of a bond and disposition in security over the lands of Meethill, dated and recorded 20th June 1862, after intimation and requisition to the debtors, proceeded to advertise the security subjects for sale in Aberdeen on 21st July 1893. On 28th June 1893 Messrs Welsh & Forbes presented a note of suspension and interdict to prevent the sale. Thereafter an arrangement was concluded between the parties in terms of the following letters:—"Edinburgh, 18th July 1893.—Suspension at our instance against Forbes and others.—Dear Sirs,—With reference to this case, and in respect that you have agreed to withdraw the sale of the lands of Meethill advertised to take place on 21st inst., we undertake and bind ourselves personally to take an assignation at our expense to the bond of £3500 in favour of ourselves, or of a lender to be selected by us, and to pay the amount therein, with all arrears of interest thereon, the said interest to be calculated at 4 per cent, with simple interest at said rate upon the arrears of interest, and further to pay the expense of the notarial intimation, and of the advertising the subjects for sale, and withdrawing them from sale, as these may be adjusted between us, or taxed, if necessary, but said expenses to exclude the proposed charges for the articles of roup and inventory of titles. The settlement on this footing to take place at the ensuing term of Martinmas.

"In respect of this undertaking, it has been agreed that the note of suspension should be withdrawn, neither party being entitled to expenses.—Yours truly, WELSH & FORBES.

"Edinr., 19th July 1893.—Susp'n. Welsh & Forbes v. Forbes and Ors.

—Dear Sirs,—We hereby accept your offer of yesterday's date, and have accordingly instructed the withdrawal of the property from the market, and also have informed the Bill-Chamber clerk that the case has been settled.—Yours truly, MACPHERSON & MACKAY.”

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Messrs Welsh & Forbes having declined to implement the contract, Duncan Forbes and others, the holders of the bond, raised the present action against them, concluding for declarator and implement.

The pursuers, in cond. 1, set forth the bond and disposition in security for £3500, dated and recorded 20th June 1862, and the note of suspension above mentioned.

Defences were lodged, in which the defenders stated that when they received the security writs on 13th September 1893 they, for the first time, became aware “that the bond and disposition in security is defective in its terms. The obligation is to repay the principal sums ‘with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum, from the date hereof to the said term of payment.’ No rate of interest is specified, nor is it stated that the interest is to be at the legal rate. The defenders therefore maintain that, inasmuch as no unknown or uncertain incumbrance can be created over land by bond and disposition in security, the title tendered by the pursuers is not valid and sufficient. . . . The defenders maintain that they are entitled to receive, on making payment of the stipulated sums, a title which will enable them to exact payment of the interest out of the lands. The personal obligation in the bond is worthless. No interest has been paid upon the said bond since 1886. The arrears of interest claimed by the pursuers amount to £854, 16s. 7d.”

The defenders pleaded;—(2) According to a sound construction of the arrangement embodied in the defenders' letter of 18th July 1893, and relative acceptance, their obligation to take an assignation to the said bond is subject to the implied condition that they should thereby obtain a valid security over the lands for the payment of interest. (3) In respect the said bond is defective in the interest clause, the defenders are not bound to take an assignation thereto. (4) In any event, the pursuers are bound to establish to the satisfaction of the Court that they are in a position to grant the defenders a valid security over the lands for the payment of interest before calling on the defenders to take an assignation.

On 16th January 1894 the Lord Ordinary (Low) pronounced this interlocutor:—“Finds that the bond and disposition in security described in the summons being defective in the clause of interest, in respect that no rate of interest is specified therein, the defenders are not bound to accept an assignation thereof under the offer and acceptance of 18th and 19th July 1893 respectively: To that extent and effect sustains the pleas in law for defenders: Assolizies them from the conclusions of the summons, and decerns,” &c.*

* “OPINION.— . . . It is not disputed that the defenders are entitled to a valid heritable security for repayment out of the lands of interest as well as of principal, but the pursuers contend that the bond in question is of that character.

“The argument of the pursuers is as follows:—There is an obligation to pay interest, and the only effect of the rate of interest not being specified is, that the debtor can be compelled to pay the highest rate of interest for which a Court of law would, in the absence of agreement, give decree, namely, 5 per cent. The bond, therefore, did not fall within the rule that an indefinite amount could not be made a burden upon lands, because the rule was satisfied

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The pursuers reclaimed, and argued;—The title offered by them was good. When no special rate of interest was mentioned in a bond legal interest was understood—that is to say, interest at 5 per cent, or, at all events, interest at not more than 5 per cent, which was quite sufficiently specific to make the incumbrance over the land valid.¹ Further, the letters of offer and acceptance completed the contract, and it must be taken in law that Messrs Welsh & Forbes took the bond just as it stood. They did not dispute that the bond in question was the one they agreed to take. On the contrary, their own averments in cond. 1 clearly shewed that it was the same, and they should have found out any objection patent on its face before they offered to take an assignation to it.

The defenders maintained that the title offered was bad in respect no interest was specified, and further, that what they agreed to take was a good title to an incumbrance over the lands in question. The offer was subject to an implied condition that the title they should receive should be valid.

LORD PRESIDENT.—The Lord Ordinary has decided this case on a view entirely different to that presented to us in the latter part of the argument on the reclaiming note. We are now asked to determine what is proper implement of the contract embodied in the letters set forth in the record.

The offer made by Messrs Welsh & Forbes is as follows:—They bind themselves “to take an assignation at our expense to the bond of £3500 in favour of ourselves, or of a lender to be selected by us, and to pay the amount therein with all arrears of interest thereon, the said interest to be calculated at 4 per cent.” Now the bond is identified in a very distinct manner by the pursuers in their opening statement, for they begin their narrative by saying that they and the defenders went to law over a particular bond, dated and recorded on certain dates. It appears that the pursuers took proceedings for the purpose of bringing the security subjects to sale, and that Messrs Welsh & Forbes took

if the maximum amount with which the lands were charged could be ascertained.

“The point is a novel one, and is not without difficulty. It may be that, in a question with the debtor under the personal obligation, payment of interest at the rate of 5 per cent could be enforced. But it does not follow that the interest is validly constituted a burden upon the lands. The law is settled and precise that, in order to the constitution of a valid security over lands, the amount secured must be definite, and the full amount of the charge must be capable of being ascertained by inspection of the records. Thus, in *Tod v. Dunlop* (1 D. 231), it was held that a security for the sum contained in certain acceptances was bad, because the amount for which the acceptances were granted was not stated, although they were identified by their dates.

“I think that it is very difficult to hold that a security for interest on a principal sum, which does not in any way specify the rate of interest, is anything else than indefinite. I am therefore of opinion that the defenders cannot be compelled to accept an assignation of the bond in question. It is not disputed that the defenders are entitled to a security which is good against the lands both for principal and interest, and I do not think that they are bound to accept a security under which it is at least extremely doubtful whether they can recover the arrears of interest.”

¹ Repeal of Usury Acts Act (17 and 18 Vict. c. 90), sec. 3; *Cochrane v. Gilkison*, Dec. 4, 1857, 20 D. 213, 30 Scot. Jur. 111; *Smith v. Barlas*, Jan. 15, 1857, 19 D. 267, 29 Scot. Jur. 135; *Douglas' Trustees v. Douglas*, June 7, 1867, 5 Macph. 827, 39 Scot. Jur. 464; *Inglis' Trustees v. Breen*, Feb. 6, 1891, 18 R. 487; *Cunninghame v. Boswell*, May 29, 1868, 6 Macph. 890, 40 Scot. Jur. 495; *Gordon v. Howden*, Feb. 9, 1853, 15 D. 378, 25 Scot. Jur. 230.

steps to prevent their doing so. Afterwards Messrs Welsh & Forbes made the offer I have read on condition of the pursuers "withdrawing the sale." Now, it cannot be taken as other than quite clear that, in making this offer, they were in full knowledge of the writ in question, and, at all events, it and nothing else was the subject of the bargain. No. 118.
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Taking then the averments in condn. 1 and 2, from which it appears that the litigation was to be settled by the bond in question being transferred from the pursuers to Messrs Welsh & Forbes, the latter parties agreeing to take an assignation to a particular writ, I think it is impossible to say that, because they find something wrong with the bond which was patent on the face of it, the defenders, who agreed to take it, are now to be relieved from doing so. They must be held to have agreed to take it just as it was.

Now, although the Lord Ordinary has not taken cognisance of this view, I think it gives a short and conclusive answer to the question before us, and that the bargain made must be implemented.

LORD ADAM concurred.

LORD M'LAREN.—The persons who agreed to take an assignation to this bond describe and identify it in their letter making the offer. I think, therefore, that they agreed to accept an assignation to that specific bond, and that the case is the same in principle as that of a purchased estate, where the purchaser agrees to take the title as it stands.

It is, accordingly, not necessary to consider the question raised in the Lord Ordinary's note, but I think it right to say that I am not to be understood as concurring with his Lordship's view, if the question were before us. Whether the bond is a good security for interest may have to be determined hereafter, and on that point I desire to reserve my opinion.

LORD KINNEAR.—I concur, and I refrain from expressing any opinion on the question of interest referred to by Lord M'Laren.

THE COURT pronounced an interlocutor recalling the Lord Ordinary's interlocutor, and finding and declaring that the defenders were bound to take from the pursuers an assignation of the bond, &c., and ordaining "the defenders to implement their part of the contract libelled, at or before the term of Whitsunday 1894, by making payment to the pursuers at or before said term, in exchange for an assignation of the said bond and disposition in security, of the said sum of £4276, 0s. 7d., in the following proportions, namely," &c.: "Continue the cause as regards the remaining conclusion of the summons."

MACPHERSON & MACKAY, W.S.—WELSH & FORBES, S.S.C.—Agents.

ROBERT KIRK SIMPSON AND OTHERS (Alexander Smith's Trustees),
First Parties.—*Ure—Constable.*

No. 119.

Mar. 9, 1894.
Smith's Trustees v. Sellar.

WILLIAM SELLAR AND OTHERS, Second Parties.—*Dickson—Younger.*
ALEXANDER SMITH AND OTHERS, Third Parties.—*Murray—D. Dundas.*
MRS MARY TOLMIE AND OTHERS, Fourth Parties.—*D.-F. Sir Charles Pearson—C. J. Guthrie.*

Succession—Satisfaction of legacy by advances—Interest.—A truster bequeathed a share of residue to his daughters in liferent only and their children in fee, but declaring "that all advances which I have made, or

No. 119. may hereafter make, to my respective sons-in-law, shall be deducted from the respective shares" liferented by his daughters. On various occasions the truster had lent sums to a firm of which one of his sons-in-law was sole partner, and had further guaranteed the payment of a sum due by his son-in-law to another firm. The son-in-law's firm, and he, as sole partner thereof, suspended payment, and their affairs were wound up under a trust-deed, which declared that "it is a condition of this deed that the creditors who accede hereto, or who shall take payment of a dividend on their claims, shall be held to have discharged us of the whole debts due by us to them." The truster acceded to this deed, took payment of dividends, and granted receipts therefor, which bore that he accepted the dividends in terms of the trust-disposition, and discharged his son-in-law. At the date of the truster's death there was still a balance due to him on the above transactions. In a special case *held* that the balance of the truster's advances, which had not been repaid to him, but without interest, fell, as at the date of the truster's death, to be imputed as a payment to account of the share of residue falling to the daughter's children.

1ST DIVISION. ALEXANDER SMITH, of Auchentroig, Buchlyvie, died on 7th December 1891, leaving a trust-disposition and settlement dated 28th April 1883.

By the third purpose of his trust-disposition the truster bequeathed one-half of the residue of his estate to his sons equally in fee, and the other half equally among his daughters in liferent for their liferent use only, and to their respective children in fee. That purpose contained the following declaration:—"Declaring that whatever sum or sums of money I may advance to any of my sons for the purpose of enabling them to commence business or otherwise shall be imputed to account of their respective shares of the residue of my said means and estate, and that all advances which I have made, or may hereafter make, to my respective sons-in-law, shall be deducted from the respective shares of the fee of the half of the said residue liferented by my said several daughters, their wives."

A question having arisen as to whether a sum of £3786, 2s. 4d. fell to be deducted from the share of the residue belonging to Margaret Muir Smith or Sellar, one of the testator's daughters, a special case was presented to the Court, to which the trustees under the trust-disposition were the first parties; the husband and children of the deceased Margaret Muir Sellar, the second parties; the sons of the truster, the third parties; and his remaining daughters and their children, the fourth parties.

The facts, as appearing from the special case, were as follows:—Mrs Margaret Muir Sellar predeceased the truster, survived by her husband William Sellar and nine children. William Sellar carried on business in Glasgow under the firm of Donald & Sellar, of which he was, after 15th March 1876, the sole partner. On 19th May 1876 the truster lent to the company of Donald & Sellar a sum of £2500, conform to receipt therefor,* and on the 28th December 1880, in terms of a minute of agreement between J. & W. Campbell & Company, warehousemen, Glasgow, the said Donald & Sellar, and William Sellar, and the truster, dated 28th and 29th December 1880, he advanced in loan to the said Donald & Sellar a further sum of £1000.† The truster also guaranteed the ultimate

* The receipt bore that £2500 had been received from Alexander Smith to the credit of his deposit-account, and was signed "Donald & Sellar."

† The minute of agreement contained these clauses:—

"First, Without prejudice to, but in corroboration of the previous agreement between the parties dated 30th March and 7th April 1876, the second [Donald & Sellar and William Sellar] and third parties [the truster] hereto acknowledge that the second party is still indebted and owing to the first party the said sum of £7000, the ultimate payment of which to the extent of the first £2750 the

payment by the said William Sellar of the sum of £4250 to the said J. & W. Campbell & Company, being part of the debt of £8500 due by the said William Sellar to them, all conform to minute of agreement between the said J. & W. Campbell & Company, William Sellar, and the truster, dated 30th March and 7th April 1876. Further, the truster also by said minute of agreement of 28th and 29th December 1880 of new guaranteed the ultimate payment to the said J. & W. Campbell & Company of the first £2750 of the sum of £7000, being the amount of the debt then due by the said William Sellar to the said J. & W. Campbell & Company. On 3d April 1883 the firm of Donald & Sellar, and the said William Sellar, as sole partner thereof, and as an individual, suspended payment, and their affairs were wound up under a trust-deed dated 3d April 1883. The truster, the said Alexander Smith, acceded to the trust-deed, and lodged a claim with the trustee thereunder, amounting to £3162, 12s. 1d. This claim was duly admitted, and in respect thereof the truster received and granted receipts for dividends from the trust-estate amounting to £1189, 5s. 5d., leaving a balance unpaid on the claim of £1973, 6s. 8d.* The truster was also called upon, under his guarantee to Messrs J. & W. Campbell & Company, to pay, and made payment to them of £1812, 15s. 8d. The difference between the amount paid by him on behalf of his son-in-law and the amount received by him was £3786, 2s. 4d. At the date of the said trust-disposition and settlement four daughters of the testator were married, and three of his sons-in-law survived. None of the testator's sons or sons-in-law had, so far as known to the parties received any advances, with the exception of William Sellar.

The trust-deed by Donald & Sellar and William Sellar contained the following clause:—"Declaring further that it is a condition of this deed that the creditors who accede hereto, or who shall take payment of a dividend on their claims, shall be held to have discharged us of the whole debts due by us to them."

The questions for the opinion and judgment of the Court were:—"(1) Does the said sum of £3786, 2s. 4d., or any part thereof, fall to be deducted by the first parties from the share of residue belonging to the children of Margaret Muir Smith or Sellar? (2) Is interest chargeable upon the said sum of £3786, 2s. 4d., and, if so, at what rate?"

The third and fourth parties maintained that the whole sum of £3786, 2s. 4d. should be deducted, and interest charged thereon at five per cent. It was true that the advances were not all made to William Sellar personally but partly to his firm, but practically they came to be advances to him.¹ It was probable that the testator had them in his mind when he made his settlement. The discharge in the trust-deed by

third party hereby of new guarantees. So soon as payments to the extent of £2750 have been made by the second party to the first party, the third party shall be relieved of his obligation for the payment thereof.

"Second, On the execution and delivery of these presents by all the parties hereto, the first and third parties agree to advance or pay the sum of £3000 in loan to the second party, £2000 of said sum being advanced by the first party, and the remaining £1000 by the third party, which loan shall bear interest at the rate of five per centum per annum until repaid."

* The receipts granted by the truster in respect of dividends from the estates of Donald & Sellar and William Sellar all bore, "which dividend I accept in terms of the said trust-disposition and assignation, and discharge the said William Sellar."

¹ Berry v. Downie, July 10, 1839, 1 D. 1216; (H. L.) March 22, 1847, 19 Scot. Jur. 447; Webster v. Rettie, June 4, 1859, 21 D. 915, 31 Scot. Jur. 504; Hutcheson v. Skelton, 1856, 2 Macq. 492; Ashbury v. Beasley, 1869, Weekly Notes, p. 96.

No. 119. Donald & Sellar and William Sellar did not discharge the debt in favour of William Sellar personally; the clause itself distinctly negatived that view. Interest should be charged in the ordinary way at 5 per cent from the date of the advances.

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Argued for the second parties;—The sum in question was not an advance within the meaning of the clause in the trust-deed. It was simply a debt due by Donald & Sellar, and was discharged in so many words by the receipts for dividends. The children of Mr Sellar were not responsible for his debts, but a deduction such as was proposed practically made them so. Even if the sum was treated as an advance, no interest could be charged, as there was no direction in the trust-deed to that effect.¹ At all events it could only be charged from the date of the testator's death.

At advising,—

LORD M'LAREN.—The first question has reference to a clause in the trust-settlement of the testator, providing "that all advances which I have made or may hereafter make to my respective sons-in-law shall be deducted from the respective shares of the fee of the half of the said residue liferented by my said several daughters, their wives." The trust-deed is dated 28th April 1883, and prior to that date the truster had advanced to his son-in-law William Sellar the sums set out in the third article of the case. On 3d April 1883 William Sellar, who carried on business under the firm of Donald & Sellar, suspended payment, and of the same date granted a trust-deed under which the business of the firm was wound up. The testator acceded to the trust-deed, claiming to the amount of £3162, 12s. 1d. His claim was admitted, and he received dividends from the trust-estate amounting to £1189, 5s. 5d., leaving an unsatisfied balance of £1973, 6s. 8d. By accepting a dividend the testator of course discharged his right to recover the unpaid balance. The testator also made a payment under a guarantee which he had undertaken on behalf of Mr Sellar, and the difference between the total amount which the testator paid on behalf of his son-in-law and the amount received in the form of dividends is stated to be £3786, 2s. 4d.

1. The first question in this case is whether the difference ought to be deducted by the testamentary trustees from the share of residue which is given to Mrs Sellar's children?

But for the direction which I have quoted, it is evident that the proposed deduction could not be made. Mrs Sellar predeceased the testator, the liferent intended for her did not take effect, and the fee of the share of the residue appropriated to the Sellar family went to her children, who are not responsible for their father's debts. Moreover, the debts of William Sellar were discharged, and even if he had been the residuary legatee of the share in question, the testamentary trustees could not have treated a debt which had been discharged as a subsisting debt of which they were entitled to operate payment by retention.

But a direction to testamentary trustees to impute advances to account of succession may be, and generally is, intended to empower the trustees to apply to advances made in the testator's lifetime a principle which would not be applicable if the will were silent on the subject, i.e., to treat such advances not as debts but as payments to account of children's shares of succession. The object of such a direction is of course to secure equality in the distribution of the

¹ Baird's Trustees v. Duncanson, July 19, 1892, 19 R. 1045.

testator's estate among the members of his family, and it is perfectly understood No. 119.
and settled that, in the construction of such directions, the word "advances" is not to be confined to advances by way of loan for which the father might have sued or claimed in bankruptcy, but is to include money advanced of which a record is kept, but which the son or daughter was under no obligation to pay. Mar. 9, 1894.
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Now, if the direction to impute advances to account of shares of succession would include, for example, money given to a daughter on her marriage, or to a son to purchase an interest in a business, for which no receipt or obligation was taken at the time, it is difficult to see why money lent to a child upon an obligation to repay should cease to be an advance because that obligation is discharged, either by the voluntary act of the father, or by the operation of the principles of the law of bankruptcy.

Another consideration, to which our attention was directed by counsel for the Sellar family, is that, while the advances were made to their father, payment is to be made by deducting the sums advanced from the children's provisions. But this is the very thing which the testator has directed, and the fact that he has so directed shews that he was not thinking about getting payment to his estate of a debt, but only of dividing his succession equitably by a *per stirpes* division in which advances made to a parent were to be imputed to the account of the children's succession. This conclusion is, I think, in accordance with the opinions expressed in the House of Lords in *Hutcheson v. Skelton*, 2 Macq. 492, and *Berry v. Downie*, 1 D. 1216, 19 Scot. Jur. 447.

2. It follows from what has been said that the advances in question only became imputable to account of succession at the testator's death, and that interest is not due for the antecedent period. In making up the residue account as at the testator's death, the sum of £3786, 2s. 4d. will be added to residue, and then the account of the Sellar family will be debited with this sum as a sum already paid.

LORD KINNEAR.—By discharge of these debts on a composition they ceased to be debts enforceable by action, but still they were advances which were in part unsatisfied, and they were made to one of the truster's sons-in-law. It was, therefore, quite in the power of the truster to say that they should be deducted from the share of the residue falling to the children of that son-in-law. The question is whether, on a sound construction of the will, he intended such a deduction to be made. I read the deed as referring to the state of the circumstances at the date of the truster's death. At that date he was certainly out of pocket for advances to his son-in-law, and I think there is no room for doubt that when he directed that deductions should be made for advances to his sons-in-law, he had these advances in his mind. I therefore concur.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT pronounced this interlocutor:—"Find and declare, with reference to the first question, that the sum of £3786, 2s. 4d. is an advance which falls, in terms of Alexander Smith's trust-disposition and settlement, to be deducted from the share of fee of the half of the residue of his estate thereby appointed to be liferented by his daughter Margaret Muir Smith or Sellar: Find and declare, with reference to the second question, that such advance only

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became imputable to account of succession at the testator's death, and that no interest is due thereon."

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N. BRIGGS CONSTABLE, W.S.—J. W. & J. MACKENZIE, W.S.—BELL & BANNERMAN, W.S.—SIMPSON & MARWICK, W.S.—Agents.

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PETER COBB, Pursuer (Reclaimer).—*Johnston—M' Lennan.*

Mar. 9, 1894.
Cobb v. Cobb's Trustees.

ALEXANDER ROBERTSON AND OTHERS (David Cobb's Trustees), Defenders (Respondents).—*Dickson—Salvesen—E. H. Robertson.*

Succession—Trust—Charitable trust—Uncertainty.—Held that a direction to trustees to pay and apply the residue of the testator's estate "to such useful, benevolent, and charitable institutions" as the trustees in their discretion might think proper, was not void from uncertainty.

2D DIVISION.
Ld Stormonth-Darling.

DAVID COBB, of Taypark, near Dundee, died in January 1892, leaving a trust-disposition and settlement, dated 2d October 1888, by which he conveyed his whole means and estate, heritable and moveable, to trustees, and with respect to the residue, directed them in the following terms:—"I further direct my said trustees to pay and apply whatever residue and interest thereon may remain in their hands to such useful, benevolent, and charitable institutions as they in their discretion may think proper, it being hereby declared that the decision of my said trustees or the majority of them, in regard to said useful, benevolent, and charitable institutions, shall be final and binding upon all concerned."

In September 1892 Peter Cobb, one of the testator's next of kin, brought an action against the trustees, in which he averred that the bequest of the residue was "vague, indefinite, and uncertain, and its terms are in law impracticable and incapable of being carried out," and concluded for declarator that the bequest of the residue was void, and that the residue fell to be distributed as intestate succession of the deceased, and for an accounting.

The trustees, in defence, pleaded;—(2) The pursuer's averments are irrelevant. (3) The residuary bequest in the said trust-disposition and settlement not being invalid on the grounds stated, the defenders should be assoilzied.

On 2d February 1894 the Lord Ordinary (Stormonth-Darling) sustained the second and third pleas in law for the defenders, and assoilzied them from the conclusions of the summons.*

* "OPINION.— . . . The pursuer cannot point to any Scottish decision in support of his contention, but he cites a number of English authorities which, if I understand them aright, establish the rule that a bequest for distribution at the discretion of trustees for any other than charitable purposes is void, and that where other purposes of an indefinite nature are named along with charitable purposes, so that the whole might be applied for either purpose, the English Courts will not sustain even the charitable part of the bequest which, if it stood by itself, would be good. The reason for this somewhat artificial rule seems to be that as the execution of every English trust is held to be under the control of the Court, it must be of such a nature that the Court itself can, if necessary, execute the trust. It can execute a trust for charitable uses, because the word 'charitable' has in England a well ascertained legal meaning (much wider than its natural meaning), derived from the Statute of Elizabeth and the decisions of the Court of Chancery thereupon; but other words, though of similar import, are held to constitute too vague a direction for the Court to administer, and if for the Court, so also for trustees.

"I refer particularly to the judgment of Lord Eldon in *Morice v. The Bishop of Durham* (1805), 10 Vesey, 521, now reported in 7 Revised Reports, 232.

"It seems to me that there is no such rule in Scotland, and that the reason

The pursuer reclaimed, and argued ;—This bequest of residue was void from uncertainty. The pursuer admitted that a bequest to “charitable

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for it does not exist. Our Courts do not supervise or execute trusts, and the recent case of *Robbie's Judicial Factor v. Macrae*, 20 R. 358, shews that they will not transmit to a judicial factor appointed by them the discretion as to the selection of objects of the testator's bounty which had been validly committed by the testator to his own trustees.

“Nothing can illustrate more strongly the vital distinction between the two systems than to contrast the English cases of *Williams v. Kershaw*, 5 Cl. and Fin. 111, and *In re Jarman's Estate*, 8 Chanc. Div. 584, with the judgments of the House of Lords, sitting as a Court of Appeal from Scotland in *Hill v. Burns*, 2 Wilson and Shaw, 80, and *Millar v. Black's Trustees*, 2 Sh. and Maclean, 866. In *Williams v. Kershaw*, Lord Cottenham, when Master of the Rolls, held that a direction by a testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, was void for uncertainty. In *Jarman's Estate*, Vice-Chancellor Hall decided that a direction to trustees to apply the residue to any charitable or benevolent purpose they might agree upon was indefinite and inoperative, and therefore bad. But in *Hill v. Burns* the House of Lords sustained a bequest whereby a testatrix appointed the residue of her estate to be applied by her trustees in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow or neighbourhood thereof, coupled with a declaration that they should be the sole judges of the appropriation of the residue for these purposes. Still more significantly, in *Millar v. Black's Trustees*, the House decided that a bequest to trustees to apply the residue to such charitable and benevolent purposes as they might think proper, was not void for uncertainty. In *Crichton v. Grierson*, 3 Wilson & Shaw, 329, Lord Lyndhurst stated the rule of Scots law in perfectly general terms. That was a case where the testator declared his wish to be that the residue should be applied in such charitable purposes and in bequests to such of his friends and relations as might be pointed out by his wife, with the approbation of the majority of his trustees. Lord Lyndhurst, in holding the direction to be good, stated (at p. 338) the question to be ‘whether it is competent for the disposer by a deed of this description to point out particular classes of persons and objects which are intended to be the object of his favour, and then to leave it to an individual, or a body of individuals, after his death to select out of those classes the particular individuals or the particular objects to whom the bounty of the testator shall be applied’? And he added,—‘I apprehend that according to the authorities in the law of Scotland it is quite clear a party has this power.’ Towards the end of his opinion (at p. 343) his Lordship took occasion to say that, in respect to bequests for charitable purposes, the law of England was ‘more strict than the law of Scotland.’

“It seems to me impossible, in the face of these decisions, to say that this bequest is void. The testator here has been more precise than some of the testators in the cases I have mentioned, because he does not content himself with the phrase ‘useful, benevolent, and charitable purposes,’ he points out ‘useful, benevolent, and charitable institutions’ as the objects of his bounty. The trustees have a free hand in selecting the particular objects, but they must be ‘institutions,’ which implies a definite organisation and some element of permanence. Except for the introduction of the word ‘useful,’ the case is precisely ruled by *Millar v. Black's Trustees*. Now, does the word ‘useful’ vitiate the whole bequest? I think not. Suppose the expression ‘useful institutions’ had stood alone. They are a class of objects as to which no doubt opinions might widely differ, but I know of no authority in the law of Scotland for saying that a testator might not delegate to his trustees the duty of selecting from among that class, according to their own opinion of what constituted a useful institution. Some fanciful illustrations were put by the pursuer's counsel of institutions which most men would admit to be useful, but which would not be appropriate recipients of a testator's bounty. Similar things might be said of

No. 120. institutions" was effectual,¹ as also, by the law of Scotland, a bequest to "benevolent institutions,"² but a bequest to "useful institutions" was bad, the word "useful" being so vague that it practically gave the trustees no criterion by which to exercise their discretion.³ A testator was not entitled to delegate his power of testing absolutely to trustees.⁴ To be effectual a trust must be for purposes sufficiently definite to enable the Court to determine whether the trustees in disposing of the trust-estate were in breach of trust or not.⁵ The Courts in Scotland had power to superintend the administration of trusts,⁶ and although they might not have adopted the technical meaning of the word "charitable," recognised in England, the trust purposes must be definite, otherwise such superintendence was impossible. In *Hill v. Burns*,⁷ and *Millar v. Black's Trustees*,⁷ and in the prior decisions referred to in these cases, the trust purposes were all definite. Here the purposes were not sufficiently definite, for the trustees might, if they thought fit, give the residue of the trust-estate, or part of it, to institutions which they chose to consider "useful," but which were neither charitable nor benevolent. The expression "useful, benevolent, and charitable institutions," was to be read disjunctively,—that was to say, "and" was to be read as equivalent to "or," for the expression meant "useful institutions and benevolent institutions and charitable institutions," thus giving the trustees the power of handing over the residue to institutions belonging to any one or more of these three classes that they thought fit, and therefore to "useful institutions" if the trustees so decided. By the law of England a gift to "benevolent or

every discretionary trust, because all discretion is liable to be abused. This Court has power to restrain abuses in the administration of trusts at the suit of the testator's next of kin, or perhaps of the Lord Advocate, however wide the discretion of trustees may be. But we are not to anticipate the abuse of discretion. It seems to me that the word 'useful' may to some extent be explained and controlled by the company in which it stands, but that even by itself it sufficiently designates a large class of institutions to which the testator's bounty might properly enough be applied, and which might not in strict language be covered by the words 'charitable' or 'benevolent.' The word 'charitable' in England, according to the definition in the Statute of Elizabeth, covers schools of learning and scholarships in universities, and it has been held to extend to such bodies as the British Museum and the Geographical Society, and to such purposes as public religious instruction (*Jarman on Wills*, 208-9). These are purposes which might not fall within the ordinary meaning of 'charitable,' or even of 'benevolent,' and it would be a singular result if the freer scope of the law of Scotland with respect to bequests of this kind were found to leave less latitude to testators than the narrower rule of the law of England. But while my own opinion is that the trustees might allocate the testator's money to institutions which are useful without being either charitable or benevolent, there is another construction of the clause which would remove all difficulty on this head—I mean the construction that any institution receiving benefit must be at once charitable, benevolent, and useful. Such a construction is by no means a forced one, and at all events I should prefer it to holding that there was intestacy. . . ."

¹ *Morice v. Bishop of Durham*, 1805, 10 Ves. 521, 7 Rev. Rep. 232.

² *Hill v. Burns*, April 14, 1826, 2 W. and S. 80; *Millar v. Black's Trustees*, July 14, 1837, 2 S. and M. 866.

³ *Kendall v. Granger*, 1842, 5 Beav. 300.

⁴ *Sutherland's Trustees v. Sutherland's Trustee*, July 6, 1893, 20 R. 925.

⁵ *Vezey v. Jamson*, 1822, 1 Sim. and St. 69.

⁶ *Millar v. Black's Trustees*, *supra*, per Lord Brougham, at p. 893.

⁷ *Supra*, note 2.

charitable institutions," would be bad,¹ as also would a gift to "useful, benevolent, and charitable institutions,"² but a gift to "benevolent and charitable institutions" would be good.³ [LORD RUTHERFURD CLARK.—
 Why should the construction be distributive when there are three adjectives, and conjunctive when there are two?] Because when there were three adjectives it was doubtful what was to be read between the first and the second.⁴ So also in America, a gift to "charitable, educational, and scientific purposes" had been construed disjunctively, and had therefore been held void.⁵ [LORD RUTHERFURD CLARK.—But do not these adjectives require the disjunctive construction? Can you combine them in a single institution? Here you may construe the bequest to mean a bequest to "useful benevolent institutions, and useful charitable institutions."] That was virtually to read "useful" as an adverb. [LORD RUTHERFURD CLARK.—But am I not bound to adopt a construction which sustains a will rather than one which destroys it?] No doubt a benignant construction of words in a will was in general to be adopted, so as if possible to avoid intestacy; but that principle did not apply to cases in which the testator had not taken the trouble to dispose of his property for himself, and had simply handed over the disposition of it to trustees.

Argued for the defenders;—The law of Scotland with respect to public trusts differed from that of England. In England trusts for charitable purposes *eo nomine*, or for purposes which, in the estimation of the law, were charitable purposes, would be sustained, because the Court knew what charitable purposes were and consequently could execute, or control the execution of, such trusts; on the other hand, public trusts for purposes which were not charitable would be held void for uncertainty; the Court, having no knowledge of the nature of such purposes, could neither execute, nor control the execution of, trusts for carrying them into effect. By charitable trusts the law of England understood a trust for one or other of the purposes enumerated in the preamble to the Statute 43 Eliz. cap. 4, or for a purpose which the Court held to be within the spirit and intendment of the statute. This whole doctrine had no place in the law of Scotland. It was the policy of the Courts in Scotland, with respect both to public and to private trusts, to leave the trustees as far as possible in the administration of the trust. Hence trusts, although they gave the trustees the largest discretion as to the distribution of the trust funds, would be sustained.⁶ It was not the law of Scotland that a testator could not put the disposal of his property at the will and discretion of another.⁷ Therefore a bequest to trustees to distribute trust property among such "useful institutions" as they thought fit was not void from uncertainty. But even if a trust for "useful institutions" was void from uncertainty, the gift of residue here would not fail if a construction was possible which would give it validity. Testamentary deeds, and particularly testamentary deeds for charitable purposes,

¹ *Ellis v. Selby*, 1836, 1 My. and Cr. 286; *In re Jarman's Estate*: *Leavers v. Clayton*, 1878, L. R., 8 Chanc. Div. 584.

² *Williams v. Kershaw*, 1835, 5 Cl. and Fin. 111.

³ *In re Sutton*: *Stone v. Attorney-General*, 1885, L. R., 28 Chanc. Div. 464.

⁴ *In re Sutton*, *supra*, per Pearson, J., at p. 466.

⁵ *Tilden v. Green*, 1891, 44 Albany Law Journal, p. 368.

⁶ *Hill v. Burns*, *supra*; *Crichton v. Grierson*, July 25, 1828, 3 W. and S., 329; *Black's Trustees v. Miller*, *supra*; *Kelland v. Douglas*, Nov. 28, 1863, 2 Macph. 150, 36 Scot. Jur. 58; *M'Lean v. Henderson's Trustees*, Feb. 24 1880, 7 R. 601, per L. J.-C. Moncreiff, at pp. 611-12.

⁷ *Hill v. Burns*, *supra*, per Lord Balgray, at p. 82, and Lord Hermand, at p. 82.

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always received a benignant construction so as to sustain the deed, if possible; and the law of Scotland was peculiarly favourable to charitable bequests.¹ If then the gift, in so far as it was in favour of "useful institutions," was void from uncertainty, the word "useful" ought to be held *pro non scripto*.² But it was not necessary to read the gift as a gift to "useful institutions"; the gift of the residue might be read either as a gift to "useful benevolent institutions and useful charitable institutions," or as a gift to institutions which were at once useful, benevolent, and charitable. Either of these constructions was grammatically admissible, and ought to be adopted rather than that the gift should fail from uncertainty.

At advising,—

LORD JUSTICE-CLERK.—The question here is whether a bequest to trustees, with directions to them to apply the amount to "useful, benevolent, and charitable institutions," is void from uncertainty. There can be no doubt that a bequest which directs trustees to apply its amount for the benefit of charitable institutions would be valid. The cases leave that matter in no uncertainty. But it is contended that the word "useful" in this testament renders the bequest void, because useful is a vague expression, and is separable from the other expressions. The contention is that the three expressions, "useful, benevolent, and charitable," are not to be read together, but to be read as alternatives to one another, as if they were connected by the word "or." I do not think that they should be so read if a reasonable meaning can be found when they are read as they stand, joined by a copulative and not a disjunctive. And I am of opinion that the words can, without any straining, and rather in accordance with their natural sequence, be read so as to refer to institutions of a benevolent and charitable character such as the trustees may select, they being called upon in doing so to consider and form an opinion as to whether the institutions being benevolent and charitable are also doing useful work in the community. The words "benevolent and charitable" may be held to form one expression in which the words are truly used as exegetical of each other respectively, the word "useful" overriding both. That is my view of how this phrase may be read and should be read. So reading it, the contention that this bequest is null from uncertainty must fail, and I think that your Lordships should adhere to the Lord Ordinary's interlocutor.

I do not go into the matter more fully or into the consideration of the question whether if the words of the bequest were to be read as disjoined the bequest might not be valid, for I have had an opportunity of reading an opinion prepared by Lord Trayner in which I entirely concur.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—The testator in this case directed his trustees, *inter alia*, "to pay and apply whatever residue and interest thereon may remain in their hands to such useful, benevolent, and charitable institutions as they in their discretion may think proper." This direction, the pursuer maintains, is void through uncertainty, and if that contention were sustained, the result would be that *quoad* the residue thus directed to be distributed according to the dis-

¹ M'Laren on Wills, vol. i. p. 426; Menzies' Conveyancing, 3d ed., at p. 483; Magistrates of Dundee v. Morris, May 1, 1858, 3 Macq. 134.

² Ersk. Inst. iii. 9, 14.

cretion of the trustees there would be intestacy. That is a result not easily to be arrived at, because the truster certainly did not intend that his estate or any part of it should be distributed according to the law of intestate succession, but intended it to go according to another rule, namely, the discretion and choice of his trustees. It may be, however, that a direction by a testator is so vague and uncertain as to be void, although the Court will be disposed, if it can, so to read the direction that it may have effect, rather than construe it so as to render it unavailing. It does not appear to me to be necessary in this case in order to sustain the direction in the will before us to have recourse either to our general rules of construction or to that tendency of our law to avoid intestacy where this can reasonably be done, for in my opinion the direction in question cannot be considered as void through uncertainty when regard is had to a series of decisions already pronounced, and of authority, in our Courts.

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The view of the direction in question which the pursuer presents is that there are three classes of institutions mentioned therein, to any one of which the trustees may give the benefit of the testator's bounty,—namely, useful institutions, benevolent institutions, or charitable institutions; that while the two latter are sufficiently defined to sustain the direction, the first, "useful institutions," to which according to his view the whole of the directed residue might be given, is too vague. I reserve my opinion upon the question whether a direction to trustees to give a portion of the trust-estate under their charge to "useful institutions" would be void through uncertainty according to the law of Scotland. It is not necessary, in the view I take of this case, to consider or decide that question, for in my opinion the testator here did not direct anything to be given to merely "useful institutions." I read his direction as one to his trustees to favour benevolent and charitable institutions, which are at the same time useful. The word "useful" is used to qualify both "benevolent" and "charitable." In that view of the clause it is a matter of indifference whether the "and" is read as conjunctive, or as equivalent to the disjunctive "or." Now, if the clause can fairly be read as I propose to read it, the pursuer's argument fails. He does not dispute that a gift or direction to benefit a "useful benevolent institution," or a "useful charitable institution," would be valid. He argues against this construction however, that it is employing two adjectives, the one to qualify the other; whereas in his reading of the clause "useful" is used to qualify the substantive, just as the other adjectives do. I think this, in any view, an extremely narrow ground on which to proceed with the result of frustrating the intention of a testator. But I find no difficulty in reading the two words as adjectives qualifying each other, as well as qualifying the substantive which follows, and I see that the same view about the use of double adjectives was taken by Mr Justice Pearson—in the case of *Sutton*, L. R., 28 Chan. Div. 464—cited during the debate.

The pursuer relied very much upon the decision pronounced in *Williams v. Kershaw*, 5 Cl. and Fin. 111, where it was held that a direction by a testator to trustees to apply the residue of his estate "for such benevolent, charitable, and religious purposes" as they should think right, was void through uncertainty. In that case, the Master of the Rolls held in construing the direction before him that the intention of the testator was to leave his trustees a discretion in the choice of purposes which were benevolent, or charitable, or religious. So read, the deed gave the trustees the power of bestowing the whole of the truster's residue on objects which were, in their opinion, benevolent; and that

No. 120. being by the law of England void through uncertainty, the truster's residue was held to be undisposed of. The decision in that case was not cited as an authority in any way binding upon us, or as one which we ought to follow, and indeed it could not be so, for the law of Scotland recognises as sufficiently certain to be valid, a direction to trustees to distribute or bestow trust-estate on benevolent objects or purposes. The case was cited, I understood, chiefly as an instance where a learned Judge had construed the language in a will as disjunctive which apparently was conjunctive, and it was suggested that the same course should be followed here, so as to make the direction before us read as if the truster had directed his trustees to bestow his bounty on useful or benevolent or charitable institutions, and so to read the word "useful" as qualifying institutions, and as altogether independent of the terms benevolent and charitable. But even for this limited purpose I think the case of *Williams* does not help the pursuer. The terms there used were such as might lead, and in fact did lead, to the conclusion that they must be read as descriptive or designative of independent objects and purposes. "Benevolent" would scarcely be used as qualifying "charitable," and "benevolent and charitable" if read together as qualifying "religious" led to the result, as the Master of the Rolls said, that "every application must be to a religious purpose," a construction which he rejected. But here there is no such difficulty to contend with; "useful, benevolent, and charitable institutions" are terms which may fairly, and I think in this case properly, be read as indicating institutions benevolent or charitable in their character and useful in their operations. The adjectives used are such as may reasonably be read together as qualifying the substantive, and do not point to their being used as independently designative. I am on these grounds for affirming the judgment reclaimed against.

THE COURT adhered.

ALEXANDER MORISON, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

No. 121. MARTIN BRYDON LAWRENCE (Clerk to and as representing the Police Commissioners of Oban), Pursuers (Respondents).—*C. K. Mackenzie—Craigie.*

Mar. 9, 1894.
Police Commissioners of Oban v. County Council of Argyllshire.

COUNTY COUNCIL OF THE COUNTY OF ARGYLL, Defenders (Reclaimers).—*Sol.-Gen. Asher—Graham Stewart.*

County Council—Assessment—Burgh—Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50).—Held (rev. judgment of Lord Low) that under the Local Government (Scotland) Act, 1889, a county council is entitled to levy the county general assessment on the annual value of lands and heritages in parliamentary burghs within the county, which have less than 7000 inhabitants and have no police establishment.

2D DIVISION.
Lord Low.

ON 4th May 1893 Martin Brydon Lawrence, clerk to and as representing the Police Commissioners of Oban, brought an action against the County Council of Argyllshire, for declarator that the defenders were not entitled to levy county general assessments on the annual value of lands and heritages within the bounds of the burgh of Oban, and, in particular, were not entitled to levy from the Police Commissioners certain specified sums in name of county general assessment in respect of property belonging to the commissioners within the burgh, and for interdict.

Oban was a parliamentary burgh, which had a population of under 7000, and had adopted the General Police and Improvement (Scotland)

Act, 1862 (25 and 26 Vict. cap. 101), but had not a police force of its own. The defenders maintained that, as Oban was a burgh in this position, they were entitled to levy the county general assessment on the annual value of the lands and heritages within the burgh.

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The parties founded on the following Acts of Parliament :—

The Disarming Act, 1724 (11 Geo. I. cap. 26), sec. 12.

The Reform Act, 1832 (2 and 3 Will. IV. cap. 65), sec. 44.

The Rogue Money Assessment Act, 1839 (2 and 3 Vict. cap. 65), secs. 1 and 3.

The Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), secs. 1, 40, 41, and 42.

The Police (Scotland) Act, 1857 (20 and 21 Vict. cap. 72), secs. 29, 34, 35, and 78.

The County General Assessment (Scotland) Act, 1868 (31 and 32 Vict. cap. 82), secs. 2, 4, 6, 7, and 10.

The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), secs. 8, 11, 12, 13, 14, 26, 27, 44, 60, 66, 105, and 121.

The nature of the statutory provisions, and the contentions of the parties, sufficiently appear from the opinions of the Lord Ordinary and the Court.

On 2d November 1893 the Lord Ordinary (Low) granted decree of declarator and interdict, as concluded for.*

* “ OPINION.— . . . That Act [the County General Assessment Act, 1868], commences with the preamble that it is expedient to abolish the power of levying ‘rogue money,’ and in ‘lieu thereof to confer upon Commissioners of Supply of counties in Scotland the power of levying a ‘county general assessment.’ The second section abolishes ‘rogue money,’ and the fourth section contains the enactments by which the general county assessment is established. It is there provided that the Commissioners of Supply ‘of every county in Scotland’ shall, once in each year, impose an assessment to be called the ‘county general assessment upon all lands and heritages within such county, according to the yearly value thereof as established by the Valuation-roll for the year.’

“That enactment seems to me to admit of only one construction. The assessment is to be imposed upon lands and heritages within the county, according to the value established by the Valuation-roll of the county. The power to assess, therefore, is limited to the lands and heritages appearing in the Valuation-roll of the county. There is, however, no definition of county in the Act, and therefore it is necessary to go to the Valuation of Lands Act to see what is included in the Valuation-roll of the county.

“By the first section of the latter Act it is provided that the Commissioners of Supply of every county and the magistrates of every burgh respectively, shall annually cause to be made up a Valuation-roll, shewing the yearly value of the whole lands and heritages within such county or burgh respectively. By the 42d section it is provided that the word ‘burgh’ shall apply only to a ‘city, burgh, or town, being a royal burgh, or which sends or contributes as a burgh to send a member to “Parliament,” and it is also provided that the word “county” shall include “stewartry,” and shall include and apply to a county exclusive of the burghs situated therein.’

“It therefore appears to me that an assessment which is to be laid on according to the Valuation-roll of the county upon the lands and heritages included in that Valuation-roll cannot possibly extend to a burgh which contributes to send a member to Parliament.

“The defenders, however, argued that the County Police Act of 1857 shewed that the word ‘county’ in the County General Assessment Act, ought to be read as including burghs which had not a police establishment. The former Act provides (section 29) that the Commissioners of Supply of every county shall impose a police assessment ‘upon all lands and heritages within such

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The defenders reclaimed.

At advising,—

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LORD JUSTICE-CLERK.—By the 11th section of the Local Government Act of

county, according to the yearly value thereof, as established by the Valuation-rolls in force for the year of assessment.’

“There is no doubt that the word ‘county’ as there used includes burghs which have not a police establishment; but I do not think that that can affect the construction of the County General Assessment Act, because the Act of 1857 has a special definition of the word ‘county.’ That word is defined by the 78th section as including ‘all burghs and places within the county or stewartry not being a burgh or town which has a Police Act or an establishment of police,’ under one of the General Police Acts then in force. It is also not unimportant to observe that under the 29th section the police assessment is to be laid on according to the Valuation-rolls, thus recognising that both the county Valuation-roll and the burgh Valuation-roll may require to be used. In the County General Assessment Act, on the other hand, the Valuation-roll alone is referred to.

“I am therefore of opinion that Commissioners of Supply had no power to assess for the county general assessment lands and heritages within a parliamentary burgh.

“I am confirmed in that view by the provisions of the Local Government Act, 1889. . . .

“No doubt it would be more easy to arrive at the conclusion that the County Council had the right of direct assessment upon lands within a burgh which was represented upon the County Council than within a burgh which had no representation; but I think that it is clear that the Act did not contemplate any such direct assessment, except in the case of police burghs, and of burghs having a population of more than 7000, but which have no separate police force. Such burghs are represented upon the council, but are not subject to the provisions as to contribution to the county fund, the assessments continuing to be levied directly by the County Council.

“The position under the Act of a parliamentary burgh with a population of less than 7000 is as follows. By section 8 such a burgh is entitled to be represented on the County Council, and by sections 13 and 14 the administration of the Police and of the Contagious Diseases (Animals) Acts is transferred to the County Council. By section 60, subsection 3, it is provided that every such burgh shall contribute to the county fund in aid of the expenditure upon Police and the Contagious Diseases Act; and by subsection 4 of the same section it is provided that the amount of the contribution shall not be assessed by the County Council upon lands and heritages within the burgh, but shall be paid by the town-council out of the police assessment or other assessment levied in the burgh, or out of the common good. In contradistinction to that enactment, it is provided by subsection 5 of the same section that police burghs with a population of less than 7000 shall be assessed by the County Council for Police and the Contagious Diseases Acts in the same manner as other lands within the county. Finally, by the 66th section it is provided that the County Council shall annually send a requisition to the town-council of a burgh liable in contribution requiring them to pay the amount of the contribution.

“Now, it seems to me that these provisions were intended to deal exhaustively with the relationship between parliamentary burghs with a population of less than 7000 and the County Council, and that it was not contemplated that the Council should in addition have the power of direct assessment within such burghs. If, in addition to the contribution to the county fund which such burghs were bound to make, the Council, as coming in place of the Commissioners of Supply, had power to levy the county general assessment within the burgh, I think that, in order to make the scheme of the statute clear and complete, it would have been necessary to make special provision in regard to the matter. . . .”

1889 there are vested in the County Council "the whole powers and duties of No. 121. the Commissioners of Supply," except as otherwise mentioned in the Act. The power of the Commissioners of Supply as regards assessment was fixed by the Reform Act of 1832 and the Rogue Money Act, 1839, by which the Commissioners were empowered to assess for rogue money and for constabulary expenses, and by the County General Assessment Act of 1868, by which a county general assessment in lieu of rogue money was established. Under the former Acts the Commissioners of Supply were entitled to assess all lands and heritages within the county, with the exception, under section 3 of the Act of 1839, of royal burghs or any burgh or town having a Police Act or having taken advantage of an Act of Will. IV. enabling burghs to establish a general system of police. The burgh of Oban does not fall within either of these exceptions.

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If the burgh of Oban, not falling under either of the above exceptions, were simply a burgh and nothing else, no question could be raised. There could be no doubt that the county authority would have the power, under the old Acts giving authority to the Commissioners of Supply to assess on the lands and heritages within the burgh. But the burgh of Oban maintains that being a parliamentary burgh the County Council has no power to levy on it the general county assessment. The burgh maintains that there was no power of assessment under the Act of 1868, and *separatim*, that if there was, it was not transferred to the new County Council by the Act of 1889.

The argument upon which it is maintained that there was no power to assess under the Act of 1868 is one which depends upon implication only. By the Act of 1868, section 4, power is given to the Commissioners of Supply to impose an assessment to be called the "general county assessment, upon all lands and heritages within such county, according to the yearly value thereof as established by the Valuation-roll for the year (commencing at Whitsunday) in which such assessment is imposed." The first question here is what is included in the words "within the county," and that must be determined by the definitions and exceptions in the previous statutes. Now, the only parts of the area of a county which have been excluded from the operation of rogue money assessment by the previous statutes were royal burghs and burghs which had a Police Act or which had been brought under the Police Act of Will. IV. Therefore Oban, which is not in any of these categories, was within the county for assessment prior to 1868. The words "within the county" in the Act of 1868 must include Oban, unless by some other words of that Act it must be held to be excluded. There is no expression indicating that the word "county" means anything different from what it bore in the previous Act. There are certainly no enacting words to that effect. And therefore, as I said before, it must be by implication that the position of such a burgh as Oban is to be changed by the Act of 1868 as regards liability to assessment. Such an implication, by which an area of assessment is to be held to be altered, would require to be clear and unambiguous. In this particular case we have this somewhat extraordinary state of matters, that from the date of the passing of the Act of 1868 down to the passing of the Local Government Act of 1889, it never seems to have occurred to any ratepayer in Oban, or indeed to any ratepayer in any similar burgh, that his liability to contribute to the county expenses was abolished by that Act. The implication can therefore scarcely be a very clear one.

From the argument addressed to us, and from the Lord Ordinary's note, it appears that the implication is to be derived from a consideration of that part

No. 121. of the enactment which relates to the mode in which the assessment is to be imposed. The Act directs that the assessment is to be levied according to the yearly value as "established by the Valuation-roll for the year." It is the contention of the pursuer—and the Lord Ordinary has given effect to the contention—that as the word "roll" is given in the singular, it is the same as if it had said Valuation-roll for the county only, and that therefore there can be no power to assess in any area in which there is a separate Valuation-roll under the Valuation Act. I cannot concur in that view. It appears to me that if at the time of the passing of the Act of 1868, the authority which assessed for rogue money did so over burghs which were not exempted under the previous Acts authorising the levying of rogue money, as that authority undoubtedly did, the new authority must, in the absence of express enactment to the contrary, assess on the same burghs, and that if the order is given that the new authority is to use the Valuation-roll as the basis of assessment, then it must be the roll applicable to the burgh in the case of a burgh which previously formed part of the county for rogue money assessment. They are to obtain their basis from the Valuation-roll, and that must be the roll of the county or the roll of the burgh respectively.

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I should have been of that opinion upon the Act of 1868 alone, but I am confirmed in that opinion by what I find in the Valuation Act itself. For section 40 of that Act clearly empowers the commissioners to assess for rogue money on the statutory valuation. But as by the Valuation Act the parliamentary burgh roll was made up separately, they could only complete their assessment on that valuation by using the burgh roll to ascertain the value of those subjects whose owners or occupiers were liable to contribute to the rogue money, but which were within the burgh. If it be contended that the direction of the Valuation Act that a separate roll for a parliamentary burgh should be made up excluded any assessing by the commissioners within the burgh, that is, I think, conclusively answered by the latter part of clause 41 of the Valuation Act, which declares that "nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment." Therefore the commissioners were bound to assess those in burghs who had been assessed for rogue money before as not having been previously exempt, and were in doing so entitled to proceed on the valuation under the Valuation Act. If they did so, they must in the case of a burgh have done so on the Valuation-roll of the burgh.

If this view be sound, I am unable to find anything in the Local Government Act of 1889 which alters the position of such a burgh as Oban in regard to the county general assessment which came in lieu of the rogue money. The powers and duties of the County Council are those of the Commissioners of Supply, and the Act, while repealing some of the clauses of the General Assessment Act of 1868, by so doing expressly leaves in force that part of the Act by which, taking it along with the Rogue Money Acts, the area of assessment is fixed and the power to assess conferred.

I have therefore come to the conclusion that the interlocutor of the Lord Ordinary should be altered, and the defenders assolizied from the conclusions of the action.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I concur. The view which I take of this case may be briefly stated.

Under the Police Act of 1857 the Commissioners of Supply were authorised to levy an assessment for rogue money and other purposes on "the whole county," and "county" was declared to include, *inter alia*, "all burghs and places within the county not being a burgh or town which has a Police Act, or an establishment of police" under the provisions of certain recited Acts. Oban being within the county, and not having a Police Act or establishment of police, was liable to be assessed for rogue money, and it was so assessed. By the Act of 1868 rogue money was abolished, and in lieu thereof the Commissioners of Supply were authorised (sec. 4) to levy a county general assessment upon all lands and heritages within the county according to the value thereof as appearing on the Valuation-roll for the year, but that only (sec. 10) on lands and heritages then liable to be assessed for rogue money. When the Act of 1868 passed Oban was liable for rogue money, and was therefore liable under that statute for the county general assessment authorised to be levied in lieu of rogue money. The county general assessment was accordingly imposed on lands and heritages in Oban down to the passing of the Local Government Act of 1889, by which the whole powers and duties of the Commissioners of Supply were vested in the County Council. The latter body, the defenders in this case, have imposed the county general assessment on lands and heritages in Oban, and the pursuers' purpose in bringing this action is to have it declared that the defenders are not entitled to do so. I think that they are. They are only doing what the Commissioners of Supply did without complaint. They are exercising one of the powers and fulfilling one of the duties of the Commissioners of Supply, and therefore seem to me to be acting within their statutory right. The view that the powers of the County Council are restricted by the direction that they are to assess according to the value appearing in the Valuation-roll and not Valuation-rolls appears to me untenable. The Valuation-roll referred to is the Valuation-roll in which the subjects assessed are appropriately entered.

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THE COURT recalled the interlocutor of the Lord Ordinary, and assoilized the defenders.

MACPHERSON & MACKAY, W.S.—M'NEILL & SIME, W.S.—Agents.

WILLIAM WHITE, Pursuer (Reclaimer).—*Wilton*.
ELIZABETH STEEL AND OTHERS, Defenders (Respondents).—*Dickson*—*A. S. D. Thomson*.

No. 122.
Mar. 10, 1894.
White v. Steel.

Process—Expenses—Parent and Child—Parent suing as tutor and administrator for pupil child.—Held (aff. judgment of Lord Kincairney) that a father who sues an action as tutor and administrator for his pupil son is liable personally for expenses if he is unsuccessful in the action.

Observations as to the grounds upon which the unsuccessful party to an action is found liable in expenses.

In May 1893 William White, furniture-broker, Glasgow, as tutor and administrator of his pupil son, Robert Frew White, raised an action in the Court of Session against Elizabeth Steel and others, concluding for damages in respect of injuries sustained by the child through falling through the railing of the area of a house belonging to the defenders.

The cause was tried before Lord Kincairney, with a jury, and a verdict was returned for the defenders.

On 13th January 1894 the Lord Ordinary, in applying the verdict,

No. 122. found "that the pursuer, William White, is liable in the expenses" of the action.*
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* "OPINION.—The sole pursuer of this action is William White, as tutor and administrator-in-law of his pupil son, and he concludes for damages on account of injury suffered by his son through the fault of the defenders. The pupil is not a party to the action. A jury has returned a verdict for the defenders, who have moved for application of the verdict, and for decree for expenses against the pursuer personally. The pursuer contends that he is not liable for expenses personally, but only in his character of tutor and administrator-in-law of his son,—in other words, that the defenders can only recover their expenses from the estate of the pupil, which means practically that they cannot recover them at all. The point is very important, and I was informed that it has not been decided.

"I have studied our authorities bearing on the question, and, so far as I have been able to discover, they seem to stand as follows:—

"It is, I think, settled that trustees litigating for their estate, whether a sequestrated estate or a trust-estate, will in general be liable in expenses to the opposing party succeeding in the litigation. It was decided, in a case which presented no specialty, that a liquidator of a joint stock company was personally liable for the expenses of an action in which he was unsuccessful. That liquidator was appointed by the Court.—*The Consolidated Copper Company of Canada v. Peddie*, 22d December 1877, 5 R. 393.

"On the other hand, it was decided in the case of *Fraser v. Pattie*, 9th March 1847, 9 D. 903, that a curator ad litem could not be made liable in expenses.

"The case of a guardian appointed by the Court, such as a curator bonis or judicial factor, has always been distinguished from the case of a trustee, and their appointment to these offices by the Court has been regarded as an important distinction. But that specialty occurred in the case of the *Consolidated Copper Company*. In *Forbes v. Morrison*, 10th June 1845, 7 D. 853, that distinction between a trustee and a curator bonis was taken, and it was held that a curator bonis who had been sisted in an action 'in room of' the pursuer, who had become insane, and who was unsuccessful, was not liable in the expenses of the action. A judgment finding 'the pursuer liable to the defender in the expenses of the action' had been pronounced, and the question of the liability of the curator bonis personally was tried in a suspension of a threatened charge. The Lord Ordinary (Cunninghame) suspended the letters. It appears from his note that he proceeded on the ground that tutors and curators were exempt from personal liability for expenses. His judgment was affirmed; but Lord Mackenzie observed that in certain cases a curator might be made personally liable, and that 'if the curator knew that there were no funds out of which expenses could be paid, that would be sufficient if it were clearly made out'; and Lord Fullerton said that there might be a great many cases in which such liability would be held to exist.

"In *Ferguson v. Murray*, 20th December 1853, 16 D. 260, Lord Anderson, as Lord Ordinary, decided that a party who on the failure of trustees, had been appointed 'curator bonis or judicial factor,' and had unsuccessfully defended an action of mails and duties, had not subjected himself to liability for expenses personally. But this interlocutor was recalled, and an interlocutor was pronounced which appears to signify that the party would be individually liable so far as the expenses could not be recovered out of the curatorial estate. I so understand the interlocutor, but it is so expressed that I cannot be confident that my interpretation of it is correct.

"In *Drummond v. Carse*, 27th January 1881, 8 R. 449, and 18 S. L. R. 272, a party to certain actions was decerned as judicial factor to pay certain sums to his opponent, and he was found liable in expenses without that qualification being expressed. He paid the expenses out of the trust-estate, and thereby reduced it below the sum which had been decerned for. In a suspension of a charge for this sum, the Lord Ordinary (Curriehill) repelled the reasons of

The pursuer reclaimed, and argued;—The pursuer was suing here in a representative capacity, as tutor to his son, and in such a case he ought

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suspension, on the ground—as explained in his note—that the judicial factor was personally liable for the expenses, as a trustee would have been. The interlocutor, however, was recalled, and the Lord Justice-Clerk expressed the opinion that the position of a judicial factor was to be distinguished from that of a trustee on a sequestrated estate, and that the decisions as to such trustees were inapplicable to questions with judicial factors. Lord Young's opinion, however, proceeds on the assumption that the judicial factor was liable for the expenses personally, although he reserves his opinion on the point. The report seems to bear that the judgment was pronounced by these two Judges.

"In an early case, *Chalmers v. Douglas*, 19th February 1790, M. 6083, a pursuer who succeeded in an action of damages against a married woman for defamation, defended by her with consent of her husband, was found entitled to expenses against the husband personally; but on appeal that finding was reversed, and it was declared that the husband was responsible for the conduct of the cause 'in so far as the same is malicious, vexatious, and calumnious,' and the cause was remitted for inquiry how much of the expenses had been occasioned by his conduct in the cause—*Baillie v. Chalmers*, 6th April 1791, 3 Paton's Appeals, 213.

"In the recent case of *Whitehead v. Blaik*, 20th July 1893, 20 R. 1045, the question whether a husband should be found liable in the expenses of a process brought by his wife was raised, but the motion to that effect was not granted, because it was held that the husband had not appeared in the cause.

"In *Fraser v. Cameron*, 8th March 1892, 19 R. 564, a judgment by the Sheriff in an action brought by a minor aged nineteen, with consent and concurrence of her father as her curator, finding the father personally liable in expenses, was approved of in the Second Division. Lord Young qualified his judgment by the remark, that 'if a father consented to make an action formally competent there might be just grounds for not subjecting him to liability for expenses.'

"Lord Fraser has expressed the opinion that, in general, a tutor will not be found liable in expenses, and he quotes, in a note, a passage from the Code (which he considers to be in accordance with the Scottish authorities), to the effect that tutors and curators might be found liable in expenses *si nomine pupillorum vel aduultorum scientes calumniosas instituant actiones*, which he regards as implying that in the general case tutors and curators would not be so liable—*Fraser on Domestic Relations*, ii. 135; also *Parent and Child*, 276.

"The pursuer referred to the 12th section of The Guardianship of Infants Act, 49 and 50 Vict. c. 27, and the first section of The Pupils Protection Act, 12 and 13 Vict. c. 51, as putting a father in the position of a tutor-at-law or tutor-dative. But I do not see that these statutes affect the question.

"In that state of the authorities, I have found very great difficulty in deciding this question. But I have come, although with much hesitation, to think that my judgment should be for the defenders.

"William White is the only pursuer of this action. His son is but a boy, only seven years old, and there can be no doubt that the action was raised in the knowledge that the son had no estate. It is the very case supposed by Lord Mackenzie in *Forbes v. Morrison*. The pursuer had the whole control of the case. He is responsible for the record, and it cannot be suggested that the boy interfered at all. Further, I think it clear that nothing which the boy did affected the result of the action. There was really no ground for charging the boy with contributory negligence. One question,—and what appeared to me the chief question,—was whether the factor for the defenders had due notice of the dangerous state of the property. On that point the evidence of the pursuer and that of the factor were in direct conflict. It was impossible to believe both. Each was supported by other witnesses. I do not say that the jury disbelieved the evidence of the pursuer, but they at least held that he had not proved his case. I am not prepared to censure the pursuer for

No. 122. to be found liable personally in expenses only if in bringing the action he had acted improperly. Otherwise, a pupil, who could not sue on his own behalf,¹ would in many cases lose his right to recover damages, as fathers would not risk such a liability as decree being given against them for expenses. There was no case in the books in which a father suing for his pupil child had been found personally liable. He was practically in the same position as curators ad litem, who had been held only to be personally liable when they had acted outwith their duty.² The case of fathers suing as tutors was much nearer that of officers of Court, such as curators ad litem, judicial factors, &c., than that of trustees, as their duty in the eye of the law was to see that their children got everything they were entitled to, and in many cases that could only be insured by an appeal to the Court.

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Argued for the respondents ;—The ground on which the unsuccessful party in a litigation was found liable in expenses was, not as a penalty, but to indemnify his opponent for expense which he had been put to by his action.³ The theory was that the decree of the Court shewed what the rights of parties truly were, and that the unsuccessful party should have known that his opponent's defence or ground of action was sound.⁴ There was a discretionary power in the Court as to awarding expenses, and that was the way in which officers of Court were sometimes allowed to escape. That rule was not, however, invariable, as was shewn in the case of the *Copper Company of Canada v. Peddie*, 5 R. 393, cited by the Lord Ordinary, in which a liquidator appointed by the Court was found personally liable. Curators ad litem had, it appeared, invariably been allowed to escape personal liability, but their appointment was peculiar, and they were often appointed in the interest of the party who proved successful. A father was not appointed tutor to his child by the Court, and where there were no tutorial funds he ought not to litigate.⁵ Further,

bringing the case, nor to affirm that his record and evidence were consciously false. These were questions, I apprehend, for the jury. But neither is it a case for treating the pursuer with exceptional indulgence; and I think, on the whole, that it is in accordance with principle, and not against the balance of authority, to hold the pursuer liable. I am unable to hold that a party is entitled to bring an action into court under the condition that he shall not be liable for the expenses. A tutor entering into any ordinary contract on behalf of his ward is liable personally to see that it is fulfilled, and if it be permissible to represent an action as a contract of litiscontestatio, or as analogous to a contract, there seems no good reason for relieving a tutor from the obligations which arise out of it. I am disposed to doubt whether Lord Fraser's statement of the law does not go slightly beyond the authorities which he quotes, and it occurs to me that the practice of the Court in reference to questions of expenses has been greatly modified since 1790, when the case of *Chalmers v. Douglas* was decided.

"If it be said that the result of holding a tutor or father liable in such cases might be to deprive a pupil of the benefit of a just action, I think the answer may be that in such a case an action in name of the pupil alone might possibly be sustained, the defect in the instance being remedied by the appointment of a curator *ad litem*."

¹ Keith v. Archer, Nov. 24, 1836, 15 S. 116.

² Forbes v. Morrison, June 10, 1845, 7 D. 853, 17 Scot. Jur. 443; Fraser on Parent and Child, pp. 271 and 273.

³ Kirkpatrick v. Irvine, Jan. 18, 1848, 10 D. 367 (Lord Jeffrey, at p. 369); Torbet v. Borthwick, Feb. 23, 1849, 11 D. 694, 21 Scot. Jur. 231; Gibson v. Pearson, May 25, 1833, 11 S. 656.

⁴ M'Laren on Trusts, vol. ii. p. 72, on Wills, ii. p. 558.

⁵ Mathieson v. Thomson, Nov. 8, 1853, 16 D. 19, 26 Scot. Jur. 24.

the father was truly the *dominus litis*, and liable as such. He had a direct personal interest, as he could, if successful, have applied the damages awarded to pay debts which otherwise he would have been bound himself to pay, *e.g.*, medical attendance, education, &c. The pursuer was practically in the same position as a voluntary trustee, and such trustees were invariably found liable if they litigated unsuccessfully.¹

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At advising,—

LORD PRESIDENT.—In my opinion the Lord Ordinary's interlocutor should be adhered to. From the carefully balanced statements in his Lordship's opinion, I gather, and I assume, that there has been nothing in the conduct of the cause to introduce any specialty into the question which we have to determine, that is, whether a man who has sued an action of damages in his character of tutor to his pupil child, and has lost it, is liable personally for judicial expenses to which his successful opponent is found entitled. I understand that the ratio of the modern rule which makes costs, in the general case, follow the event is, that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be; and that, as Lord Jeffrey said in *Irvine v. Kirkpatrick* (10 D. 367),—"If any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it is created." Now, the person who has caused the expense to the present defenders is William White; for it is he, and not the pupil, who has raised and followed forth this action. The fact that he has done so in the interests of another is not, in my opinion, a matter which affects his liability to third parties. A father who thinks that his child has been wronged may come into Court, or he may not; neither his opponent, nor anyone else, can restrain him from doing so, on the ground that the child has no money. If, as is the case here, he litigates, and is found to be wrong, it makes no difference to his opponent that the costs have been incurred in an action in which the non-existent claim was ascribed to a child. No decision can be pointed to in which the father of a pupil has been exempted from personal liability on the ground now stated, and I am therefore for deciding it on the principle thus stated by Lord M'Laren in the case of testamentary trustees:—"The existence of trust funds is now held to be immaterial, and the inconvenience to the trustee of having to pay the expenses is just as little considered; because expenses are not awarded as in the nature of penalty, but as compensation to the successful party for the cost to which he has been put in establishing a right which his opponent ought to have known to be well founded."—(M'Laren on Wills, ii. p. 558.)

LORD ADAM.—I agree that the rule as to the finding or not finding of expenses against a pursuer in such cases as the present is correctly stated by Lord Jeffrey in the case of *Kirkpatrick v. Irvine*, 10 D. 367, and repeated by him in the case of *Torbet v. Borthwick*, 11 D. 694. That rule is, that a person put to the expense of vindicating his rights by another is entitled to recover that expense from the party opposing him who led to the expense being incurred. The difficulty is when we come to the case of a person suing or being sued in a representative character.

¹ See also Mackay's Practice, 2d edit. p. 61, and cases there; Jeffrey v. Brown, June 11, 1824, 2 Sh. App. 349; Young v. Nith Commissioners, June 10, 1880, 7 R. 891; Drummond v. Carse's Executors, Jan. 27, 1881, 8 R. 449; Ferguson v. Murray, Dec. 20, 1853, 16 D. 260, 26 Scot. Jur. 116, and cases cited by the Lord Ordinary.

No. 122. So far the case of a trustee in a sequestration is settled by the case of *Gibson*, 11 S. 656, and the case of *Torbet v. Borthwick*, already referred to. The practice in such cases is now quite recognised. A liquidator has been put in the same position as a trustee in bankruptcy by a recent decision in the other Division. Then voluntary trustees have been found to be personally liable, the rule being as stated by Lord M'Laren in his book.

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On the other hand, we find that curators ad litem are not personally liable in expenses, and it is obvious that their position is such that they could not be found so liable. I think also that a curator, who merely consents to an action, is not personally liable.

As regards curators bonis and judicial factors, the law is not very well settled, and I prefer to reserve my opinion as to whether these officers of Court are personally liable, or in what circumstances they might be so.

So far the question is pretty clear. But the present case is that of a father suing as administrator for his pupil child. I agree that, when we are asked in which of the above categories a father so suing should be placed, we must answer that he falls into the class of voluntary trustees. I think, therefore, that we should adhere.

LORD KINNEAR.—I concur. The pursuer is the person who has created the expense of which the defender is entitled to be relieved, and I therefore think that we should adhere.

LORD M'LAREN was absent at the advising, but the Lord President intimated that he concurred in the judgment.

THE COURT adhered.

JOHN RHIND, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 123. JACOBSEN, SONS, & COMPANY, Pursuers (Respondents).—*Dickson—Salvesen.*

Mar. 10, 1894. E. UNDERWOOD & SON, LIMITED, Defenders (Reclaimers).—*Ure—Aitken.*
Jacobsen, Sons, & Co. v. Underwood & Son, Limited. *Contract—Sale—Offer and acceptance—Construction—"This for reply by" a day named—Time.*—An offer to buy certain goods bore, "This for reply by Monday, 6th inst." A letter accepting the offer was posted on the evening of Monday, the 6th, and did not reach the offerer until the next day. Held that the offer had been timeously accepted.

2D DIVISION. ON 2d March 1893 E. Underwood & Son, Limited, hay and straw salesmen, Brentford, who had an office at 8 Bernard Street, Leith, offered through Argyll Lindsay, their Leith agent, to buy from Jacobsen, Sons, & Company, merchants, Edinburgh, and at Bona, Algiers, 150/200 tons Algerian straw, to be shipped in March. The offer bore, "This for reply by Monday, 6th inst." On 6th March Jacobsen, Sons, & Company wrote to Underwood & Son accepting the offer. The letter of acceptance was addressed "E. Underwood & Son, per Argyll Lindsay, Esq., Leith," the name and number of the street being omitted. It was posted in Edinburgh on the evening of the 6th March, but, owing to the insufficiency of the address, it did not reach Underwood & Son's office till the noon postal delivery on the following day, instead of by the morning delivery. Underwood & Son returned the letter of acceptance to Jacobsen, Sons, & Company, intimating that as they had not received the acceptance on March 6th the contract was off; and subsequently they refused to take delivery

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of the straw when tendered to them on arrival. Jacobsen, Sons, & Company then brought an action against Underwood & Son for £143, 16s. 3d., as the difference between the contract price of the straw and the price which it realised upon a sale.

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In defence Underwood & Son averred;—"By the terms of said letter (the offer of March 2d), and according to the understanding and custom of trade and of business men, the defenders' offer contained in said letter was open for acceptance until the end of business hours on Monday 6th March, and no longer"; and pleaded;—(2) The pursuers having failed to accept the defenders' offer in terms thereof, there was no concluded contract, and the defenders ought to be assoilzied.

A proof was allowed. The evidence, in the opinion of the Lord Ordinary and the Court, failed to establish the custom of trade alleged by the defenders. Mr Jacobsen deposed that he had been in the habit of addressing letters to the defenders in the way the letter in question was addressed, and that he never had had any complaints on the subject.

On December 23d the Lord Ordinary (Stormonth-Darling) granted decree as concluded for.*

* "OPINION.— . . . The defenders aver on record what they call an 'understanding and custom of trade and of business men,' to the effect that when a limit of time is fixed for reply to an offer, the reply must be not merely despatched, but received within that limit of time. They add the further restriction, 'before the end of business hours' on the day named. But their witnesses to custom do not all go so far as that. I suppose they felt the difficulty of fixing the end of business hours. At all events the majority contented themselves with saying that the reply must be received on the day named.

"Now, I do not doubt that usage of trade may affix to the language of a contract a secondary or non-natural meaning, provided it be so notorious that both parties must be presumed to have used the language in that sense, and provided also it be consistent with law. But I regard this alleged usage as failing in both of these respects, especially the latter. The defenders' witnesses speak rather to their own interpretation of this particular contract than to any experience of a general understanding. And their interpretation of it, whether or not it be according to reason, is not, I think, according to law.

"Professor Bell in his Commentaries (Lord McLaren's edit. i. p. 344) states the law thus:—'It is the act of acceptance that binds the bargain, and in the common case it is not necessary that the acceptance shall have reached the person who makes the offer. An offer to sell goods is a consent provisionally to a bargain, if it shall be accepted within a certain time fixed by the offer or by the law. Until the expiration of that time the consent to the sale is held to subsist on the part of the offerer, provided he continues alive and capable of consent at the time of acceptance. From the moment of acceptance there is between the parties *in idem placitum concursus et conventio*, which constitutes the contract of sale. To this, however, an exception may be made by the offerer limiting it so that the arrival of the acceptance only shall bind the bargain.'

"The rule thus stated by Professor Bell is not limited to the case of an acceptance despatched by post. But authoritative decisions, and particularly the judgment of the House of Lords in *Dunlop v. Higgins*, 6 Bell's App. 195, and of the English Court of Appeal in *Household Fire Insurance Company v. Grant*, L. R., 4 Exch. Div. 216, have established that where an offer is made which, expressly or by implication, authorises the sending of an acceptance by post, the posting of the letter of acceptance completes the contract, whatever delay there may be in its delivery. In the latter case, indeed, the letter never reached its destination at all. On that special ground Lord Bramwell dissented, but even he conceded that 'where a posted letter arrives, the contract is complete on the posting.'

"Here I cannot doubt that the offer was made in such circumstances as to

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The defenders reclaimed, and argued;—The words,—“This for reply by Monday, 6th inst.,” were open to construction, and the evidence, even if it did not amount to proof of custom of trade in the strict sense, shewed how mercantile men engaged in this particular line of business would construe such words. The Court ought to adopt that construction.¹ In any case, the pursuers having caused an unnecessary delay, through the insufficiency of the address on the letter of acceptance, were not entitled to recover.

Argued for the pursuers;—There was no proof here of custom of trade, and, in the absence of a special custom, the meaning of the defenders’ offer was clearly settled by authority. It was that the posting of the letter was the *punctum temporis* at which the acceptance of the offer was concluded.² The pursuers had addressed the letter as they had addressed former letters to the defenders, who had made no complaint on the subject.

At advising,—

LORD JUSTICE-CLERK.—The question in this case is whether the defenders having offered to buy certain goods from the pursuers, and having in their letter used this expression, “this for reply by Monday, 6th inst.,” and the pursuers having posted their acceptance to the defenders on the 6th, the pursuers had timeously accepted under the above condition.

The defenders maintain that the condition in their letter was not fulfilled; that it could not be fulfilled unless the pursuers’ acceptance reached them within what they call “business hours” on the Monday, and they aver that there is what they call a “custom of trade” to that effect in Leith, where the transaction took place. They have brought evidence to substantiate this alleged custom, but having considered the evidence, I come without difficulty to the conclusion that they have entirely failed to substantiate their averment. There is certainly no satisfactory evidence of an established and accepted understanding of the kind alleged. No doubt some of the witnesses say that they would so understand such words, but that is quite a different thing from proving that there exists a universal or even general understanding such as the defenders maintain, which is and has been acted on in the trade. It could hardly be seriously maintained that such an established understanding was proved by the evidence. I think therefore that as matter of fact the defenders’ defence fails.

But, further, there is in my opinion ground for holding that the law is established to the effect that such an acceptance as that given by the pursuers is a good acceptance. When a letter of acceptance is posted, it is out of the power of the accepting party. He has committed it to a medium of communication

authorise an acceptance by post. The offerer was in Leith, the acceptor in Edinburgh. The offer, though made verbally, was confirmed by letter, and the defenders’ agent admits that he expected a letter of acceptance.

“In neither of the cases to which I have referred was any day fixed for reply. But the principle which Mr Bell states, and which these cases illustrate, is just as applicable to a case like the present as to one where the reply is to be given in due course. The principle is that the reply is made and the contract concluded when the acceptance is despatched. To the same effect (though complicated by a question as to retraction) is the case of *Thomson v. James*, 18 D. 1. . . .”

¹ *Ashforth v. Redford*, 1873, L. R., 9 C. P. 20; *Bowes v. Shand*, 1877, L. R., 2 App. Ca. 455.

² Authorities referred to by the Lord Ordinary, and *Mason v. Benhar Coal Co.*, June 2, 1882, 9 R. 883.

which is bound to hold it and safely deliver it to the other party in due course. No. 123. The dispatcher of the letter has effectually bound himself the moment he has committed his acceptance to the mail. He has done that act of acceptance which, in the language of Mr Bell in his Commentaries, "binds the bargain." If Mr Bell be correct in his statement of the law,—and there is nothing to be found to the contrary, so far as I can see,—viz., that an offer to sell goods is a consent provisionally to a bargain, if it shall be accepted within a certain time fixed by the offerer or by the law, then I feel compelled to hold that when the offerer names a time such as a certain day of the month, there is given to the person to whom the offer is made the whole of that day to make his decision, and that if within that day he accepts, in a manner to bind himself, the bargain is closed. Up to the end of the time named, the consent of the offerer must be held to subsist, so that it may be taken advantage of by the other party. Now, it has been made matter of distinct decision that acceptance by post, that is by posting a letter of acceptance, completes the contract. It is in this case undoubted that acceptance by post was a suitable mode, and indeed was contemplated, and that the defenders' representative expected that the acceptance would so come. I have no doubt in holding (1) that the pursuers were entitled to accept at any time on the Monday, and (2) that they effectually accepted by posting their letter of acceptance on the Monday.

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A point was raised on the fact that the acceptance did not reach the defenders' agent till noon on the Tuesday, and this was said to have arisen from the pursuers' fault in using an insufficient address. No such point is raised in the pleading, but even if it had been, I should have no difficulty in denying any effect to it. The address upon the letter was the same as was regularly used by the pursuers in their communications to the defenders, and appears not to have led to any delay on other occasions. It probably arose from some defect of acquaintance with the district on the part of some less informed official than the one who usually took charge of letters for the district. It is certain that the defenders' agent never informed the pursuers that their letters were unsatisfactorily addressed, and it is not proved that they were delayed in consequence of the address.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD YOUNG.—I arrive at the same conclusion. I do not think that the case is absolutely clear, but on the best consideration that I have been able to give it, I think that it is ruled by the principle stated by Professor Bell in the passage quoted by the Lord Ordinary.

With respect to usage of trade, I do not think that any usage such as is here alleged has been proved to exist. The doctrine of usage of trade is quite clear. If persons in any trade use language to which by custom a special or peculiar meaning is attached, they will be presumed to have used it with that meaning in any contract which they make, and the contract will be interpreted accordingly. The Lord Ordinary says,—“I do not doubt that usage of trade may affix to the language of a contract a secondary or non-natural meaning, provided it be so notorious that both parties must be presumed to have used the language in that sense.” So far, that is just the doctrine which I have stated, but the Lord Ordinary goes on to add, “and provided also it be consistent with law.” In one sense that is true enough. Any usage must be con-

No. 123. *istent with the public law of the land. But his Lordship goes on to say that he regards "this alleged usage as failing in both of these respects, especially the latter."* Now, I cannot assent to that. I think that, if the usage here alleged had been proved to exist there is nothing whatever in it that is inconsistent with law. My judgment proceeds entirely on this, that no usage of trade has been proved to exist, and I therefore think that the case must be decided in accordance with the doctrine stated by Professor Bell.

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LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

THE COURT adhered:

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—WALLACE & PENNELL, W.S.—Agents.

No. 124. THE PHOTOLYPTIC COMPANY, LIMITED, AND ANOTHER, Petitioners.
HUGH MILLER (Liquidator of the Photolyptic Company, Limited),
Applicant (Respondent).—*Grainger Stewart*.
JAMES MUIRHEAD, Applicant (Reclaimer).—*M' Lennan*.

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Miller v.
Muirhead.

Lease—Trade fixtures—Right in security.—Trade fixtures attached by a tenant to the *solum* become the property of the landlord subject to the tenant's right to remove them.

A tenant assigned to his landlord certain trade fixtures on the subjects let, in security of advances. In a question between the landlord and the tenant's creditors, *held* (rev. judgment of Lord Low) that the fixtures being *partes soli* were the property of the landlord, and that the tenant's assignation operated as a valid renunciation of his right to remove them so long as the debt was not paid.

2D DIVISION.
Lord Low.

BY lease dated 14th April 1892 James Muirhead let to the Photolyptic Company, Limited, certain ground and premises in St Bernard's Row, Edinburgh, for ten years from Whitsunday 1892, it being, *inter alia*, provided that the company should be entitled to make at their own expense certain alterations and additions, but under the condition that they should, "at the termination of this lease, restore the premises hereby let to the same order and condition in which they were at the date of the company's entry under these presents; and shall remove and clear the ground of any additional buildings which they may have erected for the purposes of their business."

Thereafter, by assignation dated 31st May 1892, the company, in security to Muirhead and two other persons for certain advances made by them to the company, assigned to Muirhead, *inter alia*, "All and Whole the whole machinery and plant specified and enumerated in the inventory annexed, and signed as relative hereto, and presently in the premises belonging to the said James Muirhead at St Bernard's Row, Edinburgh."

The company carried on business in the premises let by Muirhead, and used the plant and machinery therein until 21st August 1893, when the company went into voluntary liquidation (subsequently continued subject to supervision), on the ground that by reason of their liabilities they were unable to continue their business.

On 4th January 1893 the liquidator and Muirhead presented a note in the liquidation for determination of the question whether Muirhead had obtained a valid and effectual right to such portions of the machinery and plant assigned to him as consisted of proper trade fixtures.

The note stated,—“The parties are agreed that the said plant and machinery consist, to a very considerable extent, of proper trade fixtures; that is, of fixtures which have been attached to the heritable subjects for the purposes of trade, and which in a question with his landlord a tenant would have a right to sever from the heritable subjects, and to remove at

or prior to the expiry of his tenancy, but which would in a question between heir and executor be held to be sufficiently affixed to the heritable subjects to render them heritable *quoad* succession.”

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The liquidator maintained that the assignation was ineffectual, in respect that it was a conveyance of moveables in security without delivery of possession to the assignee.

Muirhead maintained that he was entitled to the machinery and plant so far as consisting of trade fixtures, because these had been affixed to the heritable subjects belonging to him, and the company had by the assignation abandoned in his favour the right of severing these fixtures from the heritable subjects which they would otherwise have possessed.

On 3d February 1894 the Lord Ordinary (Low) answered the question in the negative.*

Muirhead reclaimed, and argued;—The trade fixtures were not moveable property, but were *partes soli*, and belonged to the reclamer, subject to the company's right to remove them at the end of the lease.¹ Under the deed of assignation the company must be held to have assigned this right to the reclamer, who therefore was entitled to retain the fixtures, unless the company paid the debt in security for which the fixtures were assigned. As they could not do this, the Lord Ordinary's interlocutor ought to be recalled, and the question answered in the affirmative.

Argued for the liquidator;—The Lord Ordinary was right in holding that this was a security over moveables, which was ineffectual, as Mr Muirhead had had no possession of the security subjects.

At advising,—

LORD RUTHERFURD CLARK.—The only question before us relates to the trade fixtures. They were specially assigned, so that it is not disputed that they were comprehended in the assignation.

* OPINION.—(After deciding against Muirhead the question whether he had a valid security over the plant and machinery other than proper trade fixtures, a judgment which Muirhead acquiesced in)—“There are also included in the assignation certain machines which are of the nature of trade fixtures, and it was contended for Mr Muirhead that he had, at all events, a good security over these machines, because, being affixed to the heritage, they became part of it, subject only to the company's right as tenants to remove them, and that the effect of the assignation was truly to operate a renunciation on the part of the company in favour of Mr Muirhead of their right to remove the trade fixtures.

“There is no doubt of the right of the company to remove the machines in question, not only under the common law in regard to trade fixtures, but under their lease, by which they are taken bound at the termination of the lease to restore the premises to the same condition as they were in at the date of the company's entry.

“The machines were therefore, during the currency of the lease, the moveable property of the company, and they so dealt with them in the assignation. The effect of the assignation appears to me simply to have been to make over to Mr Muirhead whatever right the company had in the machines, and to put him in their room and place as regards the machines, in so far as that could be done without delivery. But I think that it is impossible to construe the assignation as a renunciation by the company of their right to remove the machines, or as an agreement between them and Mr Muirhead that the machines should no longer be regarded as moveables belonging to the company but as part of the heritage belonging to Mr Muirhead.

“I am therefore of opinion that, not having obtained possession, Mr Muirhead has not got a valid security over the trade fixtures.”

¹ Brand's Trustees v. Brand's Trustee, March 16, 1876, 3 R. (H. L.) 16; Smith v. Harrison & Company's Trustee, Dec. 22, 1893, *supra*, p. 330.

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The law with respect to trade fixtures was very authoritatively settled by the House of Lords in the case of *Brand*. Though the case was between heir and executor only, the noble Lords who took part in the judgment were at pains to state the general law.

In his opinion Lord Gifford had said that a fixture never becomes attached to the inheritance so as to be capable of being called a part of the inheritance. Commenting upon this *dictum* the Lord Chancellor says:—"It appears to me that this is an error; it does become attached to the inheritance; it does form part of the inheritance; it does not remain a moveable *quoad omnia*; there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right, it continues to be that which it became when it was first fixed, namely, a part of the inheritance." Again, Lord Chelmsford speaks thus:—"When the tenant brings any chattel to be used in his trade and annexes it to the ground, it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed."

No language could be clearer. The trade fixture, by being attached to the ground, becomes "a part of the inheritance," "a part of the freehold." So long as it is so attached it must belong to the owner of the soil, for he is necessarily owner of everything which is part of it. The tenant possesses it as a part of the subject of the lease, but in no other character. He has a right to make it his own by severing it from the soil, but until that right is exercised, he can have no right of property.

In this case the tenant assigned to his landlord the trade fixtures in security of certain debts. At the date of the assignation he could not assign any existing right of property. For the fixtures being still attached to the soil were the property of the landlord. The Lord Ordinary says that during the currency of the lease the fixtures were "the moveable property" of the tenant. This cannot be if they were part of the soil. They could not be at the same time part of the heritable estate of one man and the moveable property of another. But the assignation necessarily carried all the right which was vested in the tenant, and therefore, in my opinion, operated as a renunciation of the right of severance until the debts were paid.

The Lord Ordinary says that "it is impossible to construe the assignation as a renunciation by the company of a right to remove the machines." It seems to me to be impossible not to put that construction on the assignation. If I assign a thing which is not mine, I assign all the rights I have to make it mine. If I assign a thing which I have bought, but which remains in the possession of the seller, I assign what is not my property, but I also assign the right to obtain delivery. The law implies that a cedent confers on his assignee everything which is necessary to make the assignation effectual.

If, therefore, these fixtures had been assigned to a stranger, I cannot doubt that the assignation must be construed to comprehend the tenant's right to remove them, for under no other right could he reduce them into his possession. When the assignation is in favour of the landlord it must be equally comprehensive. Inasmuch as the things assigned are the property of the landlord, there is no necessity to vest him with a right to remove. But as the tenant could not remove the fixtures without defeating the assignation, he must be

held to renounce that right, and the assignation operates as a renunciation of No. 124.
 it. When the assignation is in security only, it will operate as a renunciation ^{Mar. 10, 1894.}
 till the debt is paid. If the landlord bought the fixtures, he would get a good ^{Miller v.}
 title by an assignation, though it could be nothing more than a renunciation of ^{Muirhead.}
 the right to remove. An assignation in security must have the same force,
 though it is qualified by a condition.

There remains the question whether it was necessary to do more in order to make the assignation effectual as against the liquidator. I do not think that it was. The tenant had nothing more than a right to remove, though the act of removal vests him with the property of the thing removed. If he renounces that right absolutely it is gone by the mere force of the renunciation. If he renounces it until he shall pay a certain debt, he cannot exercise it until he fulfils that condition. We are not dealing with the property of the tenant, but with his right to do an act by which property may be acquired. To extinguish or modify that right nothing more is required than a completed agreement between the person who may do the act and the person who must suffer it to be done.

In the case of a stranger, I think that the assignation would be completed by intimation to the landlord, and that thereafter neither the tenant nor a trustee in bankruptcy could exercise the right to remove. And if the landlord is to be regarded as being merely an assignee, the assignation will be effectual without intimation, for the landlord would not require to make intimation to himself. But I think that the landlord is in a better position than a stranger, for the assignation does not convey to him any property. It is no more than a renunciation or discharge of a claim competent to the tenant, and as such is competent by mere agreement.

I am therefore of opinion that the trade fixtures are at present the property of Mr Muirhead, and that he can prevent the liquidator from removing them till his debt is paid.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and answered the question in the affirmative.

DALGLEISH, GRAY, & DOBBIE, W.S., Agents.

JAMES BLAIR, Pursuer (Respondent).—*C. J. Guthrie—Salvesen.*

No. 125.

CHARLES STRACHAN, Defender (Reclaimer).—*D. Dundas—Craigie.*

^{Mar. 14, 1894.}
^{Blair v.}
^{Strachan.}

Property—Superior and Vassal—Feu-charter—Construction—Servitude—Road.—In 1806 a proprietor feued to A a piece of ground bounded on the south by a road, and on the west by another feu granted to B. At the northern extremity of A's feu, 140 feet from the road, was a well, and his charter contained this clause,—“But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disposed.”

B had built a house fronting the road, with its eastern gable resting upon but not beyond the verge of his feu, with a boundary wall in continuation to the back, also just within his feu.

A, in building his house, instead of building a western gable, made use of B's gable, leaving a passage below the house 6 feet wide close to B's gable. Behind the house a passage to the well 6 feet wide was left unbuilt on close to B's boundary.

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In 1866 B's successors made openings in their boundary wall, which were used as an access to the passage.

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In 1892 A's successor in his feu brought an action against B's successor for declarator that he was entitled to build a wall on the extreme west of his feu, the effect of building such a wall being that the passage would require to be moved eastward to an extent equal to the breadth of the proposed wall, and that B's successor would not have access to the passage through the doors in his wall.

Held that, on a sound construction of his titles, the pursuer was entitled to decree (*diss.* Lord Young, on the ground that the line of road had been definitely fixed by the feu-charter and the actings of A and B following upon it).

2D DIVISION.
Ld. Kyllachy.

By feu-charter, dated 29th December 1806, Thomas Leys and others feued out to Andrew Brodie a piece of ground bounded on the south by a road, which was afterwards known as Hadden Street, in the burgh of Woodside, near Aberdeen, and on the west by ground feued out by the same superiors to James Rust. On the northern extremity of Brodie's feu was a well 140 feet from the road, with reference to which his feu-charter contained this clause,—“But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disposed.”

Rust had built a house fronting the road, on the south portion of his feu. This house, which was afterwards known as 124 Hadden Street, had its eastern gable resting upon but not beyond the east verge of Rust's feu, and there was a boundary wall, in continuation of the gable to the back, also just within the feu.

Shortly after obtaining his feu-charter Brodie erected a building, subsequently known as 120 and 122 Hadden Street, on the south portion of his feu, fronting the road. Instead of building a western gable Brodie made use of Rust's eastern gable, leaving a passage close to the gable of Rust's house, 6 feet wide, about 70 feet long, and 8 feet high from the floor of the passage to Brodie's building above. This passage or entrance came to be 122 Hadden Street, the rest of Brodie's house being No. 120. Behind the line of the houses a passage in continuation, 6 feet wide, led for about 70 feet northwards to the well on the northern extremity of Brodie's feu.

About 1866 the successor in Rust's feu made four entrances into the passage. One of these entrances opened into the portion of the passage which was covered over by buildings erected by Brodie, and formed the entry to the back part of the house erected by Rust, No. 124 Hadden Street. The other three opened into the uncovered part of the passage, and gave access to stables, bakehouse, &c., on Rust's feu.

On 4th April 1892 James Blair, who had acquired Brodie's feu in 1887, brought an action against Charles Strachan, the successor in Rust's feu, concluding for declarator that the pursuer, as heritable proprietor of the piece of ground described in the feu-charter granted to Brodie, with the buildings thereon, was “entitled to erect upon the said ground, at the west boundary thereof, and where it adjoins the property of the defender, a fence or boundary wall between his said feu and the property of the defender, but so as not to obstruct the door or entry to the back part of the defender's dwelling-house, No. 124 Hadden Street, Woodside, and provided always a road or passage of 6 feet wide is left out in the west end of pursuer's feu as an access to a pump-well in the back part of the said feu, in terms of a provision in said feu-charter,” and for interdict against the defender interfering with the pursuer erecting such a wall.

The effect of building the wall as the pursuer claimed right to do would have been to move the passage eastward to an extent equal to the

breadth of the proposed wall, and to prevent the defender from having access to the passage through the three doors in the back portion of his feu, which in the proceedings were styled entrances Nos. 2, 3, and 4. With respect to the door opening into the closed part of the passage, styled entrance No. 1, the pursuer conceded that he was not entitled to obstruct the defender's use of this entrance.

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The ground behind the pursuer's houses, 120 and 122 Hadden Street, was not built upon, and there was no wall separating the rest of that ground from the passage corresponding to the continuation wall on the defender's feu.

The defender had several different grounds of defence; in particular, he averred that he had acquired a prescriptive right to use the entrances Nos. 2, 3, and 4 as accesses to the passage; but he abandoned this plea in the Inner-House, where the discussion was confined to the question raised by the following plea stated by the defender:—“(5) On a sound construction of the pursuer's title, the pursuer is not entitled to erect a wall so as to exclude the defender from access or passage to said well.”

The pursuer produced a plan shewing the buildings in question, and the passage between them, but no plan was referred to in his titles or in any way incorporated therewith.

On 10th November 1893 the Lord Ordinary (Kyllachy) (after a proof which was mainly directed to the question of prescription) granted decree of declarator and interdict as craved.*

* “OPINION.— . . . There can, I think, be no doubt that if the matter stood upon the titles of parties, the defender would be out of Court. Both parties derive their rights from a common superior, and the only servitude affecting the pursuer's property—which, as I have said, includes the space now forming the close—is thus expressed in the pursuer's title:—‘But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disposed.’

“It seems plain upon the construction of this clause that at the date of the grant the defender's author had no higher right than the other feuars round about, and that so long as a passage was left to the well of the prescribed width and height, the pursuer's author might, if he had so desired, have built a wall on the extremity of his ground all the way down the close. Indeed, the reference to the height of the close shews that what the title had in view was a covered close passing under and through the pursuer's houses.

“It appears, however, to have been decided, or at least conceded, in a previous litigation between the parties, that the defender, besides the common access from the street, was entitled to a special access to the close by a door or opening in his buildings, which I have called the entrance No. 1. And to this extent it is not disputed that the defender is now at least in a different position from the other feuars. But the defender maintains that he has acquired, by prescriptive use, a right of access to the well through a second opening or entrance half-way down the close, viz., the opening which has been described as entrance No. 4; and what I have to decide in this case is, whether he has made good this contention. The facts have been ascertained by a proof, which, after a discussion in the Procedure Roll, I allowed before answer, and which has extended to a length which, I am afraid, is rather out of proportion to the value of the subject.

“I am of opinion, on the whole matter, that the defender has failed to make good his point.”

[The Lord Ordinary then adverted to the question of prescription, in the course of which his Lordship observed]:—“Further, I am, in the next place, disposed to doubt whether, in point of law, any amount of prescriptive use

No. 125. The defender reclaimed. The arguments for the parties sufficiently appear from the opinions of the Court.¹
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LORD YOUNG.—The parties are owners of adjoining properties held in feu of a common superior. The march between them, so far at least as concerns this case, is a straight line running north, from Hadden Street, Aberdeen, on the south, for a distance of about 140 feet, the pursuer's property being on the east and the defender's on the west of that line.

The first and leading conclusion of the action is for declarator that the pursuer is proprietor of the ground on the east of the march, and "is entitled to erect upon the said ground at the west boundary thereof, and where it adjoins the property of the defender, a fence or boundary wall between his said feu and the property of the defender, but so as not to obstruct"—a certain door of the defender's house—"and provided always a road or passage of 6 feet wide is left out in the west end of the pursuer's feu as an access to a pump-well in the back part of the said feu in terms of a provision in said feu-charter," viz, a feu-charter dated 29th December 1806, by which the pursuer's feu was originally acquired from the superior.

The pursuer's right of property is admitted, but his right to build a wall along the line of march is disputed, because, and only because, of the existence of a servitude road on his property along the whole line of march, the defender's feu being the dominant tenement in the servitude.

The pursuer admits the servitude, and also that the *solum* which it now occupies, and has done since 1806, extends up to and along the whole line of march between the dominant and servient tenements, i.e., between his feu and that of the defender. But he maintains that he is entitled to change the line of *solum* which it occupies, and has heretofore occupied, to the extent of taking the thickness of a wall off it on the one side and adding to it an equivalent on the other, so that it shall thereafter be of the same width as before. In support of this contention he refers to the jurisdiction of the Court, as illustrated by several cases which his counsel cited, to define and limit a theretofore more or less indefinite right of way or passage, or equitably allow a change in the line of such road or passage which the Court, on inquiry and consideration, thinks may be made with advantage or reasonable relief to the servient tenement, and without an appreciable or reasonably conceivable detriment to the dominant tenement.

To this the defender answers, first, that we cannot deal with this action as an application to the Court to limit and define the line of a road (heretofore indefinite), or to sanction a reasonable change, but must consider and determine

can extend the exercise of a servitude constituted by grant beyond what is reasonably necessary to satisfy the terms of the grant. The exercise of a servitude may, I take it, always be regulated so as to make it as little burdensome as possible to the servient tenement. For example, a right of servitude, say over a field, may be confined to a single line, although for forty years it has followed several lines to the same point. And if this is so when, as generally happens, the grant is only presumed from possession, the principle would seem to apply *a fortiori* where, as here, the grant is in writing, and its terms are ascertained."

¹ *Authorities (cited by the Pursuer)*,—Bruce v. Wardlaw, 1748, M. 14,525; Ross v. Ross, 1751, M. 14,531; (*cited by the Defender*),—Hill v. Maclaren, July 19, 1879, 6 R. 1363.

the alleged legal right which we are asked to declare ; second, that (irrespective of the form and character of the action) the Court has not jurisdiction to change the line and limits of a servitude road as prescribed by valid title or as arranged by the owners of both the dominant and servient tenement in conformity with the title, and as it has existed from time immemorial ; and third, that assuming such jurisdiction there is nothing in the case to call for or warrant the exercise of it.

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After full consideration I am of opinion that the pursuer has not the right which he asks us to declare,—I mean of course to erect the wall,—for his right of property is not and never has been questioned.

The original charter of the servient tenement (1806) constitutes the servitude “of road or passage,” and, according to what I think the true construction of its language, prescribes the exact line and limits of it. It is to be “6 feet wide and at least 8 feet high,” and is “to be left out upon the west end of the piece of ground hereby disposed.” I cannot regard the words “to be left out” as insignificant or meaningless. I think they import that the road or passage is not to be enclosed by any wall or building on the servient tenement, but is to be left outside any wall or building thereon. It cannot be left out of the tenement itself, for it must be on it, and so I think the words can only have the meaning I have stated. Such accordingly is the meaning which the grantee by the charter accepted and acted upon—I must assume with the assent of the owner of the dominant tenement adjoining. The admitted facts of the case shew that this is so, and the pursuer in his record avers that it is so. In condescendence 3 he says that Mr Brodie (the grantee of the charter) or his successors “built the house property presently on the said lot or piece of ground,” “but in building the said property they left a road or passage on the west end thereof, and where it adjoins the defender’s property, in terms of the reservation of issue and entry contained in the said feu-charter,” and to shew more distinctly what was thus done he produces a plan “shewing the said road or passage.” And it does shew it as distinctly defined and limited in its line, its length, and its width as a plan can possibly shew a road or passage. Its length is from the street on the south to the pump-well on the north 140 feet, and its width 6 feet measured from the line of march between the dominant and servient tenement. Nor does it signify that the buildings on the servient tenement extend only to 70 feet in length. These were erected, I must assume, not accidentally but purposely, along a line parallel to the march and exactly 6 feet from it, so that the road or passage of that width should be “left out upon the west end” as required by the charter. But assuming, contrary to my opinion, that the charter left the owner of the servient tenement at liberty, if he pleased, to enclose the road or passage by a wall on the servient tenement between it and the dominant tenement, he was certainly entitled, if he thought it for his advantage, or on any consideration satisfactory to himself, so to leave out the road that there would be no room for the erection of such wall, and he did so leave out the road to the extent of 70 feet, or one-half its length. The road as so left out and enclosed on both sides by buildings has existed and been used for nearly one hundred years.

It seems to me not merely probable but certain that what was thus done so long ago was done by agreement between the owners of these two adjoining tenements. In condescendence 5 the pursuer states that the buildings on the defender’s tenement (including the east gable of his house and on which the

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west side of the pend is built) extend "the whole length of both properties, and are built wholly upon the defender's property." Therefore they are not march fence or mutual walls, but are the exclusive property of the defender. It follows that when the pursuer's predecessor in 1806 built the west side of his pend on the gable of the house (now the defender's) on the adjoining feu, he built outside his property necessarily with the consent of the adjoining proprietor. I think we cannot reasonably separate this from what was done to fix the line of the servitude road and the exact *solum* which it should occupy. Further, it seems to me that what was thus agreed to and done was for the benefit of both parties—at least according to their own judgment. On the one hand, the owner of the eastmost feu thus satisfied the servitude on it by leaving out a strip of ground exactly 6 feet in width which he could never be required to increase, and was relieved of his proper share of the cost of a mutual house gable and mutual fence wall between him and his neighbour, and the contribution of his share of the site thereof. On the other hand the owner of the westmost feu thus secured that the servitude road should touch and run along his property without the intervention of even a mutual wall, or hedge, or paling, there being according to the arrangement not an inch of space left for the erection of anything.

In accordance with this arrangement, and indeed in pursuance of it, the defender allowed the pursuer to build on the wall of his house,—“built wholly on the defender's property,”—and the servitude road which comes up to it and runs along it cannot be changed while the pursuer's house exists, the width of the ground between the walls being exactly the 6 feet occupied by the *solum* of the road. And this is equally true to the extent of the whole line of the pursuer's buildings, about 70 feet. I asked if any intention had been stated or existed of taking down and altering the position of the pursuer's house and buildings, and was answered in the negative. But the Lord Ordinary's judgment of declarator and interdict applies to this 70 feet as well as to the remaining 70 feet of the road's length, in view of a possible future change in the position of the buildings, although no intention of making such change has ever been expressed or contemplated. In such circumstances there is, I think, no expediency or propriety in a declarator of right and relative interdict.

With respect to the northern half of the road (about 70 feet), the physical obstructions in the way of a change are not the same, but the legal objection to a change is, in my opinion, of the same character and validity. I think that the line and position of the road for the whole length of it was fixed as stated by the pursuer in condescendence 3, and shewn on the plan which he has produced in order to shew it. It is thus averred and shewn to be on the west end of the servient tenement, and where it adjoins the defender's property. As shewn on the plan, and as it has existed and been used in all past time, it comes up to the defender's property without a hair's-breadth of ground between them. Nor is the absence of buildings (a wall or any other) on the opposite or east side material, for if the bounding line on one side is fixed, that on the other is fixed also, as it must be parallel with the other, and exactly 6 feet apart from it. Further, I think that the arrangement on which the line and exact position of the road was thus fixed (sufficiently onerous on the part of the dominant tenement) applies to the whole length, and is not limited to the southern half. The legal and equitable considerations thence arising are, I think, obvious.

The pursuer seems to have contended before the Lord Ordinary that the

defender had not a right of access into the close from all parts of his property, No. 125. but only from the end of it at Hadden Street, having "no higher right than the other feuars round about," and the Lord Ordinary expresses a clear opinion in favour of this contention. It is, in my opinion, true or not according as the close adjoins the defender's property or not. If it does not adjoin, he cannot have access by passing over a part of the pursuer's property, however narrow, which intervenes, for that would be trespass; but if it does adjoin, with no intervening property of the pursuer's to be passed over, it seems to be too clear to admit of dispute that he may legitimately have access wherever he finds it most convenient for the exercise of his servitude right. That right is to take water from the servitude well for the use of his property, which extends along the whole length of the road down to the well. The place where he immediately needs the water may be in fact as close to the well as you could figure for illustration, and with nothing between it and the well from which he has right to take water except the road which he has right to use as an access to it—say 6 feet of it—or it may be for half its width. The contention that the law of servitude with respect to the road is such that he must on every occasion use the road for the whole length of it or not at all does not seem sensible or rational. With respect to the servitude use of the road, the defender has (as the Lord Ordinary says) "no higher right than the other feuars round about," but the right of access to it—that is to say, where access to it may be had—is another matter. The same distinction with respect to access is familiar in regard to every public road or street or close between those of the public who have property adjoining it and those who have not.

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The Lord Ordinary observes in his opinion that "the reference to the height of the close shews that what the title had in view was a covered close passing under and through the pursuer's houses."

I think the inference is illegitimate, and also immaterial. First, I think it illegitimate to infer that the title had in view what the facts shew was never in view of the parties,—“a covered close passing under and through the pursuer's houses.” I think it is at least more reasonable to infer that “what the title had in view” was what was done under it immediately after it was granted, and has remained undisturbed ever since. The pursuer's predecessor who erected the buildings did not build a wall on the extremity of his ground all the way or any part of the way down the close, and the idea of building such wall never, so far as we know, occurred during a period of over eighty years. On the contrary, the buildings were so erected, and the close or passage so left out, as to be utterly inconsistent with the possibility of building such wall. At the same time, legitimate arrangement was made for the erection of a pend without any need for such wall, and consistently with the gable-wall of the pursuer's house, being within 6 feet of the edge of his property, which he (or his predecessor) no doubt regarded as a substantial advantage to him. “The reference to the height of the close” in the title applies to this pend, which was built accordingly. The title prescribes nothing—and indeed says nothing—about the erection of a pend or any covering over the passage, although it prohibits any structure whatever above the *solum* within 8 feet from the ground. It applies to prohibit any projection from the adjoining wall, however much within 6 feet, and requiring no opposite wall to support it. Again, these two adjoining feus might become the property of one owner, or any legal contract whatever might be made between the

No. 125. owners thereof as to building, but subject to this, that the servitude road in which "the other feuars round about" are interested shall be left "at least 8 feet high." Full effect is thus given to the reference to height in the title without any such inference as is suggested.

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Second, I think the inference (viz., that the owner of the servient tenement was at liberty to erect a wall on the extremity of his ground all the way down the close) is immaterial. He was certainly at liberty not to erect such wall and to leave out the passage so that it should occupy the extremity of his ground where it adjoins the dominant tenement. That this was done is, I think, indisputable, and also that it was done on arrangement with the owner of the adjoining dominant tenement, who on that footing allowed the use of his house wall and dispensed with any mutual march or fence wall between the properties.

I am of opinion that this is conclusive as to the site and position of the *solum* of this servitude passage, and that no case whatever has been stated for judicially authorising a change which would manifestly, and indeed admittedly, be to the detriment of the dominant tenement.

LORD RUTHERFURD CLARK.—The feu-disposition dated 6th December 1806, under which the piece of ground belonging to the pursuer was given out, contains this clause,—“But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well, by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disposed.”

The servitude road or passage has from time immemorial been on the extreme west of the pursuer's ground, so as to adjoin the property of the defender. The pursuer proposes to build a wall between his property and that of the defender, and the site of the wall will necessarily occupy a portion of the servitude road. But he undertakes to leave a road or passage as wide as that required by the feu-disposition, or in other words, to add to the road on the east as much as he takes away on the west. The question is whether he is entitled to do so.

It is contended by the defender that according to the just construction of the feu-disposition, the road must come up to the extreme verge of the pursuer's property, and that the road as it has in fact existed is the only road which would satisfy the obligation created by the disposition. He claims the benefit thence arising—that is to say, he claims the right of using the road from any part of his own property.

It is to be observed that the road is common to the whole feuars, and that the servitude was created merely as an access to a well at the back of the pursuer's tenement. With such an origin I think it unlikely that the defender took a higher right than the other feuars, though it is quite possible that he might derive a benefit from the situation of his feu. It is true that in a previous litigation he was found entitled to use the road as an access to his property at a point a little way distant from the street. But this right was not conferred by the disposition, and it is certain that the road has never been used as an access to the well, except from the street or in the case of the defender from the above-mentioned point. Therefore I think it to be very improbable that the road was to be made on “the west end of the piece of ground” with any view to the peculiar benefit of the defender or his predecessors, so that the

pursuer should be so far restrained in the use of his property as to be disabled from building a boundary wall. No. 125.

The feu-disposition provides that the servitude is to be exercised by a road or passage of 6 feet wide and at least 8 feet high. This means a covered way, indicating, as I think, very plainly that the only entrance to the road is to be from the street. There is no limit to the covered way, and if it extended, as it might, for the whole depth of the pursuer's property, there could be no other entrance. For a covered way could not be constructed without building a wall along its western side. Mar. 14, 1894.
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It follows of necessity that as matter of right the defender cannot under the title require that the servitude road shall be open to him from his own property, and by consequence there is nothing to prevent the pursuer from erecting a boundary wall.

That such a wall has not been built is not in my judgment of any consequence. All the powers competent to the pursuer as the owner of the feu remain entire, except in so far as the defender has acquired any rights by which they are limited. He has, in my opinion, acquired none. He has had no access to the servitude road, except from the street and the point to which I have already referred. There is, I think, no pretence for saying that the defender is in the possession of any prescriptive right which disables the pursuer from erecting the proposed wall. The uses which he has had of the servitude road are fully preserved to him.

Nor is it material that the pursuer does not propose to build a covered way, but only to erect a boundary wall. I have referred to the covered way merely to shew that it is not part of the right reserved under the feu-disposition that the road shall be bounded by the pursuer's property. If it be not, the pursuer is not restrained from erecting a boundary wall. He may do any act competent to a proprietor which is not inconsistent with the right of servitude, and I need hardly say that a proprietor is never restrained in the use of his property except by very plain and express stipulations. I do not see that any restraint has been imposed by the title except that the pursuer shall allow an access on the west end of his ground to the well. If there were nothing more, I should hesitate to affirm that he was thereby prevented from building a boundary wall. But when I find that the road may be covered, I must say that all doubt is removed from my mind. Nothing could shew more clearly that the pursuer was not bound to keep the road unfenced on the defender's side.

LORD TRAYNER.—I concur in the judgment which the Lord Ordinary has pronounced.

The pursuer is the proprietor of the ground in question, and as such is entitled to build thereon in so far as his right to do so has not been validly restricted. The question therefore is, whether there is any restriction on the pursuer's right which disentitles him to the declarator which he seeks, or which is the same thing, disentitles him to build a wall on the west boundary of his ground as he proposes to do. The only restriction on the pursuer's right is that set forth in his title which reserves to the defender and other neighbouring feuars free entry and issue to and from a well on the pursuer's property, "by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end" of that property. The pursuer proposes to leave such a passage or road as an access to the well—but his operations, if carried out, would remove the passage some 9 or

No. 125. 12 inches, the breadth of his wall, east of his west boundary line. Is he entitled to do that? Now, I think, by the fair and indeed necessary implication of his title, that the pursuer is entitled to do so. The passage is to be at least 8 feet high, which implies that the pursuer is to be entitled to have a building over the passage. But in that case he must have a wall on the west boundary to support his building. Nor does such a wall prevent the pursuer leaving a 6 feet passage on the west end of his property. It need not be, to comply in the strictest way with the terms of the reserved right, the most westerly 6 feet of his subjects that are devoted to the passage. It is enough if he leaves a 6 feet passage at the "west end" of his property. That is in every sense a correct description of the passage which the pursuer proposes to leave. It is to be 6 feet wide, and at the west end of his property. It is noticed, however, that the 6 feet passage is "to be left out" upon the west side of the property, and it is said that to be left out implies or suggests that the 6 feet for the passage are to be left out, that is, outside of the pursuer's building. That, in my opinion, is not the meaning of the reservation. Such a reading is inconsistent with the idea of any building over the passage, for that as I have said implies some building west of the passage on which the structure over the passage can rest. It affords no answer to this view to say that there are buildings at present over the passage in question which do not rest on a wall belonging to the pursuer. Under what conditions the pursuer's author was allowed to rest the present building on the building belonging to the defender we do not know. But the pursuer may at any time take down the present building, and it does not appear that he would be entitled to rest any new building on the defender's property. He might not be inclined to ask, and if he asked might not get, leave to support his new buildings as the present buildings are supported; but as he is entitled, in my opinion, as matter of right, to build over the passage, it follows, as I have said, that he must have right to the necessary support for it on his own ground. I regard the words "left out" as meaning that the 6 feet are to be excluded from the pursuer's feu as ground on which he may not build as he may build on all the rest. In short, "left out" does not mean "left outside" of the buildings on the feu, but left out unbuilt upon when the rest is built upon. The particular line of the passage was never laid down on any plan or made matter of contract, in the same way as the passage in dispute in the case of *Hill v. Maclaren* to which we were referred—and indeed this case could be distinguished, if necessary, from *Hill's* case in other respects.

But then it is said that the defender has had access to the servitude passage from almost any part of his own adjoining boundary, and has acquired right of access in that way by prescriptive use. That view has been negatived by the Lord Ordinary, on the ground that the proof adduced does not support it, and that part of the Lord Ordinary's judgment has not been assailed. It appears, I think, clearly enough that any use which the defender has had of the passage by access to it, from his own land instead of from Hadden Street, has been merely the consequence of the pursuer's neighbourly tolerance—and in no respect the exercise of a right. The pursuer or his authors could at any time (if I am right in the view which I have expressed as to the meaning of the pursuer's title) have prevented access by the defender from his own ground on to the servitude road by building the wall which is now proposed to be built, whether for the purpose of resting a superstructure thereon, or merely for the purpose of fencing his property.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

ALEXANDER MORISON, S.S.C.—R. J. GIBSON, S.S.C.—Agents.

No. 125.

Mar. 14, 1894.
Blair v.
Strachan.

MISS VIOLET COLQUHOUN AND ANOTHER, Petitioners.—*N. J. Kennedy.* No. 126.

Nobile Officium—Trust—Advances out of income directed to be accumulated. Mar. 15, 1894.
—A truster, who died in 1884, directed his trustees to invest the whole residue of his estate in their own names, and to retain out of the income thereof, which was to be paid to A during her life, the sum of £1000 annually for the benefit of A's two daughters, and to invest the same, along with the income accruing thereon, for behoof of the daughters equally, and of the survivor, and in the event of A dying, to continue to set aside £1000 annually, "until, with interest on said sums, there be accumulated a sum of £10,000, for behoof" of A's two daughters "equally between them, or the whole to the survivor, in the event of the predeceaser not leaving issue." Payment was to be made on A's death, provided they had then attained majority or been married.

In 1893 it was decided by the Court of Session that the accumulation of the income did not cease on £10,000 being accumulated, but must go on during A's life.

In 1894, after £11,000 had been accumulated, A's daughters, who were respectively seventeen and sixteen years of age, presented a petition for advances to be made for their maintenance and education out of the income directed to be accumulated. They stated that they were entirely dependent on their mother A, whose income was about £1100. The Court, in respect that the main purpose of the truster had been effected by the accumulation of £10,000, and that the advances were desirable in the interests of the children, *granted* the petition, and authorised the trustees to advance £200 a-year for each of the petitioners.

WILLIAM COLQUHOUN, residing at Rossdhu, Luss, Dumbartonshire, died 1st DIVISION. on the 22d March 1884, leaving a trust-disposition and settlement, dated 7th March 1876, by which he conveyed his whole estate to trustees. By the fourth purpose thereof he directed his trustees to invest the whole residue of his means and estate, heritable and moveable, in their own names, and to hold the same for a period of twenty years from and after his decease, and also to invest the rents, interests, dividends, and other income thereof from time to time as the same might accumulate; and by the fifth purpose he directed them, at the expiry of said period of twenty years, to apply the said accumulated fund, both principal and interest (so far as not then already invested in land), to the purchase of land in Dumbartonshire, or wherever else they might judge most expedient, and to settle the estate or estates so purchased in a specified manner.

By codicils, dated 25th November 1882 and 6th December 1883, the truster directed his trustees, in the event of his being survived by Mrs Anna Maria Colquhoun, wife of his nephew, Colonel James Colquhoun, and in case the latter should die without having succeeded to the estate of Luss, and should leave her a widow, to pay and make over the income of the residue to her, so long as she survived, instead of accumulating it for twenty years, in terms of the fourth purpose of his settlement.

By a codicil dated 12th February 1884 the truster directed his trustees, out of the income directed to be paid to Mrs Colquhoun, "to retain and reserve £1000 annually for the benefit of Violet Colquhoun and Helen Colquhoun, her two daughters, and to invest the same, along with the annual interest or income accruing thereon, in my said trustees' and executors' own names for behoof of the said Violet and Helen Colquhoun, equally between them, share and share alike, or in the event of one dying

No. 126. without leaving lawful issue, then the whole to the survivor, and in the event of the said Mrs Anna Maria Colquhoun dying or marrying again (in which latter event I hereby revoke and recall the provision of the rents, interests, dividends, and other income left to her by the foregoing codicil), then I direct my trustees and executors nevertheless to continue to set aside annually £1000, until with interest on said sums there be accumulated a sum of £10,000, for behoof of the said Violet and Helen Colquhoun, equally between them, or the whole to the survivor, in the event of the predeceaser not leaving lawful issue as aforesaid: Declaring that said sums shall be payable to the said Violet and Helen Colquhoun on their mother's death, provided they have attained the age of twenty-one or have been married; and further declaring that said sums shall be alimentary, and shall not be affectable by the acts and deeds of the said Violet or Helen Colquhoun, nor assignable by them, nor attachable for their debts, or the debts of any husband to whom they may be married."

Mar. 15, 1894.
Colquhoun.

The testator was predeceased by the said Colonel James Colquhoun, who did not succeed to the estate of Luss, and survived by the said Mrs Anna Maria Colquhoun and her two daughters, Violet and Helen.

Various questions having arisen as to the future administration of the estate after the trustees had accumulated £10,000, a special case was, on 28th February 1893, presented to the Court, in which it was decided that the accumulation of the fund for behoof of the daughters did not cease on the sum of £10,000 being accumulated, but must continue during Mrs Colquhoun's lifetime, so long as she remained unmarried.

On 9th January 1894 a petition was presented to the Court by Miss Violet and Miss Helen Colquhoun, with consent of their curators and the persons having the residuary interest in the fund, craving the Court to authorise Mr Colquhoun's trustees to pay to their curators a sum sufficient for the petitioners' "maintenance and education, having regard to their position and prospects in life," out of the free annual income directed to be accumulated for their behoof.

They stated that they were now seventeen and sixteen years of age respectively, that the trustees had accumulated upwards of £11,000 for their behoof, that their father, Colonel James Colquhoun, did not leave any estate from which they could be alimented, and that they were therefore entirely dependent on their mother, whose income consisted of £200, under her marriage-contract trust, and of between £800 and £900 from Mr Colquhoun's trust.

"The petitioners are now at an age when a considerable sum is required annually for their maintenance and education. Mrs Colquhoun is unable out of her own funds to afford the expense of a proper education for her daughters, which is at present not less than £300 per annum, and at the same time to maintain for them the home to which they are entitled."

A remit having been made to T. M. Murray, Esq., W.S., to report upon the petition, he reported in favour of an advance being made.

The undernoted cases were cited in support of the application.¹

LORD ADAM.—This is an application made by the two daughters of Mrs Colquhoun, aged seventeen and sixteen respectively, for advances to be made to them out of a certain fund left by a granduncle. The application is made with

¹ Duncan's Trustees, July 17, 1877, 4 R. 1093; Maitland's Trustees v. McDermaid, March 15, 1861, 23 D. 732, 33 Scot. Jur. 372; Latta, June 5, 1880, 7 R. 881; Websters v. Miller's Trustees, Feb. 26, 1887, 14 R. 501; Muir v. Muir's Trustees, Dec. 10, 1887, 15 R. 170.

the consent of their mother and also of the persons interested to claim the funds in question if these, and assuming that these, were to fall into residue. No. 126.

Now, with regard to the residue of his estate we find that Mr William Colquhoun, the granduncle, at first directed the whole income arising therefrom to be paid to the mother of the petitioners, but by a subsequent codicil he directed it to the extent of £1000 a-year to be retained by his trustees for the benefit of her two daughters, and invested along with the annual interest or income arising thereon until there should be accumulated a sum of £10,000 for behoof of the daughters equally, and then each of the daughters is substituted to the other. The accumulated fund is to be paid over to the daughters on the death of their mother, provided they have then attained twenty-one years of age or been married. The form of the destination therefore is, that the trustees are to hold the fund for behoof of the girls, with a direction to pay it over to them on a particular event. We are now asked in the circumstances explained to us to award payments out of the income of the accumulated funds for the maintenance and education of these girls, having regard to their position and prospects in life. We are informed that their mother, Mrs Colquhoun, has an income arising out of funds of her own of about £200 a-year, and of about £900 derived from the trust-funds of Mr William Colquhoun. We are also told—and I think this is a very material point—that the accumulated funds have reached the sum of £10,000. I say that is very material, for I think that the main object of the truster was that by the date of their mother's death her daughters should have accumulated for them a small fortune of £5000 to each or £10,000 to the survivor. That his main object and immediate purpose has been effected, and so we are left free—without in any way defeating that purpose—to deal with the application of the income of the fund in the meantime as a source for providing for the maintenance and education of the daughters. Now, looking to the authorities that have been quoted, I think that in the circumstances it is desirable and appropriate that the income of this fund should be so far paid over for their benefit, and accordingly that the prayer of the petition should be granted. Mar. 15, 1894.
Colquhoun.

LORD KINNEAR.—I am of the same opinion. This cannot be represented as a case of pressing necessity, but there is no doubt that the mother of the petitioners will be able to provide for their suitable maintenance and education much more conveniently and advantageously for them and for herself if the payment is allowed, and that is a ground which the Court will always take into consideration in dealing with applications of this kind. I doubt whether we could give effect to the petition but for the consideration to which Lord Adam has adverted, for if there were were no such provision in Mr Colquhoun's settlement as that which shews that the truster thought the sum to be accumulated should be £10,000, I should have some difficulty in saying that he had not himself contemplated the question we are now considering and decided it against the petitioners, for of course he knew what provision he was making for their mother, and he directs that the rest of the income should be accumulated. I think, however, that the special point which Lord Adam has mentioned is extremely important, and taking the same view of it as his Lordship does, I agree in thinking that the petition should be granted.

The LORD PRESIDENT concurred.

No. 126. LORD M'LAREN was absent.

Mar. 15, 1894.
Colquhoun.

THE COURT authorised the trustees of Mr Colquhoun to advance to the curators of the petitioners the sum of £200 for the maintenance and education of each of the petitioners.

MACRAE, FLETT, & RENNIE, W.S., Agents.

No. 127. MRS JANE HENDERSON AND OTHERS, Petitioners.—*John Wilson—Greenlees.*

Mar. 15, 1894.
Henderson v.
Louttit & Co.,
Limited.

JAMES LOUTTIT & COMPANY, LIMITED, AND OTHERS, Respondents.—*Dickson—M'Lennan.*

Company—Winding-up—General meeting—Quorum—The Companies Act, 1862 (25 and 26 Vict. c. 89), Schedule I, Table A, Articles 37, 38.—The Companies Act, 1862, by article 37 of Table A, Schedule 1, enacts,—“No business shall be transacted at any general meeting . . . unless a quorum of members is present at the time when the meeting proceeds to business. . . .” *Held* (1) that “members” mean members entitled to vote; and (2) that a quorum must not only be present at the commencement of the meeting but also at the time when the business is transacted.

1ST DIVISION.

ON 22d February 1894 Mrs Jane Henderson and other shareholders of James Louttit & Company, Limited, presented a petition craving the Court “to order the voluntary winding-up of the said James Louttit & Company, Limited, resolved on by the extraordinary resolutions [after-mentioned], to be continued, but subject to the supervision of the Court, in terms of the Companies Acts, 1862 to 1892; or otherwise, as an alternative to the foregoing prayer, to order the said company to be wound up by the Court under the provisions of the said Companies Acts.”

The company was registered on 31st March 1873, and incorporated under the Companies Acts, 1862 and 1867. Its capital consisted of £6000, in 600 shares of £10 each. The memorandum of association was registered without articles of association, and consequently Table A of the Companies Act, 1862, formed the regulations of the company.

The petitioners averred that on 5th February 1894 at an extraordinary meeting of the shareholders, a resolution was unanimously adopted requiring the company to be wound up voluntarily, and that at a subsequent meeting on 20th February 1894 that resolution was duly confirmed and a liquidator appointed.

They further averred that the creditors of the company would be paid in full, and that the shareholders alone had any interest in the winding-up, and stated, as a reason for the winding-up being placed under the supervision of the Court, the risk of injury to the company by the possible separate action of a small section of the shareholders. No reason was stated in support of the alternative prayer for a compulsory winding-up.

Answers were lodged by James Louttit & Company, Limited, and the directors and secretary of the company.

The respondents stated, and it was not disputed, that the number of shareholders at the date of the meeting on 5th February was fifty-five.

They further stated,—“Said second meeting was duly convened, but at the time and place fixed only twelve members entitled to vote at the meeting presented themselves. Mr Daniel Wares Georgeson, solicitor, Wick, who had acquired certain shares in the company on the day previous to the meeting, also presented himself, but under Article 47 of Table A he was disqualified from voting, not having held his shares for

three months prior to the meeting. There being thus no quorum present, No. 127. no business was or could be transacted. In the view of ten of the twelve qualified members who assembled, Mr Georgeson could not be reckoned for the purpose of making up a quorum, and these ten members accordingly left the place of meeting. There remained, in addition to Mr Georgeson, only two members, the petitioners Mr Alexander Laing, S.S.C., and Mr James Sutherland. These gentlemen proceeded, notwithstanding the provision of the said 37th and 38th Articles of the said Table A, to pass the pretended resolutions set forth in the petition. There having been no quorum present when the said two shareholders proceeded to business, the said pretended resolutions were wholly incompetent and inept. The resolution of 5th February in favour of liquidation remains unconfirmed, and the company is consequently not now in liquidation.*

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It was admitted by the petitioners that Mr Georgeson had not held his shares for three months, and that ten of the members who came to the second meeting had left before the consideration of the resolution was entered upon.

The petitioners argued ;—There were thirteen members of the company present at the second meeting. That constituted a quorum. It did not matter that one of them had not held his shares for three months. Art. 37 did not say that a quorum must be of members entitled to vote, but simply of members. Further, it was enough that a quorum was present at the commencement of the meeting, which then proceeded to business, and there was nothing in the Act which made it necessary for a quorum to remain throughout the proceedings. The resolution, therefore, having been confirmed at a duly convened and duly attended meeting the company was in voluntary liquidation, and it was obviously for the advantage of all parties that the winding-up should now be placed under the supervision of the Court.

The respondents argued ;—A quorum of members meant an effective quorum of members entitled to vote and take part in the business of the meeting.¹ Any other construction of the expression was extravagant. It was equally extravagant to contend that provided a quorum of members was present at the commencement of a meeting before the business of it was entered upon, fewer members than a quorum were entitled at any time thereafter at the same meeting competently to transact the business.

* The Companies Act, 1862 (25 and 26 Vict. c. 89), Schedule 1, Table A, enacts, Article 37,—“No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to transact business, and such quorum shall be ascertained as follows, that is to say, if the persons who have taken shares in the company at the time of the meeting do not exceed ten in number, the quorum shall be five, if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation that no quorum shall in any case exceed twenty.”

Article 38.—“If within one hour from the time appointed for the meeting a quorum is not present the meeting” shall be dissolved or stand adjourned.

Article 47.—“ . . . No member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting . . . unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.”

¹ Buckley on the Companies Acts (6th ed.), p. 482; *Cambrian Peat Company*, 1875, 31 L. T. 773.

No. 127. No reason whatever had been suggested for a compulsory winding-up. The shareholders admittedly were the only persons interested, and no valid expression of their views had yet been obtained on the question.

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LORD PRESIDENT.—I think this petition fails in both its branches. The application to have the voluntary winding-up continued subject to the supervision of the Court, of course, postulates the existence of a voluntary winding-up, and that depends on the validity of the proceedings at the confirmation meeting. Now, on the face of these proceedings, it appears to me that there was not a quorum present. It is impossible to hold that when the word "quorum" is used it has any other sense than a quorum of effective members—members qualified to take part in and to decide upon questions brought before the meeting. Accordingly, it appears to me that in regard to the meeting in question the proceedings disclose two fatal faults:—First, Mr Georgeson was not a member qualified to vote, and could not therefore, in my view, count as a member in ascertaining the quorum. Second, when the meeting proceeded to the business for which it had been called there were present only two members qualified to vote, and I think it would never do to construe sec. 37 of Table A as the petitioners propose. It would be a highly inconvenient, not to say unnatural meaning to attribute to it, to hold that all that is necessary to the validity of the proceedings is, that at the earliest stage of the meeting a quorum should be present, but that after the real business of the meeting is started and under consideration the quorum might go away. I think, therefore, that there is no liquidation in existence which can be continued under the supervision of the Court.

As regards the second branch of the application, the petitioner clearly shews that this is not a creditors' liquidation, as all the creditors are to be paid in full. Accordingly the persons interested in the matter, and entitled to be heard, are the shareholders. Now, the proceedings in question having miscarried, it would be quite premature for us to grant the application for a winding-up by the Court without waiting to see what opinion is entertained by the shareholders.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT refused the petition.

PHILIP, LAING, & Co., S.S.C.—THOMAS LIDDLE, S.S.C.—Agents.

No. 128. MRS JANET ADAM, Pursuer (Respondent).—*James Clark—T. B. Morison.*
JAMES CRAIG (Adam's Trustee), Defender (Appellant).—*Grainger Stewart.*

Mar. 16, 1894.
Adam v.
Adam's Trustee.

Husband and Wife—Bankruptcy—Wife's furniture in husband's house—Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), sec. 1.—In the case of a marriage contracted in 1885 held that furniture which had belonged to the wife before her marriage, and had been taken by her to the house in which she and her husband lived after marriage, had not been imixed with her husband's funds nor lent or entrusted to him, in the sense of the Married Women's Property Act, 1881, sec. 1, and did not pass, on his sequestration, to his trustee.

2D DIVISION.
Sheriff of
Lanarkshire.

IN November 1893 Mrs Janet Adam, wife of George Adam, sometime spirit-dealer in Airdrie, brought an action in the Sheriff Court at Airdrie against James Craig, C.A., trustee on her husband's sequestrated estates, praying the Court to interdict the defender, as trustee, from selling,

removing, or in any way interfering with certain specified articles of No. 128. furniture in the house at Airdrie in which she resided.

The pursuer averred, and the defender admitted, that the furniture in question had been purchased by her before her marriage (which took place in 1885) with money received from her father. She further averred,—(Cond. 2) “The said articles are thus the sole property of the pursuer, the said Mrs Adam, and have still remained hers, she having been married after the Married Women’s Property Act, 1881. The said articles had only been immixed with other estate of the said George Adam in respect they were in the same house as his furniture, and they were capable of easy identification.” The defender answered,—(Ans. 2) “Denied. The said articles have been immixed with the furniture and other estate of the said George Adam.”

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tee.

The defender pleaded;—(2) The said articles having been immixed with the estate of the said George Adam, and being part of his sequestrated estate, belong to the defender as trustee thereon.*

On 6th February 1894 the Sheriff-substitute (Mair) pronounced this interlocutor:—“Finds . . . (3) that in virtue of section 1 of the Married Women’s Property (Scotland) Act, 1881, the said articles were vested in the petitioner as her separate estate, and were not subject to her husband’s *jus mariti*, and were not subject to arrestment or other diligence of the law for her husband’s debts; (4) that although the said articles were in the petitioner’s husband’s house, along with articles of furniture belonging to him at the date of his sequestration, they were not, in the sense of subsection 4, section 1, of the said Act, lent or entrusted to the husband, or ‘immixed with his funds,’ but were capable of being identified and distinguished from the estate of the husband: Finds in law that the said articles were the separate property of the petitioner, that they did not form part of the assets of her husband, and that the defender, as trustee on the husband’s sequestrated estate, is not entitled to take possession of the same: Therefore declares the interim interdict formerly granted perpetual: Finds the petitioner entitled to expenses,” &c.†

* The Married Women’s Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), sec. 1, enacts,—“Where a marriage is contracted after the passing of this Act, and the husband shall, at the time of the marriage, have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*. . . .”

(3) “Except as hereinafter provided, the wife’s moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband’s debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband.”

(4) “Any money or other estate of the wife lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband’s estate in bankruptcy, under reservation of the wife’s claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money’s worth have been satisfied.”

† “NOTE.—The findings in the above interlocutor speak for themselves, and I have only to refer in support of it to the passage in Lord Fraser’s Treatise on Husband and Wife, p. 1517, where his Lordship says,—‘The investments in which the wife may put her earnings may be furniture or any other *corpora mobilia* as well as stocks or heritage, and thus although the two spouses be living together,

No. 128.

Mar. 16, 1894.
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Adam's Trustee.

The defender appealed, and argued;—The furniture having been taken to the husband's house after the marriage, had been immixed with his funds, or had been lent or entrusted to him, in the sense of the Act, and consequently it had passed to his trustee.¹

Argued for the pursuer;—The Sheriff-substitute's judgment was right. The furniture here was admittedly the wife's property before marriage; and the effect of the Act was to put the wife's property (subject to the exceptions provided by the Act) into the position in which it would have been had the husband's *jus mariti* been excluded, in which case the property was not open to the diligence of his creditors.² It was said that the furniture was within the exception of having been immixed with the husband's funds, but furniture was not capable of being "immixed" with the husband's funds. The exception of immixing and of lending or intrusting to the husband, applied only to money, or its equivalent—not to corporeals such as furniture. *Anderson's* case really went on the ground that the furniture was not *in bona fide* the wife's property.

At advising,—

LORD YOUNG.—The question in this case arises under the Married Women's Property Act, 1881. It relates to fifteen articles of furniture,—I should think the whole articles of furniture found in the house of this publican. He became bankrupt and these articles are now claimed by his trustee. The wife says that the articles are hers, that they were purchased before her marriage with her own money, and that averment is admitted by the trustee. Therefore in the case of these articles of furniture there was no immixing of them with any furniture of the husband. The question is whether under the Married Women's Property Act, 1881, the wife is entitled to the furniture or whether it belongs to the husband's creditors. *Prima facie* the wife is entitled to the furniture unless the case falls under section 1, subsection 4, of the Act, which the trustee says it does.

Now, it is not stated on record, and it is not the defender's case, that the furniture was entrusted or lent to the husband. The defender's case, as stated in answer 2 and in his second plea in law, is that these articles of furniture have been immixed with the furniture and other estate of the husband, and therefore that it now belongs to the defender as trustee on that estate. But as I have said there was no immixing in this case, at least no immixing that was not capable of immediate separation or unmixing. I am, therefore, of opinion with the Sheriff-substitute, who in deciding the case has proceeded on the law stated by Lord Fraser in his treatise on Husband and Wife, that this furniture, and any furniture in a similar position, is the estate of the wife, and does not pass to the husband's trustee in bankruptcy.

The Sheriff-substitute refers to the case of *Anderson v. Leith*, 19 R. 684, but he is of opinion that that case was a special one and does not derogate in any way from the law laid down by Lord Fraser. I agree with the Sheriff-substi-

the whole of the plenishings apparently his may be the wife's property, and cannot be taken by the husband's creditors.'

"Reference was made at the debate by the agent for the defender to the case of *Anderson v. Leith*, 18th March 1892, 19 Rettie, 684, but in my opinion that case was a special one, and does not derogate in any way from what is laid down by Lord Fraser."

¹ *Anderson v. Anderson's Trustee*, March 18, 1892, 19 R. 684.

² *Young v. Loudon*, June 28, 1855, 17 D. 998, 27 Scot. Jur. 512.

tute. I think the case of *Anderson* was a very special one, and I do not think that it was decided on any ground of immixing. The case was that of a clergyman who on the eve of bankruptcy, having a considerable number of small debts, and being tormented by his creditors, in order, as I thought,—and as I think all the Judges who heard the case thought,—to put his furniture beyond the reach of his creditors had made a sale on paper of his furniture to his wife. No change had been made in the possession of the furniture; there was nothing but the document to shew that the furniture had become the property of the wife. I was of opinion that the transaction was not *in bona fide*. But the case there was not one of immixing; the case was that even if there had been a valid sale the wife had lent or entrusted the furniture to her husband. There were some observations made by some of the Judges in that case tending to this, that a wife may lend or entrust furniture belonging to her to her husband. That may be; I do not think that is impossible. But where a woman who is in possession of furniture marries a man who has no furniture at all, or very little, and brings it into his house, or it may be into her own house, I do not think that she thereby lends or entrusts it to her husband within the sense of section 1, subsection 4, of the statute. I do not think, therefore, that there is any case of lending or entrusting made out here at all.

On the whole matter, I agree in the judgment of the Sheriff-substitute, and in the law as stated by Lord Fraser, on which the Sheriff-substitute proceeds.

LORD RUTHERFURD CLARK.—In my opinion the furniture belonged to the wife, and was not lent or entrusted to the husband or immixed with his estate. I therefore concur.

LORD JUSTICE-CLERK.—I also agree. If we decided this case in favour of the defender, I do not think that there could ever be a case in which a wife's furniture when brought into her husband's house could be prevented from becoming his property.

LORD TRAYNER was absent.

THE COURT adhered.

J. L. OFFICER, W.S.—MARCUS J. BROWN, S.S.C.—Agents.

ALEXANDER CUTHBERT AND ANOTHER (James Ritchie's Trustees), First Parties.—*Ure—Galbraith Miller*. No. 129.

ALEXANDER RITCHIE, Second Party.—*Johnston—Hunter*.

Succession—Trust—Vesting—Repugnancy.—A testator directed his trustees, after payment of an alimentary liferent of the residue of his estate to his brother, Joseph Ritchie, to "hold and apply" one-half of the residue "for the uses and behoof of Alexander Ritchie, son of Joseph Ritchie, and of any other child or children that may yet be procreated of his marriage, equally among them if more than one, and if only one child should be left, then for the sole use and behoof of such child, and that in such sums, at such times, and in such manner as my trustees shall think best, and of which they shall be the sole judges."

Joseph Ritchie survived his brother, the testator, and as one of his brother's two next of kin was entitled to one-half of such part of his brother's estate as might be undisposed of.

Joseph Ritchie died leaving a will by which he bequeathed the fee of his whole estates to his only son Alexander.

Alexander having called on his grandfather's trustees to denude of one-half of the trust-estates in his favour, held that the fee of one-half of the residue of

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No. 129. his grandfather's estate having vested in Alexander Ritchie either under his grandfather's will or *ab intestato*, the trustees were bound to denude in his favour.

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2D DIVISION.

JAMES RITCHIE, sometime merchant in San Francisco, died at Newton-on-Ayr on 27th May 1871, leaving a trust-disposition and settlement by which, after providing for the payment of certain legacies and of an alimentary liferent of the residue of his estate to his brother, Joseph Ritchie, and his brother's wife, Mrs Margaret Boyd or Ritchie, he directed his trustees, *inter alia*,—"In the third place, on the death of the survivor of the said Joseph Ritchie and Margaret Boyd or Ritchie, my trustees shall hold and apply the residue of my means and estate to and for the uses and behoof of Alexander Ritchie, son of the said Joseph Ritchie, and of any other child or children that may yet be procreated of his marriage, equally among them if more than one, and if only one child should be left, then for the sole use and behoof of such child, and that in such sums, at such times, and in such manner as my trustees shall think best, and of which they shall be the sole judges." The testator farther provided, that in the event of his brother John Ritchie, "who has not been heard of for many years, being alive and returning to this country, my trustees shall hold and apply the one half of the residue of my means and estate to and for his use and behoof, and in that case the provision to the said Joseph Ritchie, my brother, and his wife and family shall be restricted to the other half of the residue of my means and estate."

The testator was survived by his brother Joseph and his wife, and by their only son Alexander.

Joseph Ritchie died on 13th May 1876, leaving a general disposition and settlement whereby he conveyed his whole estates to his widow in liferent, and his son Alexander and his heirs and assignees whomsoever in fee.

Mrs Ritchie, Joseph Ritchie's widow, died on 17th September 1893.

Alexander Ritchie, Mr and Mrs Joseph Ritchie's son, then called on James Ritchie's trustees to denude in his favour to the extent of one-half of the residue of the trust-estate in their hands, and the trustees having declined to do so, a special case was presented. The trustees were the first parties, and Alexander Ritchie was the second party.

The case stated that James Ritchie's next of kin at the time of his death were his brothers Joseph Ritchie and John Ritchie, if John Ritchie was then alive. The case farther stated that Alexander Ritchie, the second party, had presented a petition under the Presumption of Life Limitation (Scotland) Act, 1891, to have it found that John Ritchie was to be presumed to have died on 31st December 1853, and that intimation of this petition had been ordered.

The questions of law were:—“(1) Are the first parties bound to denude in favour of the second party, and to convey to him one-half of the residue of the said trust-estate? or (2) Are the first parties entitled to retain the said residue for the purpose of applying the same for the use and behoof of the second party, in such sums, at such times, and in such manner as the first parties, as trustees foresaid, shall think best?”

Argued for the first parties;—Under the third purpose the first parties had a discretion to pay or withhold payment of the fee of the residue in whole or in part from the second party; or in other words they were empowered to restrict his right to a liferent. No right of fee, therefore, vested in the second party until he received payment.¹ In *Miller's*

¹ *Paterson's Trustees v. Paterson*, Jan. 29, 1870, 8 Macph. 449, 42 Scot.

*Trustees*¹ and *Wilkie's Trustees*² there was, in the opinion of the Court, No. 129. a direction to pay over; here the direction was "to hold and apply" merely. Even if there was vesting a trust would be kept up unless it was cumbrous and unnecessary,³ which here it was not. If then the trust ought to be kept up, it was immaterial that the second party took a vested right of fee *ab intestato*. Mar. 16, 1894.
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Argued for the second party;—The fee had vested in the second party under the deed;⁴ the trustees had no such discretionary power to restrict as occurred in *Chambers' Trustees*,⁵ and similar cases cited on the other side. In any case the second party took the fee as representing the testator's next of kin. For, if the second party did not take the fee under the will, then one-half of the fee passed *ab intestato* to the second party's father as one of the testator's two next of kin; and the second party took that half in virtue of his father's will. If, therefore, the fee had vested in the second party, the trustees were bound to denude in his favour.⁶ Even if a trust might be kept up as being reasonable, a limitation which, as here, was indefinite in point of time was *prima facie* unreasonable.

LORD JUSTICE-CLERK.—The only question in this case about which there is any doubt, after the decisions which have been pronounced by the Court, is whether under this deed a fee is given to Alexander Ritchie. I do not think that it is necessary to decide that question, because it is clear that either under the deed or *ab intestato* Alexander Ritchie takes a right of fee, and that being so, it is impossible to distinguish this case from several recent cases, particularly *Miller's Trustees*, 18 R. 301, and *Wilkie's Trustees*, 21 R. 199, in which it was held that where a person who is *sui juris* takes a right of fee he cannot be restricted as regards his possession and enjoyment of the subject by any such trust limitation as we have here. I think that we must hold this to be the law—in the meantime at all events—and I therefore think that Alexander Ritchie is entitled to have this estate handed over to him.

LORD YOUNG.—The question here relates to the residue of the means and estate of the testator, James Ritchie. Now, unless otherwise disposed of by this will, the fee belongs to the claimant, Alexander Ritchie. He is the fiar of the whole residue, the fee of which is not otherwise disposed of. It may be a question whether the residue is given to him by the will. If it is, then he is fiar under the will; if it is not, then it is certainly not given to anyone else, and he consequently takes it under the law of intestacy. That being so, it is, I think, according to the decisions,—certainly the later decisions, particularly *Miller's Trustees*, *Wilkie's Trustees*, and *Mackinnon*,—that such a trust direction as this with respect to the fee of an estate is ineffectual to limit the right of the fiar, and that, if there is no other interest involved, he is entitled

Jur. 198; *Chambers' Trustees v. Smith*, April 15, 1878, 5 R. (H. L.) 151; *Smith's Trustees v. Smith*, July 11, 1883, 10 R. 1044.

¹ *Miller's Trustees v. Miller*, Dec. 19, 1890, 18 R. 301.

² *Wilkie's Trustees v. Wright's Trustees*, Nov. 30, 1893, *supra*, p. 199.

³ *Miller's Trustees v. Miller*, *supra*, per Lord President Inglis, at p. 305.

⁴ *M'Elmail v. Lundie's Trustees*, Oct. 31, 1888, 16 R. 47.

⁵ *Chambers' Trustees v. Smith*, *supra*.

⁶ *Duthie's Trustees v. Forlong*, July 17, 1889, 16 R. 1002; *Mackinnon's Trustees v. Official Receiver in Bankruptcy in England*, July 19, 1892, 19 R. 1051; *Wilkie's Trustees*, *supra*; *Miller's Trustees*, *supra*.

No. 129. to have the property made over to him without being embarrassed by the restriction. My own view, I confess, is that it would be expedient that the owner of property, even with respect to property which he leaves to his heir, should be at liberty by means of a trust to protect the object of his bounty from wasting the property, and therefore that such a trust direction as we have here ought to be effectual, and ought not to be defeated by any technical considerations based on the doctrine of repugnancy. But my views have been overruled, and are contrary to the law as it has now been established by the decisions.

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LORD RUTHERFURD CLARK.—I agree. I have said all that I have to say on this subject in former cases, which have been referred to.

LORD TRAYNER.—I think that the question is settled by the authorities which have been cited to us.

THE COURT answered the first question in the affirmative, and the second in the negative.

DAVID TURNBULL, W.S.—JOHN MACMILLAN, S.S.C.—Agents.

No. 130. **MAGISTRATES OF GALASHIELS, Complainers (Respondents).**—*Dickson—D. Dundas.*

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WILLIAM SCHULZE, Respondent (Reclaimer).—*Party.*

Burgh—Street—Regular line of street—Setting back buildings—General Police and Improvement Act, 1862 (25 and 26 Vict. c. 101), sec. 162.—In 1877 the corporation of a burgh resolved to widen a street in the burgh to an uniform width of 40 feet. In 1893 the width of the street, with the exception of one place in which three houses projected 13 to 15 feet into the street, was at least 40 feet, but the buildings were not in any regular line, some being further back from the 40 feet line than others. One of the three houses which projected beyond that line having been pulled down with a view to its being rebuilt, the Magistrates sought to have the proprietor ordained to set the new building back to "the regular line of the street," in terms of sec. 162 of the General Police and Improvement Act, 1862. *Held (rev. judgment of Lord Low)* that the "regular line of the street" contemplated by the Act was the line of the existing buildings in the street, and that there was, in point of fact, no such regular line to which the Magistrates were entitled to have the new building set back.

Burgh—Street—Restriction on height of building—General Turnpike Act, 1831 (1 and 2 Will. IV. cap. 43)—Adoption of Act by Local Act.—Sec. 91 of the Turnpike Act, 1831, provides that no houses, &c. "above 7 feet high shall be erected without the consent of the trustees . . . within the distance of 25 feet from the centre of any turnpike road." That and other sections of the General Act were adopted by the Local Police Act of a burgh "so far as said clauses are applicable to the roads and streets within" the burgh, "and in so far as the same are not inconsistent with this Act and the Police Act." *Held (aff. judgment of Lord Low)* that sec. 91 applied to a street in the burgh, and that the Magistrates were entitled to prevent the proprietor of vacant land bordering on a street from erecting thereon buildings of a greater height than 7 feet within 25 feet of the centre of the street.

1ST DIVISION.
Lord Low.

IN 1878 the Corporation of Galashiels resolved to improve Channel Street, one of the leading thoroughfares of the burgh, by widening it to 40 feet conform to a plan.

The Corporation, by agreement with various proprietors, were able to widen the greater part of the street, but three of the proprietors on the north side of the street, Messrs Gillies, Mr M'Queen, and Mr Schulze,

refused to transact, and their buildings, having a frontage of from 40 to 50 yards, projected beyond the proposed line of street shewn on the plan.

Mr Schulze, whose property consisted of two houses on the north side of the street and of a vacant space adjoining them on the west, after taking down the two houses, proposed to erect new buildings upon their site and on the ground adjoining.

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In 1893 the Corporation presented a note of suspension and interdict against Mr Schulze to prevent him doing so.

The objection to the respondent building on the site of the two houses was rested upon sec. 162 of the General Police Act, 1862, which enacts, "When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the Commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, in such manner as the Commissioners may direct, for the improvement of such street, subject always to payment of compensation to the owner of such house or building for any damage he thereby sustains which compensation may be settled in manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845."

The objection to the building to be erected on the ground previously unbuilt on was rested upon sec. 91 of the General Turnpike Act, 1831, which, along with other sections, was incorporated in the Galashiels Municipal Extension Police and Water Act, 1876, by sec. 40 thereof, which enacts that these clauses, "so far as the said clauses are applicable to the roads and streets within the extended burgh, and in so far as the same are not inconsistent with this Act and the Police Act, shall from and after 15th May 1877 extend and apply to all the roads and streets within the extended burgh."

Sec. 91 of the Turnpike Act, 1831, enacts,—“No houses, walls, or other buildings, above 7 feet high, shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made within the distance of 25 feet from the centre of any turnpike road.”

The respondent averred with reference to the first objection that in Channel Street as a whole there was no regular line of street, "and that the two small houses belonging to the respondent did not project beyond the line of the street at the part thereof where they were situated, or beyond the houses or buildings adjoining them."

With reference to the second objection, the respondent admitted that the buildings he proposed to erect on the vacant ground were over 7 feet in height.

The respondent pleaded;—4. The complainers are not entitled to object to the respondent's operations under the said General Police Act of 1862, in respect that there is no regular line of street in Channel Street as a whole, and that the buildings formerly on the ground did not project, and the new buildings will not project beyond either (1) the actual line of the street at the part thereof where situated, or (2) the actual front of the houses or buildings thereto adjoining. 6. The provisions of the Act 1 and 2 William IV. cap. 43, founded on by the complainers, being inapplicable to the present case, and the operation thereof contended for by the complainers being inconsistent with the provisions of the said General Police and Improvement (Scotland) Act, 1862, and the Galashiels Municipal Extension Police and Water Act, 1876, interdict should be refused.

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The state of the street at the date of the proceedings is sufficiently described in the Lord Ordinary's note.

On 9th June 1893 the Lord Ordinary (Low) suspended the proceedings complained of, and granted interdict in terms of the prayer.*

* "OPINION.—I do not think that there is any substantial dispute between the parties as to the material facts of this case, and I am therefore in a position to dispose of it without further inquiry.

"Channel Street is one of the leading thoroughfares in Galashiels, and about 1878 the complainers approved of a scheme for widening the street to a breadth of 40 feet. The plan No. 10 of process shews in pink the buildings and front gardens as they existed in 1878, and the blue lines shew what the line of the street will be when the scheme is carried into effect.

"The complainers have by agreement with the proprietors been able to widen the greater part of the street, but three of the proprietors, viz., Messrs Gillies, Mr M'Queen, and the respondent Mr Schulze, have refused to transact thereanent with the complainers, and their buildings still project beyond the line of the street as widened.

"The plan No. 17 of process shews the present condition of the street.

"The respondent had two houses fronting Channel Street, and adjoining them a vacant stance at the corner of Channel Street and Park Street. He has taken down the two houses fronting Channel Street, and proposes to rebuild them. The front line of the houses projects into the street from 13 to 15 feet beyond the line of the street as widened. The complainers have required the respondent, in terms of the 162d section of the General Police Act of 1862, to set back the new houses to the line of the street as widened.

"The respondent also proposes to erect a building upon the vacant stance upon the same line of frontage as his old houses. The 162d section of the Police Act does not apply to a building erected for the first time, as it only deals with the case of existing houses being taken down to be altered or rebuilt. The complainers therefore appeal to the 91st section of the General Turnpike Act of 1831, which is incorporated with the Galashiels Municipal Extension Police and Water Act, 1876. That section provides that no houses or other buildings above 7 feet high shall be erected without the consent of the trustees (in this case the complainers) previously obtained in writing, within the distance of 25 feet from the centre of any turnpike road. By the Galashiels Act, and for the purposes of that Act, the expression 'turnpike roads,' when used in the incorporated section of the Turnpike Act, is defined as meaning 'roads and streets' within the burgh. The complainers accordingly contend that the respondent is not entitled, without their consent in writing, which they refuse to give, to erect a building upon the vacant stance above 7 feet high within 25 feet of the centre of Channel Street. If the complainers are right in their contention they can prevent the respondent erecting a building of a greater height than 7 feet upon the vacant stance beyond the line of the street as widened.

"I shall first consider the case in regard to the old houses under the 162d section of the General Police Act, and then the case of the new house under the 91st section of the Turnpike Act.

"The 162d section of the Police Act provides,—'When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or towards the line of the street . . . for the improvement of such street.'

"It is admitted that the respondent's houses do not fall under the alternative case contemplated by the section, because they do not project beyond the front of the house immediately to the east,—that is, Mr M'Queen's house. The question, therefore, is whether they project beyond the regular line of the street within the meaning of the Act. The respondent contends that they do not do so, because there is no regular line of street, and he appeals to the plan No. 17

The respondent reclaimed.

The arguments of parties sufficiently appear from the opinions of the Lord Ordinary, and of the Judges in the Inner-House.¹

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of process as shewing that that is the case. That plan shews that the regular line of the street is, in the first place, interrupted by the projecting houses of the three proprietors to whom I have referred, who refused to sell to the complainers the ground necessary for widening the street opposite their houses. In the second place, the plan shews that eastward of the Douglas Hotel the houses upon the north side of the street stand behind and are not parallel with the line shewn upon the plan as the line of the street. The latter state of matters is, however, easily explained. The plan of 1878, No. 10 of process, shews that a number of the houses to the east of the Douglas Hotel had enclosed plots of ground in front of them. The proprietors were willing to sell or give to the complainers the ground necessary for widening the street, but they stipulated that the complainers should take over and pave the whole of the front plots, and not only the portions thereof which were included within the proposed line of street. It was also agreed that in the event of any of these proprietors rebuilding his house he should be entitled to bring the front forward to the new line of the street. The complainers accordingly, in paving the front plots, ran a line of coloured stones along the pavement upon the new line of the street. The result is that throughout the whole length of the street, except *ex adverso* of the three properties to which I have referred, the street has actually been widened to the proposed regular breadth of 40 feet, or the ground necessary for that purpose has been acquired, and the ultimate line of the street marked upon the pavement. In these circumstances, I think that the street has a regular line according to the fair and ordinary use of language, except in so far as that line is broken by the three projecting properties.

“The question therefore arises whether the fact that there are three properties which have not been brought into line prevents the application of the Act. Whether or not there is a regular line of street within the meaning of the Act must always, I think, be a question of circumstances. Here the fact is, as shewn by the plan, that out of a street of over 200 yards in length there are only buildings (including those of the respondent) having a frontage of from 40 to 50 yards which project beyond the regular line of the street. It seems to me that that is just the kind of case in which the Act gives the Commissioners power to take advantage of the rebuilding of a projecting house to compel the proprietor to set it back to the regular line of the street.

“I am therefore of opinion that the complainers are entitled to prevail as regards the old houses.

“In regard to the new building upon the vacant stance, the only question is whether the 91st section of the General Turnpike Act applies. If it does apply, the complainers can prevent the respondent building above a certain height, beyond the regular line of the street, and of course it is only to that extent and effect that they desire to exercise their statutory powers.

“By the Galashiels Municipal Extension and Police Act, a number of the clauses (including the 91st) of the General Turnpike Act are incorporated, ‘so far as the said clauses are applicable to the roads and streets within the extended burgh, and in so far as the same are not inconsistent with this Act and the Police Act.’

“Now, many of the incorporated sections are obviously not applicable to a street within burgh. Thus the 84th and the 85th sections, which empower the road trustees to make side drains and ditches along the side of a turnpike road; the 88th and 89th sections, which provide for the pruning of hedges and trees at the side of a road; the 103d section, which provides that no animal is to be

¹ *Respondent's authority*.—Fraser v. Kennedy, Jan. 9, 1877, 4 R. 266, July 8, 1878, 5 R. (H. L.) 215.

Complainers' authority.—Robertson v. Greenock Police Board, Dec. 11, 1883, 11 R 304.

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LORD KINNEAR.—This reclaiming note raises two separate questions. The claimer is proprietor of ground in Channel Street, Galashiels, formerly occupied by two houses fronting the street; and he is also proprietor of a vacant stance at the corner of Channel Street and Park Street. He has taken down the two houses and proposes to rebuild them. The first question is, whether he is entitled to erect the new buildings on the same site as the old, or whether he can be compelled to set them back from 13 to 15 feet, to a line which the com-

pastured upon a public road, and several others, plainly refer to country roads, and would seldom, if ever, be applicable to a street within burgh. But I see no reason why the 91st section should not be applicable to a street within burgh. It cannot be disputed that it is applicable to a road (as distinguished from a street) within the burgh boundaries, and there does not seem to me to be any sufficient reason for drawing a sharp distinction between a road within burgh and a street within burgh. I have already pointed out that the Galashiels Act defines 'turnpike road' as 'road or street' within the extended boundaries of the burgh.

"The respondent's counsel suggested that the reason of giving the power in the case of a road was that the road might afterwards be more easily widened if that should be found necessary. But that would be a reason for giving the power in the case of a street, and it is for that very purpose that the complainers desire to exercise the power.

"The respondent further says that the section is inconsistent with the Galashiels Act. That Act authorises the Commissioners to widen existing streets, and for that purpose to acquire land by agreement. That, the respondent argues, is the limit of the complainers' right as regards 'existing streets.' When there is a road which is not an 'existing street,' they may use the power given in the 91st section of the Turnpike Act, in view of it being necessary subsequently to widen the road, but if there is an existing street they can only widen it by acquiring the requisite land by agreement. Further, to put in force the powers of the 91st section would not, the respondent argues, enable the complainers to widen the street. It would not give them any part of the respondent's land, but would only limit the respondent's use of his land by preventing him building upon a certain part of it to a greater height than seven feet.

"I am of opinion that the respondent's argument is not well founded. I do not think that it can be said that the power conferred by the 91st section of the Turnpike Act is inconsistent with the special power given by the Galashiels Act to acquire land for the purpose of widening a street, because road trustees under the Turnpike Act had, in addition to the general powers of the 91st section, special power by the 61st section of that Act to widen roads to twenty feet without paying for the ground, and to forty feet on making satisfaction.

"Then, although it is quite true that the complainers would not, by exercising the powers of the 91st section, acquire any additional land, or be entitled actually to widen the street, they have a substantial interest to enforce these powers. If they are to complete the widening of the street, they must ultimately acquire the necessary part of the respondent's land, either by agreement or by the exercise of the compulsory power which they now possess. If the complainers are entitled to call in aid the 91st section, then the respondent must either keep back his buildings to the new line of the street, or must restrict their height to seven feet. In either case, the subject which the complainers would be compelled to acquire in order to complete the widening of the street, would be less costly than it would be if the respondent is entitled to erect buildings several storeys in height, up to the verge of his property.

"I have therefore come to be of opinion that the 91st section of the Turnpike Act is applicable, and that the complainers are entitled to enforce it.

"I shall therefore grant interdict in terms of the prayer of the note."

plainers allege to be the regular line of the street. This depends on the terms of the 162d section of the General Police Act of 1862. That section contemplates two different conditions in which a street may be found when a house or building is taken down in order to be altered or rebuilt. In one case the Act supposes that there is a regular line of street, although the house that is to be altered projects beyond it. In the other, it is not assumed that any regular line exists, but that the front of the house which is to be altered projects beyond the front of the house on either side. In the first case the section provides that when any house or building, any part of which projects beyond the regular line of the street, has been taken down in order to be altered or to be rebuilt, the commissioners may require the same to be set backwards to, or toward, the line of the street. In the other case the commissioners may require the house to be set back to the line of the adjoining houses.

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The first question is, whether the reclamer can be compelled to set back his house to what has been called the line of the street, and that depends upon whether or not there is a regular line. That is a question of fact which must be determined with reference to the actual condition of the street at the time when the alterations are being made, and not to any scheme for an improved street, which may have been framed or approved by the Corporation, but not yet carried into effect. Whether there is or is not such a line is a question on which opinions may differ, because a street may be called regular notwithstanding that there may be some occasional departure from absolute uniformity of line. It is a question of less or more. But I am not satisfied that the magistrates have shewn that there is a regular line of street in a reasonable sense of these words. Their averment is that the width of the street varies, and that the line of the building on each side of it is irregular, although the line of the street is regular and well defined. I do not appreciate the distinction between the line of the street and the line of the buildings on either side of it. If there is a regular line to which a new building is to be set back it must be the line of the existing buildings, and in the present case it appears to me that there is no such regular line. The plans produced, although they shew that the magistrates contemplate alterations which may result in the creation of a uniform line, shew at the same time that the existing line of buildings is still irregular, and if the complaint were sustained the result would be to increase the irregularity by compelling the reclamer not to make his house uniform with those of his neighbours, but to set it back several yards behind their houses. I think that an operation having that result is not within the enactment, and therefore in this branch of the case I am unable to agree with the Lord Ordinary.

The second question depends upon the 91st section of the General Turnpike Act, which is incorporated with the Galashiels Municipal Extension and Police Act, and by which it is provided that "no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees, within the distance of 25 feet from the centre of any turnpike road." The question is, whether that section of the Turnpike Act is or is not applicable to a street within the burgh of Galashiels.

Clauses 88 to 92 and others of the General Turnpike Act are by section 40 of the local Act adopted "so far as said clauses are applicable to the roads and streets within the burgh, and in so far as the same are not inconsistent with" the local Act. Now, there are various provisions in the incorporated clauses,

No. 130. and in particular in clause 91, which would be quite inapplicable to a street within burgh. But I do not think a prohibition to erect new buildings above a certain height within a certain distance of the centre of the street is in that position. There is no difficulty in its practical application if it be applicable in law. Our attention was not called to any clauses in the local Act which would be inconsistent with this provision, except to those to which the Lord Ordinary has adverted, and as to these I agree with his Lordship. But the ground on which it was maintained that the clause in question is inapplicable was, that it would be inequitable to enforce it, inasmuch as it would deprive the respondent of a valuable right without adequate compensation. But that is not a consideration for this Court. It may be that powers which have been given to the Corporation for the benefit of the community may operate harshly in particular cases. But the only question we have to determine is, whether they have or have not been conferred. On this part of the case I agree with the Lord Ordinary.

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LORD M'LAREN.—I concur.

LORD PRESIDENT.—I concur.

LORD ADAM was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary: Interdict, prohibit, and discharge the respondent from erecting on the vacant ground belonging to him at the corner of Channel Street and Park Street houses or buildings above 7 feet high, and within the distance of 25 feet from the centre of the street: *Quoad ultra* refuse the interdict, and decern."

BRUCE & KERR, W.S.—ANDREW TOSH, S.S.C.—Agents.

No. 131. EDINBURGH STREET TRAMWAYS COMPANY, Pursuers (Reclaimers).—*Murray—Vary Campbell—Clyde.*
LORD PROVOST AND MAGISTRATES OF EDINBURGH AND OTHERS, Defenders (Respondents).—*Ure—Cooper.*

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Tramway—Sale to Local Authority—Undertaking—Price—Rental value—Tramways Act, 1870 (33 and 34 Vict. c. 78), sec. 43.—Section 43 of the Tramways Act, 1870, provides, that where the promoters of a tramway in any district are not the local authority, the local authority may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, require the promoters to sell to them "their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district," such value to be determined by a referee appointed by the Board of Trade.

In an action for the reduction of an award by a referee under this provision, held (aff. judgment of Lord Low, *diss.* Lord President) that the "then value of the tramway" meant the then value of the tramway lines, and that in fixing the price the basis of the calculation should be the cost of construction of the lines regarded as plant *in situ* capable of earning profit, less a sum for depreciation, and that the referee ought not to include in the price any allowance for the rental value of the company's undertaking.

IN November 1893 the Edinburgh Street Tramways Company, incorporated by the Edinburgh Tramways Act, 1871, with which the Tramways Act, 1870, was incorporated, raised an action in the Court of Session against the Lord Provost and Magistrates of the city of Edinburgh, and against Henry Tennant, Esquire, York, and W. S. Haldane, W.S., Edinburgh, respectively, referee nominated by the Board of Trade, and clerk to the referee, in a reference entered into between the pursuers and the Magistrates, concluding for reduction of an award, dated 13th November 1893, pronounced by Mr Tennant.

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The purpose of the reference was to determine the value of so much of the pursuers' tramways works and undertaking as were within the royal burgh, city, and county of the city of Edinburgh, and were purchased by the Magistrates under the powers conferred by sec. 43 of the Tramways Act, 1870.*

It appeared from the record in the case that, during the proceedings before the referee, the tramways company claimed that their "rental interest in the tramway lines falling under the statutory sale was a distinct item or part of the subjects of sale which it was the duty of the referee to consider, take into account, and value. No allowance was asked for past or future profits of the undertaking, *i.e.*, for loss of the business carried on by the company as occupiers, nor was any compensation asked for compulsory sale, nor any consideration whatever, beyond the then value of the lines to the owners. . . . The lines should be valued by capitalising the rent at which one year with another the lines might in their actual state be reasonably expected to let."

After evidence had been led and parties heard, the referee issued a revised draft of his proposed award on 27th September 1893, in which he found that "the sum of £212,979, 7s. 6d. is the value (exclusive of any allowance for past or future profits of the undertaking, or any com-

* Sec. 43 of the Tramways Act, 1870, provides,—“Where the promoters of a tramway in any district are not the local authority, the local authority, if by resolution passed at a special meeting of the members constituting such local authority they so decide, may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, and within six months after the expiration of every subsequent period of seven years, or within three months after any order made by the Board of Trade under either of the two next preceding sections, with the approval of the Board of Trade, by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such district, such value to be, in case of difference, determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs. And when any such sale has been made, all the rights, powers, and authorities of such promoters in respect to the undertaking sold, or where any order has been made by the Board of Trade under either of the next preceding sections, all the rights, powers, and authorities of such promoters previous to the making of such order in respect to the undertaking sold, shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold, in like manner as if such tramway was constructed by such authority, under the powers conferred upon them by a provisional order under this Act, and in reference to the same they shall be deemed to be the promoters.”

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The referee thus stated his opinion in law :—" Second, that in valuing the tramways I am not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition ; and that, in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition. Third, that I am entitled, in valuing said tramways according to the cost of construction and establishment, to make allowance both for the sums expended by said company in obtaining parliamentary authority in so far as I consider such expenditure necessary or proper, and also for the sum of £2500, which sum I consider was a necessary and proper expenditure by said company, to enable double lines of tramways to be laid over said North Bridge, and which double lines form part of the undertaking." *

On 18th November 1893 the referee issued his final award (dated 13th November) in terms of the revised draft.

The pursuers pleaded, *inter alia* ;—(3) The referee is not prevented by the Tramways Act, 1870, from considering, taking into account, and valuing the tramway lines of the pursuers falling under the statutory sale according to their rental valuation ; and in refusing such valuation as being excluded by the statute, he has acted in error and *ultra vires*, and has failed in his duty to proceed with and exhaust the reference, and to issue a complete and final award and determination.

The defenders pleaded, *inter alia* ;—(3) The referee having valued the tramway lines in accordance with the provisions of the Tramways Act, 1870, the defenders should be assolized. (4) On a true construction of the Tramways Act, 1870, and especially of section 43 thereof, the defenders are not liable to pay for the rental value of the lines, and decree of absolvitor should therefore be pronounced.

On 22d February 1894 the Lord Ordinary (Low), having considered the conjoined processes, assolized the defenders.†

* Immediately after this draft award was issued the tramways company raised an action against the corporation and the arbiter for declarator, *inter alia*, that the latter was bound to value the lines of tramways according to their rental value. This action was subsequently conjoined with the action for reduction, and need not be further alluded to.

† " OPINION.—The question to be determined in this case depends upon the construction to be put upon the 43d section of the Tramways Act, 1870.

" The leading provisions of that Act, which it is important to keep in view in construing the 43d section, are as follows :—

" It is in the first place provided that the local authority of any district in which it is proposed to construct a tramway, or any person, corporation, or company, with the consent of the local authority, may, subject to the conditions of the Act, obtain a provisional order and relative Act of Parliament, authorising the construction of the tramway.

" By section 19 it is provided that a local authority which has completed or purchased a tramway, may by lease ' demise to any person or persons, corporation, or company, the right of user of the tramway, and of taking in respect of the same the tolls and charges authorised,' but no local authority is entitled ' to place and run carriages on such tramway and take tolls and charges in respect of the use of such carriages.'

" By section 34 it is enacted that ' the promoters and their lessees shall have

The pursuers reclaimed, and argued ;—The arbiter had not exhausted the reference, as he had neglected to put a value on one item, viz., the

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the exclusive use of their tramways for carriages for flange wheels or other wheels suitable only to run upon the prescribed line.'

"The 41st section provides that if at any time after the opening of the tramway the promoters discontinue working it, the Board of Trade may by order declare the powers of the promoters in respect of such tramways to be at an end, 'and thereupon the said powers of the promoters shall cease and determine unless the same are purchased by the local authority in manner by this Act provided.' The manner in the Act provided here referred to is that set forth in the 43d section. The 42d section contains provisions similar to those of the 41st section in the case of the promoters becoming insolvent.

"By section 45 the promoters of a tramway are authorised to take in respect of such tramway certain tolls and charges.

"By the 57th section it is provided that, notwithstanding anything in the Act contained, the promoters of any tramway shall not acquire any right other than that of user of any road along or across which they lay any tramway.

"Turning now to the 43d section it is there provided :—[Quoted *supra*, p. 689].

"Twenty-one years from the time when the Edinburgh Street Tramway Company was empowered to construct their tramways having expired, the Lord Provost and Magistrates of Edinburgh, as the local authority, exercised the right given to them by the 43d section to purchase the undertaking, and Mr Henry Tennant was appointed by the Board of Trade as referee to determine the value.

"In his award Mr Tennant states the principle upon which he has proceeded in valuing the tramways, thus :—'I am of opinion that I must assume . . . that in valuing the tramways I am not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition, and that in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition.'

"The tramways company contend that the principle of valuation thus adopted by the referee is unsound, and that, in terms of the 43d section of the statute, he was bound to value the tramway lines according to their rental value as in a voluntary sale.

"The company argued that the undertaking which the corporation was authorised to purchase, and had purchased, included not only the tramway lines, buildings, carriages, and so forth, but the exclusive right to use the lines, and to take tolls; that the local authority were bound to pay for the whole undertaking, and not only for part of it; that according to the usual and recognised method of valuing such an undertaking the arbiter was bound to ascertain the rent at which the tramways, with the exclusive right to use them, might have been let; and that the parenthetical enactment only provided that the company was not to have any allowance for past or future profits over and above the rental value, or any allowance in respect that the sale was compulsory.

"The word 'undertaking' is no doubt wide enough to include the exclusive right to use the tramway and the power to take tolls, but to say that the corporation is bound to pay for the whole of the undertaking, is really to beg the question, because the question, and the only question, is, whether the Legislature has not authorised the purchase upon payment of something less than the value of the whole undertaking.

"If it had been intended that the local authority was to pay for the whole undertaking, including the exclusive right to use the tramways, I think that the Act would simply have said that the promoters should sell to the local authority their undertaking at a price to be determined, in case of difference, by a referee; and it would have been very easy to add that the price was to be fixed

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No. 131. rental value of the tramways. What the corporation were buying was, under section 43 of the Act, the "undertaking" of the company, and they

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upon the basis of a voluntary and not a compulsory sale. But that is not what the Act does. On the contrary, the terms of the 43d section seem to me to imply that the transaction is a purely statutory one, and that while on the one hand the whole undertaking is to be acquired by the local authority, on the other hand the value of certain specified things alone is to be paid.

"The words are,—'The promoters shall sell the undertaking . . . upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking . . .) of the tramway, and all lands, buildings, works, materials, and plant of the promoters.'

"The words 'upon terms of paying' appear to me to be important as shewing that the Act was fixing a statutory price for a statutory sale. The promoters were to sell the undertaking, but the terms of payment were to be those specified in the Act and nothing more.

"Then the purchasers are to pay the value of the 'tramway,' and it is important to see what is meant by that word. The company contended that it must be construed according to the interpretation clause of their special Act—the Edinburgh Tramways Act, 1871. By the 3d section of that Act it is enacted that 'the expression "the tramways" or "the undertaking" shall mean "the tramways and works and undertaking by this Act authorised."' The company therefore argued that the word 'tramway,' in the 43d section of the Act of 1870, must be read as meaning the tramways and works and undertaking authorised by the special Act. Although the general Act is incorporated with the special Act, this case in my opinion depends upon the construction of the former Act alone. In it there is no definition of 'undertaking' or 'tramways,' and if the framers of the Act had regarded 'tramways' and 'undertaking' as synonymous terms, I cannot believe that they would have done anything so misleading as to use the word 'undertaking' when defining what was to be sold, and the word 'tramway,' along with a number of other words, when specifying what was to be paid for. Further, even if the 43d section fell in this case to be construed as part of the special Act, I should think that the connection in which the word 'tramway' is used renders it impossible to construe it as equivalent to 'the tramways and works and undertaking by this Act authorised,' because the word 'tramway' is followed by the words 'and all lands, buildings, works, materials, and plant,'—an enumeration which would have been altogether unnecessary and redundant, if the word 'tramway' was used in the extended sense for which the company contend. I therefore think that the word 'tramway' in the 43d section must be read in its ordinary sense, as meaning the tramway line.

"But then the company argued that assuming that the word 'tramway' is to be construed as meaning the tramway line and nothing more, it must be valued as a tramway line which the purchasers have acquired the exclusive power to use for the purpose of earning profit. That view I think may mean one of three things—either (1) that the company are entitled to be paid not only the cost of construction, but also the value of the exclusive right to use the tramway; or (2) that the value of the tramway is to be ascertained upon the basis of the rent for which it could be let; or (3) that the tramway is to be valued as a completed tramway, ready and fit for immediate use.

"I assent to the company's argument to the extent of the third of these alternatives, but it seems to me that the first two are inconsistent with the provision that the value to be paid for the tramway is to be 'exclusive of any allowance for past or future profits of the undertaking.'

"The first alternative is, I think, clearly inconsistent with that provision, because it is impossible to my mind to find any basis upon which the company could be paid the value of their right to use the tramway, except the profits which they had earned or might expect to earn.

"I come to the same conclusion in regard to the second alternative. If a valuator was set to fix the rental value of a subject which had been in posses-

were bound to pay for that the "then value" of the tramway. The measure of the "then value" was the plant plus the right which the

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sion of, and successfully worked by, the proprietor, it seems to me that the only reliable method upon which he could proceed would be to ascertain what were the profits which had been earned, and from that to estimate what rent could have been obtained if the proprietors had let the subject. But I think that that would involve the making an allowance for profits, because as the profits were larger or smaller the rent would be greater or less.

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"The company argued, and I think rightly, that what is excluded from the value by the parenthetical clause would, but for that exclusion, have been included. I do not, however, see how that helps the company. Supposing that there had been no parenthesis, and that the referee had proceeded to ascertain the rental value (which the company say would have been the proper way), I do not know upon what principle he could have allowed any additional sum for profits.

"Suppose the company had let the tramway, the rent would have represented their whole profit, and in that case I think that a rental valuation would clearly have been one making an allowance for profits.

"I would also point out that two practical men of great eminence—Mr Tennant in this case, and Sir Frederick Bramwell in the London case (to which I shall afterwards refer) have come to the conclusion that it is impossible to value the tramway lines upon the basis of rental, without making allowance for profits.

"I therefore come to the conclusion that the provision that no allowance is to be made for profits means that in valuing the tramway the referee is not to take into consideration, either directly or indirectly, past or future profits.

"Something was also said as to the inequity of taking from the company the right to use the tramways, without paying them for that right. Such considerations do not go far in construing an Act of Parliament, but I confess that I do not appreciate the alleged inequity. For the convenience of the public a tramway company which has obtained a provisional order is allowed to take the use of the public streets without paying anything for that use. But the Act gave to the local authority in whom the streets were vested right to acquire the undertaking of the tramway company at the end of twenty-one years, and I do not see anything inequitable in the Legislature providing, that upon condition of the local authority paying the tramway company for everything which had cost them money, the right of use, for which the tramway company had paid nothing, should pass to the local authority without price.

"The company further called in aid of their argument the 41st and 42d sections, which provide that in the event of a tramway company discontinuing the working of the tramway, or becoming insolvent, 'the powers' of the tramway company shall, upon an order by the Board of Trade, 'cease and determine unless the same are purchased by the local authority in manner by this Act provided.' What the local authority may purchase under these sections is 'the powers' of the tramway company, and the purchase is to be made in manner provided by the 43d section. The company therefore argued that the 43d section must include the purchase of the 'powers' of the tramway company. I assume that the purchase authorised by the 43d section does include the powers of the tramway company, because it is the purchase of the undertaking, but it does not necessarily follow (it depends upon the enactment) that compensation for the loss of the powers is to be included in the price. Further, although I do not think that the meaning of the 41st and 42d sections is doubtful, it seems to me that the phraseology is unfortunate. To purchase the powers would be of little benefit to the local authority unless they could also purchase the tramways. If, instead of 'powers,' the word 'undertaking' had been used in the 41st and 42d sections, it seems to me that the object in view would have been more clearly expressed.

"I am therefore of opinion that the pursuers are not entitled to compensation for the loss of the exclusive right to use the tramway, nor to have the value of the tramway ascertained according to its rental value. In my opinion they are

No. 131. company had in the streets, viz., an exclusive right to use them for flange wheel traffic. That right was given to the company in permanence, not only for twenty-one years, subject only to the right of the corporation to

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only entitled to the value of the tramway as a completed tramway, ready and fit for immediate use; or (to adopt the language used in the case of *Stockton and Middlesborough Water Board v. Kirkleatham Local Board*, L. R., App. Ca. [1893], p. 444, to which I shall presently refer), the value of the tramway 'regarded as plant *in situ* capable of earning a profit.'

"The case of *Stockton and Middlesborough Water Board*, to which I have just referred, arose in the following circumstances:—

"Prior to 1876 the Stockton and Middlesborough Water-Works Company had the right to supply with water Stockton and Middlesborough, and also a number of other places, and among them Kirkleatham. In 1876 the Stockton and Middlesborough Corporations Water-Works Act was passed, which, upon the narrative that it was expedient that the undertaking of the Water-Works Company should be vested in the corporations of Stockton and Middlesborough, enacted that the company should 'sell to the corporations their undertaking, property, rights, powers, and privileges.' The consideration for the sale was to be perpetual annuities to the amount of the maximum statutory dividend of the company, or, in the option of the company, a sum representing twenty-five years' purchase of the dividend. The corporations were also to pay and take over the debts and liabilities of the company, and to pay the company a sum for compulsory sale, and for the prospective value of the company's undertaking.

"The Act also provided that the joint board, which in terms of the Act, was elected to represent the corporations, should, when so required by the sanitary authorities of certain districts, 'sell to such sanitary authority all mains, pipes, and fittings . . . belonging to the joint board within that district . . . at a price to be fixed, in default of agreement, by an arbitrator, and after such sale the joint board shall cease to supply water within such district.'

"Kirkleatham was one of the districts the sanitary authority of which was entitled to require a sale by the joint board in terms of the enactment which I have quoted. The sanitary authority of Kirkleatham was, prior to 1876, under the Public Health Act, 1875 (section 52), deprived of the power to construct water-works within the limits of supply of the Stockton and Middlesborough Company, if and so long as that company was willing to give a reasonable supply at the statutory rate.

"The Kirkleatham sanitary authority in 1891 required the joint board to sell to them the mains, pipes, and fittings within the district of Kirkleatham, and the question of price was referred to an arbitrator.

"Two views were submitted to the arbitrator as to the method of valuation, or rather the subject to be valued. The joint board maintained that the value of the mains, pipes, and fittings was to be ascertained not only by the cost of construction, but by the revenue which the joint board was enabled to earn by their means. The sanitary authority on the other hand contended that the board was only entitled to the value of the mains, pipes, and fittings regarded as plant *in situ*, capable of earning a profit.

"The arbitrator adopted the former of these views, but it was held by the House of Lords, affirming the judgment of the Appeal Court, that he was wrong in doing so, and that the basis of valuation proposed by the sanitary authority was the sound basis in terms of the Act.

"Of course the construction put upon one Act of Parliament is not an authority for the construction of another Act, unless the words used are practically identical, but the principles upon which the *Kirkleatham* case was decided appear to me to apply to that which I am now considering. Indeed it seems to me that in some respects the considerations in favour of including in the valuation an allowance for the revenue, which the joint board was enabled to earn by means of the pipes, were stronger than those urged by the company for a similar allowance being made in this case. Because (1) the joint board had actually paid, when they purchased from the water company, for the right to

buy them out.¹ The right had been treated as a perpetuity in questions of assessment, tramways being regarded as lands and heritages in the

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supply water; and (2) the Act only said that the sanitary authority was to take over the pipes at 'a price' to be fixed by an arbitrator, without providing, as the Tramways Act does, that no allowance should be made for the profits or for compulsory sale.

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"No doubt the Tramways Act provides that the 'undertaking' shall be sold to the local authority, whereas in the *Kirkleatham* case the Act only provided that the 'mains, pipes, and fittings' should be sold to the sanitary authority. But, as I have already said, it appears to me that the important part of the Tramways Act is that which deals with the price which the local authority shall pay, and if the two cases are regarded from that point of view they are almost identical. In the *Kirkleatham* case the joint board was to be deprived of its undertaking upon receiving the price of the mains, pipes, and fittings, while under the Tramways Act the promoters are to be deprived of their undertaking upon receiving payment of the then value (exclusive of any allowance for profits) of the tramway, buildings, &c.

"It was said, however, that there was this material difference between the *Kirkleatham* case and the present, namely, that the *Kirkleatham* sanitary authority had right to supply water to the district under the Public Health Act, and therefore only required to buy the pipes, whereas here the local authority had no right of user except under the purchase, and therefore required to buy both the tramways and the right to use them. Now assuming that the sanitary authority had power to bring in a water supply for the district, the joint board had also right to supply it with water. That right must have been worth something, especially as the joint board were in possession, had mains and pipes *in situ*, and were actually supplying water. Yet the statute, as construed by the House of Lords, took that right from them without any compensation whatever. Again, it is not the case that the local authority here only acquire the right to use the tramways by virtue of the purchase, because the 43d section, after providing what price is to be paid, enacts, 'and when any such sale has been made all the rights, powers, and authorities of such promoters in respect of the undertaking sold, . . . shall be transferred to, vested in, and may be exercised by the local authority.'

"I therefore regard the judgment of the House of Lords in the *Kirkleatham* case as having a very direct bearing upon the present case.

"The only remaining question is, whether the referee has adopted the principle of valuation of the tramway directed by the Act as I have interpreted it. I think that he has. He has allowed the cost of construction, less depreciation, he has taken into account that the tramways are successfully constructed and in complete working order, and he has further made allowance for the sums expended by the company in obtaining parliamentary authority, and in widening the North Bridge to enable a double line of rails to be laid across it. The company contended that the referee in making the latter allowances, while refusing to allow anything for the sale of the exclusive right to use the tramways, acted inconsistently. I do not think so. The referee has proceeded upon the footing of giving to the company the value of everything which has cost them money, in so far as the same is available to the corporation, and that, as I have said, appears to me to be what the statute directs.

"I was referred to a judgment given in the Queen's Bench Division of the High Court of Justice in England in a similar question between the London County Council and the London Street Tramways Company. In that case *Matthew and Collins, J. J.*, set aside an award of Sir Frederick Bramwell, the referee appointed by the Board of Trade. Sir Frederick had only allowed to the tramway company the cost of construction of the tramway less depreciation. In so far as he did not take into consideration the fact that the tramways were completed and capable of being immediately worked, I agree that the award was wrong; but in so far as the learned Judges of the Divisional Court held that

¹ *People v. O'Brien*, 1888, 7 Amer. State Reps. 684.

No. 131. sense of the Poor Law Act.¹ The *Toronto Street Railway Company's* case² was distinguished from the present by the fact that there the right to use the tramway rails was vested in the corporation prior to the date of the sale. In the 43d section of the Act what was to be paid for, i.e., the tramway, was equivalent to the undertaking of the company which was to be sold compulsorily. The word "tramway" was broad enough to cover "undertaking," and was used in other parts of the statute in that sense. There was no interpretation clause in the Tramways Act of 1870, but in the interpretation clause of the company's special Act, "tramway" was interpreted (sec. 3) to mean "the tramways and works and undertaking by this Act authorised." That interpretation was imported into the general Act. Now, in valuing the "then value" of the "undertaking," the arbiter had only allowed the cost of the tramway, less depreciation, but "then value" must include more than that, otherwise the statute need not have excluded any allowance for "past and future profits." The obvious meaning was that the corporation were to pay the value of the tramways as lettable subjects. The arbiter was only to look at the lettable value at the date of the sale, and not to allow for loss of profit on the basis of profits earned in the past and estimated as to be earned in the future. Rent must be paid or allowed for upon any subject before profit could be ascertained, and the arbiter was bound to take the rent at which the subjects would let into consideration. This view had been given effect to in England.³ The *Kirkleatham* case⁴ was not in point, as what was bought in that case were the mains and pipes, but not the right to supply water which had been previously possessed by the local authority.

Argued for the defenders ;—What the pursuers had under their Acts was an exclusive right to lay tramway lines, and to use them for flange wheel traffic. The company had no doubt an absolute property in the stables, &c., used by them in their undertaking, but their right of exclusive use of the lines was limited to twenty-one years, or at least subject to defeasance at that time. That that was only a right for a term of years had been expressly settled in the *Toronto Street Railway Company's* case ([1893] App. Cas. 511). *Craig's* case (1 R. 947) turned solely on the meaning of the word "owner" in the Poor-Law Act, and did not touch the present question. As regarded the interpretation of section 43, it was to be noticed that the first part of the section stated upon what terms the actual plant and other heritable subjects were to be acquired, while the second dealt with the right of the corporation to use the subjects acquired. The question was, were the company entitled to compensation for the loss of their right to rent. That depended on the words of the Act. Now, "undertaking" in the section could only relate to physical subjects, because the corporation could only buy what was locally situated within

the rental value was the basis upon which the tramways should have been valued, I must, for the reasons which I have given, respectfully dissent from the judgment.

"I shall therefore assoilzie the corporation in the actions of declarator and reduction, and refuse the note of suspension and interdict."

¹ *Craig v. Edinburgh Street Tramways Co.*, May 27, 1874, 1 R. 947; *Pimlico Tramway Co. v. Greenwich*, 1873, L. R., 9 Q. B. 9.

² *Toronto Street Railway Co. v. Corporation of the City of Toronto*, L. R. [1894], A. C. 511.

³ *London County Council v. London Street Tramways Co.* [1894], 2 Q. B. 189.

⁴ *In re Kirkleatham Local Board and Stockton, &c., Local Water Board* [1893], A. C. 444.

the city, &c. Again, "then value" might have various meanings, either break-up value or rental value, or (the meaning adopted by the arbiter) the value of the plant, it being *in situ*, and capable of being immediately worked for traffic. Then if "tramway" in the section was equivalent to "undertaking" the enumeration of lands, buildings, &c., which followed was needless, and the second part of the section would also be useless, because the first would then have included the right of user. But the word "tramway" did not mean "undertaking." The word as used in the general Act of 1870 could not be interpreted by means of the interpretation clause of a subsequent incorporating statute, and, besides, the word in one case was "tramway," and in the other "tramways." The enumeration of tramway, lands, buildings, &c., was necessary, because there were two classes of subjects sold,—one, subjects of which the company had actual possession, the other, subjects in which they only had a right of user. Any allowance for past or future profits was excluded, and that necessarily excluded an estimate of past or future profits, on which alone rental value could be computed. "Past and future profits" exhausted all possible profits, and therefore all reference to profits was illegal. The right to work the tramway after it had been acquired was not derived from the sellers, but directly from the Legislature, and was separately given by the latter part of the section. The decision in the *London County Council* case was wrong, and the present case fell within the rule of the *Kirkleatham* case ([1893] A. C. 444). The section there interpreted was practically identical with the present, but this case was even stronger, as in the *Kirkleatham* case there were no words such as there were here excluding any allowance for profits, and the seller there had paid for the right to supply water, which right was being taken from him, while here the company had paid nothing for the right of use of the streets.

At advising,—

LORD ADAM.—The question at issue in this case arises out of the purchase by the defenders of so much of the undertaking of the pursuers as lies within the district of which they are the local authority.

The undertaking embraced not only the tramway lines, lands, and other material subjects acquired by the pursuers for the purposes of the undertaking, but also the monopoly of using the tramway lines, and the right of exacting tolls, which had been conferred by Parliament. The purchase is a compulsory purchase by the defenders, under powers contained in the Tramways Act, 1870, under the terms and conditions set forth in the 43d section of the Act.

As I have said, the subject of the sale was so much of the undertaking of the pursuers as lay within the district of which the defenders are the local authority. The price which the defenders are to pay for it is defined by the Act as the value of the tramway, and all lands, buildings, works, materials, and plant of the promoters (that is, the pursuers) suitable to and used by them for the purposes of their undertaking within such district, exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever, such value in case of difference of opinion to be determined by a referee to be nominated by the Board of Trade. Now, it will be observed that it is not the undertaking that is to be valued, as one would perhaps naturally expect, but it is certain enumerated subjects which are to be valued for the purpose of ascertaining the price which is to be paid for the undertaking.

It was argued before us that the word "tramway" in this enumeration must be read as "the undertaking." But in this Act which we are construing

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there is nothing in the interpretation clause, as there is in the private Act, with which we are not at present concerned, which says that tramways may mean the tramways and works and undertaking authorised. But even if there were, I think it could not be so construed here, because in that case it would necessarily include lands, buildings, and others which are specifically enumerated, and render these words altogether superfluous and insensible, and I agree therefore with the Lord Ordinary that a construction of the Act which leads to that result cannot be accepted. I think that "tramway" here means tramway line, a sense in which it is certainly used in the two immediately preceding sections—the 41st and 42d. I think, therefore, that it was the duty of the referee to value the tramway line as a separate subject, just as he is directed to value the lands, buildings, and other specific articles enumerated in the clause. But it is said that if this be so, no value will be put on, and therefore no price paid for, the monopoly of the use of the tramway lines and the right to levy tolls, which are valuable parts of the undertaking, and that the Legislature could never have intended to deprive the promoters of a part of their property without being paid for it.

It is to be kept in view, however, that the Legislature was dealing with a very peculiar subject. The promoters never acquired any exclusive right to use the tramways in perpetuity. All that they acquired was an absolute right to the use of the tramways for a period of twenty-one years certain, modified, however, by the agreements set forth in the first schedule appended to the private Act. They knew when they entered on their undertaking that it was in the power of the defenders, the local authority, to terminate by notice their exclusive use at the end of that time, or at the end of any succeeding period of seven years. Moreover, it is to be remembered that the only possible purchasers were the local authority, who, as owners of the tramways, were in quite a different position from the promoters. The local authority were themselves the owners of the streets on which the tramway lines lay, and I can quite understand that the Legislature considered that when they became owners of the tramways they should not be called upon to pay for the right of using the streets, which were their own property, in this particular way, for the benefit of the inhabitants, and that it was sufficient that the pursuers should be paid for the material subjects which had cost them money, but that they should not be paid for these powers which had cost them nothing. But however that may be, the whole matter is statutory, and I think that the direction of the statute is clear as to the subjects which alone are to be valued in order to fix the price to be paid by the local authority.

It will be observed that the matters which the referee was directed to value were not certain selected articles, but everything that made the tramways a profit-earning subject, and I think that the referee, seeing that this was a compulsory and not a voluntary sale, would, in the absence of directions to the contrary, have been entitled in estimating the value of the subjects to add an allowance for loss of profits in respect of the pursuers being deprived of a profit-earning subject, just as he would have been entitled to add a percentage or allowance for compulsory sale. Therefore I think the clause introduced in the parenthesis, to the effect that the value put on the subjects should be exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever, was necessary, if it was, as I think it was, the intention of the Legislature

that all question of profits should be excluded from the consideration of the referee. No. 131.

That this was the construction put upon the Act both by the pursuers and defenders appears from the 14th section of the agreement entered into between them when the undertaking was authorised by Parliament, and which is set forth in the first schedule appended to the Act, and which is made part of the Act. By that section the defenders are empowered to require the pursuers at the expiry of seven years to sell their undertaking to them, which they are bound to do, upon the terms of paying the then value of the tramway and all lands and others, just as in the 43d section of the statute; but in this case there is no exclusion of an allowance for compulsory sale or for past or future profits. The parties evidently assumed that the terms of this clause would not exclude an award for the loss of future profits, but that such an allowance would be made, because by the 17th section of the agreement they specify the limits within which such an award is to be confined. That section provides that the allowance for past and future profits, including compulsory sale, and every other consideration whatever, should not be less than 10 per cent nor more than 12½ per cent on the expended capital of the company for the period to elapse between the date of the purchase and the expiry of twenty-one years from the time the promoters were empowered to construct the tramway. It is significant that such allowances were to terminate at the end of twenty-one years, that being the period with which we are now dealing.

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But it was further said that the ordinary and well-recognised mode of estimating the value of such an undertaking as this was by rental value, and no doubt that is so. The task, however, set to the referee in this case was not, as I have said, to value the undertaking as a whole, but certain material subjects which were part of it. But however that may be, it is clear that the rental value could not be arrived at in this case in the ordinary and recognised way. That is, as I understand, by taking into consideration, *inter alia*, the past, present, and probable future profits, with a view to ascertaining the true rental value; but if the referee is prohibited from making any allowance for past or future profits, he is prohibited, it appears to me, from taking these elements into consideration in fixing the value. But these are the main elements which determine the rental value, and how that value can possibly be arrived at without taking them into consideration I fail to see.

It was further maintained that the fact that the referee is prohibited from making any allowance for past and future profits shews that rental value or a consideration of profits was to be the rule of the valuation, as otherwise there would be no meaning in the exclusion of past and future profits. I think, however, that such an allowance is excluded only in the sense that it is not to be added to the amount of the valuation otherwise arrived at. That is certainly the meaning of the clause as regards the allowance for compulsory sale, which is equally excluded.

On the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD M'LAREN.—I also am of opinion that the Lord Ordinary's interlocutor is well founded, and I concur generally in the grounds of judgment as stated in his Lordship's opinion.

I understand the 43d section of the Tramways Act, 1870, as making a con-

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ditional contract of sale between the "promoters" of any tramway company which may come into existence, and the "local authority" of the district within which the "undertaking" is locally situated.

The subject of sale is to be the undertaking; the condition is that a notice and requisition to the promoters to sell shall be given by the local authority, and the price to be paid is defined as the "then value," or, we may now say, the present value "of the tramway, and all lands, buildings, works, material and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such district," exclusive of certain things which I shall presently consider.

The question relates to the ascertainment of the price—whether the price to be paid by the local authority is the value of the corporeal subjects described considered as plant *in situ* capable of earning a profit, or whether the price is to be ascertained on the principle that the tramway company is selling a revenue-earning right, and by fixing its value at so many years' purchase of a hypothetical rental.

1. It is worth noticing (though the use of the term may be accidental) that throughout this section the sellers are called the "promoters"; and this indicates to my mind that attention is called to the fact that the section is not imposing terms of compulsory sale upon existing companies, but is making a contract of sale which is to be a condition of the powers given to any new company that may be formed, and the terms of which must be accepted by its promoters as a part of the consideration for the powers which they propose to obtain from Parliament.

2. The statutory contract of sale is a sale of the company's undertaking, but the price to be paid by the local authority is not described as the value of the "undertaking," but as the value of "the tramway, and all lands," &c. It was argued to us that the expression "the tramway" means the undertaking; but even according to the definition clause of the local Act founded on, that meaning is only attributed to "tramways" (in the plural), and this is consistent with a known use of language in which the plural form of a word may have a generalised meaning if the context be consistent with such a meaning. If "tramway" in the singular means the undertaking, it is difficult to see what separable meaning can be attached to the enumeration of subjects which follow that word. But I think that "tramway" in the expression quoted means only the corporeal subject, or tramway line, consisting of rails, points, and their supports *in situ*. This tramway line I take to be one of the assemblage of things enumerated, the aggregate value of which, when ascertained by arbitration, is to constitute the price of the transfer of the undertaking to the local authority.

3. I next consider the words which in the printed Act of Parliament are put within brackets, and which I do not here repeat. Their purport is to exclude certain possible elements of value. It was argued that the words of exclusion applicable to past and future profits would not have the effect of preventing the referee from taking into account present profits at the time of the statutory sale. But as it seems to me there could be no reason for excluding inquiry as to profits realised in the past or expected in the future, except for the purpose of excluding profits as an element in the present value. Again, it was suggested that valuation on the basis of rental does not necessarily include the element of "allowance" for profits, because in the method of valuation proposed the gross revenue is to be first ascertained, and then a sum is to be subtracted under the

name of profits in order to arrive at rental value. But then there are also the words exclusive of "any compensation for compulsory sale or other consideration whatsoever," and I cannot help thinking that revenue is one of the other "considerations" which are not to be taken into account for the purpose of determining the value. Of course, if I am right in construing the word "value," and the words which it governs, as being equivalent to a direction to value the assemblage of the corporeal subjects *in situ*, the exclusion of profits in the sense in which I read it would naturally follow, and the whole clause or description of the terms of sale would be consistent, because the valuation to be made is a valuation into which neither gross nor net profits would enter as an element. I have difficulty in seeing how, under the method of valuation based on rental, effect can be given to the statutory direction to exclude any allowance for past or future profits, because it seems to me that the hypothetical rental which the referee would have to determine is really a species of profit. It is the return which the company would get by letting the subject, and this would be greater or less according to the success of the undertaking, which seems to me to be the true criterion of profit as distinguished from interest of money or fixed return.

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4. I think that the Lord Ordinary's judgment is supported by the decision of the House of Lords in the *Kirkleatham* case, L. R., 1893, App. Cases, 444, although the terms of the enactments in the two cases are not identical. The chief difference in the enactments is that in the *Kirkleatham* case the thing to be determined is the "price" of the corporeal subjects, while here the word used is "value," though there is also a difference as to the description of subjects enumerated. Now, I do not agree with the argument that the word "value" has a fixed meaning in an Act of Parliament, and is always identical with rating value. I do not doubt that for rating purposes the value of the undertaking of this tramway company would properly be estimated on the basis of rental; but then the value referred to in this statute is not expressed to be the value of the undertaking, but (as I think), of the corporeal subjects enumerated, and therefore, as I think, rental value is not applicable. I think that what is meant in this Act of Parliament is the exchangeable value of the subjects specified, or the value to the purchaser, as it is put in the *Kirkleatham* case.

5. I have carefully considered the opinions of the learned Judges who decided the case of *The London Tramways v. The County Council*. As I have formed a different opinion on the question, I should not think it proper to discuss their Lordships' judgments, or to enter upon the subject at all, except to say that I agree with Mr Justice Collins in thinking that we are not concerned to inquire whether either of the methods of valuation offers adequate compensation to the company. But I may point out that tramway companies are enabled to earn their profits by the use of the public streets in a way peculiar to their traffic, for which I understand no consideration is paid; and one effect of the statutory notice to purchase on the expiration of the term of twenty-one years is, that this qualified right of use of the public streets ceases, or reverts to the local authority. This may be one of the reasons why the Legislature made these special provisions for valuing the tramway property on a different principle from that which would be thought proper in case of a transference from one company or mercantile undertaking to another. But I do not consider at all whether the method of valuation preferred by the referee is equit-

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able or adequate. It appears to me, on the best consideration I am able to give to the question, to be in accordance with the requirements of the Act of Parliament.

LORD KINNEAR.—I concur in the opinions delivered by your Lordships.

LORD PRESIDENT.—The leading proposition in the enactment which we have to construe is, that in a certain event the promoters shall sell their undertaking to the local authority.

Much has been said of the limited nature of the right of the tramway company under the statute. It is said that their right to the tramway being conferred by this statute and being terminable as under this section, they are not to be regarded, or rather it is not to be expected that the Legislature would regard them as ordinary owners. To that the plain answer is to be found in the words of section 43. Having to describe what I quite agree is the termination of the tramway's rights to the tramway, and the terms on which it is to be effected, Parliament states the transaction as being a sale. It might quite well have done otherwise—might have declared the right of the company to be terminated, and the compensation to be payable on a specified scale. To say that this is a mere question of language is precisely to point out the significance of the choice of language actually made.

This is then a sale, and a sale of what? Of the undertaking; the transaction contemplated is a sale of a living undertaking—the transfer by sale of a going concern. This is what, on the theory of the section, the corporation get and the company give.

Now, of course, the words upon which I have hitherto commented are not those which immediately and primarily are before us. The words immediately before us are those which state the terms upon which the transaction takes place. But I own to thinking it important, in construing the terms, to realise what is the transaction of which these are the terms; or rather, what is the mode in which the Legislature describes the transaction for the purpose of stating the terms. This being asserted by Parliament to be a sale of an undertaking, it seems to me most legitimate to adopt that construction of any ambiguous description of the terms which best accords with the nature of a sale of an undertaking.

It is of course true that (apart from the parenthesis) the section when it states the terms does not say that there shall be payment of the value of the undertaking, but proceeds by way of enumerating various assets of the company, the principal of which is the tramway. This method seems to have been adopted to cover the case dealt with by the section—of an undertaking overlapping the bounds of the purchasing local authority, in which event only part of the undertaking is bought; it clearly and distributively applies to the several parts of the undertaking the process of selection by which only such things, but all such things, are to be valued as are useful for a body whose operations are limited to its own district.

Well, then, among the things enumerated is the tramway. Now, of the word tramway (the singular) there is no definition either in the general or the local statute. Its meaning therefore must be its ordinary meaning in relation to the context. Now, the proper way to read the section is surely in the first instance to miss out the parenthesis (inasmuch as it purports to state an exclusion), so as to understand from what it is that the exclusion is made. If so,

then we find that the consideration for the sale of this undertaking is to be the value of certain specified things, and, first of all, the tramway. What, then, is "the then value of the tramway"? No. 131.

I suppose if any man of business, not to say man of sense, were asked what was the value of any stated thing at any given time, he would rejoin by inquiring what was it then used for. To this inquiry, made regarding any tramway at the date of a notice under this section, the answer must be,—Carrying passengers over it for hire. The profit over the outlay on this operation was its value. Nobody can make any use of a tramway but this; and if you demur that I am assuming that I have a right to run over it, the reply must be that if I have none, the thing has no value at all, and the hypothesis of the inquiry, that it has a value, is upset. The only qualification to the statement that the thing would have no value is, that it would have the value of old metal; but then this theory is rejected by the Corporation of Edinburgh, who think it is to be valued as an established tramway, only one of which no use could be made at the moment in question. Now, I pause to say that (doing as I am going to do, full justice to the plausibility of their argument so far as it is founded upon the parenthesis) I consider their view, applied to the words without the parenthesis, to be an impossible view. In the *Kirkleatham* case that construction was manifestly right; in the present case, reading the whole section (parenthesis and all), even if I did not know that it has been adopted by the Lord Ordinary and the majority of this Court, I should consider it a tenable conclusion; but if section 43 be read (in the meantime and for the sake of argument) without the parenthesis, I do not think this construction tenable. The words are "the then value of the tramway." I say the then value is determined by the then use; and the then use was, in fact and in the contemplation of the section, that which I have stated.

And now I take the parenthesis into account. It is expressed as a qualification or explanation of the words in which it is interpolated. Neither party to the controversy is able to say that these words are specially well adapted to express the result which he maintains. The contention of the corporation seems to me exposed to the grave objection that it allows words having a subordinate and qualifying position to kill the plain import of the main proposition to which they relate, and does so by ascribing to those words more meaning than *prima facie* they bear. I cannot conceive why the Legislature should describe the transaction as a sale, and say the terms are to be the payment of the existing value of the tramway, &c., and then, incidentally and by way of exclusion, put in words which make the terms inconsistent with sale and purchase, and inconsistent also with payment of existing value. No such result is, in my opinion, necessary. The words "past or future" in the parenthesis are, I think, clearly suggested by the "then" which goes before; they emphasise present value by excluding allowance for past and future value. It is the existing state of things at the moment of the notice to sell that is to be the standard of valuation; neither the history of the past nor the anticipation of the future is to be made the ground of any separate "allowance." This leaves untouched the usual, and as far as I know, the only rational way of ascertaining value, which is the consideration of use and resulting profit. It seems to me that this construction satisfies the words on which the controversy turns, gives them their natural sense, and keeps them in their proper place. On the other hand, the defenders seem to me to commit a cardinal error of construction even

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No. 131. within the parenthesis itself, for they give no effect whatever to the words "past or future." Indeed, their argument was that "past and future profits" is merely "profits" writ large—for this reason, that time is exhaustively divided into past and future, and the present is merely a dividing line between the two. This is, of course, a profound and impressive truth, but there are times and places for everything, and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching business men metaphysics unawares—more especially as this statute applies to England as well as to Scotland. If the Act had meant that profits were not to be looked at at all, it would have said so; and it would not have said so in a parenthesis to a plain direction that the present value of a tramway at present in use is to be paid for the purchase of the undertaking of which it is part.

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The defenders have relied on the *Kirkleatham* case. It seems to me to form a complete contrast to the present case. In *Kirkleatham* there was no sale of the undertaking, for the best of reasons—the local authority did not require it. The only things directed to be sold were the mains, pipes, and fittings; and what had got to be paid was their own value. This being so, the structure of the section construed in the *Kirkleatham* case was as different from that now under consideration as were the things transferred and the theory of transference.

My opinion on the section before us is in accordance with the judgment of the Divisional Court of the High Court of Justice in England. As I differ from your Lordships, I have thought it proper to write this opinion. I should otherwise have been content to express my general concurrence in the views of Mr Justice Matthew and Mr Justice Henn Collins.

THE COURT adhered.

DRUMMOND & REID, S.S.C.—W. WHITE MILLAR, S.S.C.—Agents.

No. 132. JOHN STEWART SMITH AND OTHERS (Thomas Elder's Trustees), Real Raisers and Claimants (Reclaimers).—*Younger*.

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MRS ELIZABETH REID AND ANOTHER, Claimants (Reclaimers).—*McClure*.
MRS MARGARET ELDER, Claimant (Respondent).—*Shaw—W. Campbell*.

Succession—Conditio si testator sine liberis decesserit.—The presumption is that a settlement which makes no provision for children *nascituri* is revoked on the birth of a child to the testator after the date of the settlement, although he had children at its date.

1ST DIVISION.
Lord Low.

THOMAS ELDER, wine and spirit merchant in Glasgow, died on 24th October 1891, leaving a trust-disposition and settlement dated 26th March 1886. By this settlement he conveyed his whole estate, heritable and moveable, to trustees, and directed them, after making payment of certain small legacies, to hold the residue for behoof of his daughters, Elizabeth, Martha, and Margaret in liferent, and their issue in fee. The settlement contained no provision for children of the testator *nascituri*.

The testator had been twice married, and had had in all four children. Of the daughters mentioned in the settlement two, Elizabeth (Mrs Reid), and Martha (Mrs Lockhart), were born of the first marriage—Martha, the younger, having been born in 1860; Margaret, the remaining daughter mentioned in the settlement, was born of the second marriage (which took place in 1879) on 11th December 1885. After the date of the settlement a son, Thomas, was born to the testator on 18th December

1890, about ten months before his father's death. All the testator's children, and his second wife, survived him. She had entered into an antenuptial contract of marriage with her husband under which, in return for a provision, she discharged her legal rights. This marriage-contract made no provision for children. No. 132.
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On 19th April 1893 Mr Elder's trustees brought an action of multipointing in order, *inter alia*, to have the rights of the testator's son in the property left by his father determined.

Mrs Blair or Elder, the testator's widow, as tutor of her pupil son, claimed to be ranked and preferred to the whole heritable property of the deceased, with the revenues that had accrued therefrom since his death. There followed certain alternative claims not necessary to be here specified. She averred (cond. 2) a variety of circumstances to shew that the testator intended his son to take the heritable property, and that he believed his settlement to have been revoked in consequence of the birth of his son; and she further averred that he had expressed his intention and belief to that effect to several persons named. She pleaded,—“(1) In respect of the birth of the said Thomas Elder, and in the circumstances stated, the trust-disposition and settlement mentioned in the condescendence must be held to have been and were revoked, and the said Thomas Elder, as his father's heir *ab intestato*, is entitled to be ranked and preferred in terms of the first alternative of the claim.”

The trustees claimed to be ranked and preferred to the whole fund *in medio*, to be held and administered by them in terms of the trust-disposition and settlement.

Mrs Reid and Mrs Lockhart, the testator's daughters by his first marriage, claimed to be ranked and preferred to the liferent of one-third each of the fund *in medio*, after deducting the legitim due to their brother, and subject to the administration of the trustees.

It appeared that the testator left heritable estate to the value of over £10,000, and moveable estate to the value of over £14,000. The greater part of the moveable estate consisted of bonds and dispositions in security, so that the legitim fund did not amount to more than £2000, giving about £500 to each child who might claim legitim.

On 10th November 1893 the Lord Ordinary (Low) pronounced this interlocutor:—“Allows to the claimant, Mrs Margaret Blair or Elder, a proof of her averments in article 2d of her condescendence, and to the other claimants a conjunct probation.”*

* “OPINION.—The question of law which is raised in this case is, whether a general settlement made by a father in favour of children in existence at the date of the settlement *nominatim* can be revoked by the subsequent birth of a child, whose birth the father survived only for a short time.

“It was argued, on the one hand, that the principles embodied in the maxim *si testator sine liberis decesserit*, may apply to such a case just as strongly as to the case of a settlement made in favour of strangers before any children have come into existence. On the other hand, it was contended that implied revocation by the birth of children was confined, as the words of the maxim shewed, to the case of a will made by a person who had no children at the time when it was executed.

“So far as I know, all the cases in Scotland in which the application of the *conditio* has been in question have been cases where the settlement was made when there were no children in existence, and therefore it is necessary to consider whether the principle upon which these decisions proceeded is applicable to such a case as the present.

“The decisions appear to me to have proceeded upon presumed intention. Where the position of the testator has been entirely changed, and new moral

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The trustees and the claimants Mrs Reid and Mrs Lockhart reclaimed, and argued;—(1) The Lord Ordinary's interlocutor allowing a proof ought to be recalled. If, as the Lord Ordinary had held, the presumption was in favour of the application of the *conditio si testator sine liberis decesserit*, a proof was unnecessary. But the *conditio* applied only in cases where the testator had no children at the date of the settlement; it could not be pleaded by a *post-natus* against children provided for under the will. In the case of *Oliphant*,¹ the claim of a *post-natus* was sustained to a share of a bond of provision destined to two children *nominatim*; but

obligations have come into existence by the birth of children, there is a strong presumption that a settlement which amounts to a disinheritance of the children no longer expresses the intention of the testator. I see no reason in principle why the presumption should not also apply (unless, of course, the circumstances of the case preclude it) in favour of a child or children born after the date of a settlement making provision for children in existence at its date. Indeed, the fact of such a settlement having been made seems to me to be rather in favour of the presumption, because it shews that the father was alive to and desirous of fulfilling the duty of providing for his children.

"In the civil law it appears that if a child was not expressly instituted or expressly disinherited the testament was held to be ineffectual—Inst. lib. 2, tit. 13.

"Again, in England, prior to the Wills Act of 1838 (which seems to have practically put an end to such questions by providing that every will shall be revoked by marriage, and that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances), it was more than once decided that the will of a married man having several children was revoked by the subsequent birth of other children unprovided for. I may specially refer to the case of *Johnston v. Johnston*, 1 Phil. 447, in which Sir John Nicholl, in a very elaborate judgment, deals with the law of implied revocation of a will by the subsequent birth of children.

"I am therefore of opinion that the presumption is applicable to such a case as the present, unless it is excluded by the special circumstances.

"*Prima facie*, the circumstances of the present case are favourable for the application of the presumption.

"The testator was twice married. By his first marriage he had two daughters, the youngest of whom was born in 1860. In 1879 the testator married a second time, and there was no issue of that marriage until 1885, when a daughter was born. It was not until the 18th December 1890 that a son, in whose favour the presumption is now pleaded, was born. The testator died on 24th October 1891.

"The settlement was made in March 1886, a few months after the birth of the first child of the second marriage. After bequeathing a few legacies of inconsiderable amount, the testator directed his trustees to hold the whole residue of his estate for his three daughters, equally among them in life, and for their children in fee.

"In such circumstances, it seems to me that the presumption is that the testator did not intend to leave his son wholly unprovided for, except to the extent of the few hundreds of pounds which represent his share of legitim, and I am inclined to think that the question might have been disposed of upon the admitted facts. The son's guardian, however, did not ask me to dispose finally of the question now, but to allow her a proof of her averments. The motion for proof was only opposed because it was argued that whatever were the facts the *conditio* did not apply to the case. As I am of opinion that that argument is not well founded, and as it is desirable that all the circumstances should be before the Court, I shall allow a proof of the averments in article 2 of the concordance for Mrs Elder as guardian of her pupil son."

¹ *Oliphant*, Dec. 10, 1794, Bell's Folio Cases, 126.

Oliphant's case could not now be regarded as an authority,¹ and there was no instance of a settlement being held as revoked in consequence of the birth of a child when the testator had children in existence at the date of the settlement, while there were cases in which settlements might have been attacked on this ground but were not.² The law of England was not the same as the law of Scotland on this point, nor was it as the Lord Ordinary had stated it.³ *Johnston's* case, cited by the Lord Ordinary, was not mentioned by Jarman. If, therefore, the *conditio* in its nature could not include a case like the present, a proof was incompetent, for no matter what was proved the legal position of the reclaimers would remain unaffected. But (2) in any case, the averments of the respondent could not be admitted to probation, since they involved the proof of a will for the testator by parole in contradiction of his written will.

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Argued for the respondent ;—Even if the case of the son here was not within the literal terms of the *conditio*, in principle the *conditio* applied. It was not easy to give any intelligible ground for distinguishing between the case of a child born after the date of the will to a testator who had no children at its date and the case of a child born after the date of the will to a testator who at the date of the will had children. The principle upon which the *conditio* was held to be applicable in the former class of cases was that a testator was not to be presumed to have intended to disinherit his unborn children,⁴ and in reason the position of a *post-natus* was the same whether his father had children in existence at the date of the will or was then childless. The question whether the *conditio* applied in any particular case was one of circumstances.⁵ Hence parole evidence was competent. Such evidence was tendered, not to construe the will, but to determine whether the deed was the will of the deceased, or had been revoked.

At advising,—

LORD ADAM.—The late Mr Elder was twice married. By his first marriage he had two daughters, Mrs Reid and Mrs Lockhart, who are claimants in this multipointing.

He married a second time in 1879, and by this marriage he had two children, a daughter Margaret, born on 11th December 1885, and a son Thomas, born on 18th December 1890. Mr Elder died on 24th October 1891, about ten months after the birth of his son Thomas.

On 26th March 1886, a few months after the birth of his daughter Margaret, he executed a trust-disposition and settlement in favour of trustees, who are the present pursuers and claimants, by which he conveyed to them his whole estate, heritable and moveable.

By this settlement, after providing for the payment of some small legacies and annuities, he directed the residue of his estate to be equally divided among his three daughters. He made no provision for children *nascituri*.

The first question raised by this reclaiming note is whether this settlement was revoked by the subsequent birth of his son Thomas.

¹ *Spalding v. Spalding's Trustees*, Dec. 18, 1874, 2 R. 237 ; *Findlay's Trustees v. Findlays*, Dec. 7, 1886, 14 R. 167 ; *M'Laren on Wills*, i. p. 259.

² *Hastie v. Hastie*, 1671, M. 416 ; *Spalding v. Spalding's Trustees*, *supra*.

³ *Jarman on Wills*, 5th ed. i. p. 111 ; *Doe v. Barford*, 4 Maule and Sel. 10.

⁴ *A's Executors v. B*, Jan. 22, 1874, 11 S. L. R. 259 ; *Dobie's Trustees v. Pritchard*, Oct. 19, 1887, 15 R. 2 ; *Munro's Executors v. Monro*, Nov. 18, 1890, 18 R. 122 ; *Colquhoun v. Campbell*, June 5, 1829, 7 S. 709, 1 Scot. Jur. 248.

⁵ *Hughes v. Edwardes*, Jan. 25, 1892, 19 R. (H. L.) 33 ; *Millar's Trustees v. Millar*, July 20, 1893, 20 R. 1040.

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It cannot be disputed that the *conditio si testator sine liberis decesserit* has been adopted in the law of Scotland, but it was argued that that was only in a question with strangers, and did not apply to a case like the present, where the testator had children in existence at the date of the will, and had provided for them therein.

We were not referred to any case in which the matter had been the subject of discussion in the law of Scotland.

It is clear, however, that in the civil law, from which the condition was derived, it applies whether previously born children were in existence or not at the time when the will was made, and that the subsequent birth of a child revoked the will. It also appears, as has been pointed out by the Lord Ordinary, that in the law of England, which also adopted the *conditio si sine liberis*, it was applied equally whether there were other children in existence or not.

I see no reason to doubt that that is also the law of Scotland. It is the duty of a father to provide for his children, and the law presumes that he must intend to do so, and therefore if there be a will in existence which has the effect of disinheriting subsequently born children, the presumption is that it was not his intention that the will should continue valid. But it appears to me that the presumption applies equally in the case of all children, and if the effect of a will is to leave any subsequently born child unprovided for, the presumption is that the father did not intend that the will should continue in force. I therefore concur with the Lord Ordinary in thinking that there is no reason why the *conditio* should not apply in a question with other children, as in a question with strangers.

The next question raised by the interlocutor is whether a proof should be allowed to Mrs Elder of her averments in article 2 of her condescendence. She desires to have this proof in order to shew that the testator understood that the will had been revoked and acted on that footing.

It appears to me that while we have adopted the principle of the *conditio* from the law of Rome, we have not adopted it to the same extent and effect. By that law it was regarded as an implied condition of the will, and therefore the birth of a child *eo ipso* revoked the settlement. But that does not appear to be the law of Scotland. In the recent case of *Millar's Trustees v. Millar*, 20 R. 1040, the Court held that whether revocation of a will by the subsequent birth of a child was to be implied or not was entirely a question of circumstances. That being so, it appears to me that the birth of a child affords only a *presumptio juris* that the testator does not thereafter intend the will to remain valid.

That presumption will be of varying force according to the circumstances of the case, and may, like any other presumption of law, be rebutted by evidence of contrary intention. But if there be no evidence of any contrary intention, it appears to me that the presumption must prevail.

Now, I can find no averments made by any of the claimants in this record of any facts or circumstances implying that the testator did not intend to revoke the will. The only fact stated is, that ten months elapsed between the date of the birth of the child and the death of the father, during which time he had an opportunity of revoking the will had he so desired, but did not do so. But it appears to me that that is not sufficient to overcome the presumption—and there is nothing else.

I think, therefore, that the proof allowed to Mrs Elder is unnecessary, and

that we should sustain the first alternative of her claim as guardian or tutor of her pupil son. No. 132.

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LORD KINNEAR.—I am of the same opinion. I think there can be no question that our law recognises a presumption arising from the birth of a child after the execution of the will. It is a presumption which may be rebutted by evidence of contrary intention; and therefore in agreeing with Lord Adam that the presumption is recognised in our law, I do not think that we are saying anything at all contrary to the *dictum* ascribed to Lord Watson in the case of *Hughes v. Edwardes*, 19 R. (H. L.) 33, that whether a revocation of a will is to be presumed from the subsequent birth of a child is, according to the law of Scotland, a question of circumstances, because I apprehend his Lordship did not thereby mean to say that in the absence of special circumstances there was no presumption in law to support revocation, but only that the force of the presumption may depend upon the circumstances of each particular case. I therefore agree with Lord Adam that the true principle is this, that the subsequent birth of the child raises a presumption of revocation,—that the inference which the law requires us to draw from that single fact may be rebutted by the inference of a contrary intention, which may be deduced, if so be, from other facts and circumstances; but that in the absence of evidence to the contrary the presumption must hold.

Now, the only facts that are stated in this case do not appear to me to suggest any different inference from that which should in general be drawn from the subsequent birth of a child. The material facts are that a considerable part of the testator's property consisted of heritage; that the child born after the execution of the will was a son, and that all the children alive at the date of the will were daughters. If these facts affect the presumption at all they would tend to support and not to displace it. The only other fact that we are required to consider is, that the testator lived for ten months after the birth of his son without actually revoking the will, and therefore the question seems to me to be whether the mere fact of the testator's survivance for such a period as that is of itself sufficient to rebut the presumption, and I do not think it is. If that be so, I think it is needless as well as incompetent to allow a proof of the testator's declarations of intention. The principle upon which evidence may be admitted in such cases is elaborately discussed by Lord St Leonards in the case of *Hall v. Hall*, Dec. 14, 1841, 1 Dr. and War. 94. The decisions which that great Judge considers in his opinion are all of them English, but the principles which he deduces from those decisions are common to the law of both England and Scotland, and are indeed necessary consequences of the legal conception of a presumption of law by which the apparent intention of a will which the law requires to be expressed in writing may be defeated or modified. The principle which Lord St Leonards lays down, as I understand it, is that when the law creates a presumption which is contrary to the apparent intention of a will, evidence may be given to shew that it was in truth executed or left unaltered with the intention which its words express. But if evidence is admitted to rebut the presumption of law, evidence of the same kind must be admitted on the other side to set it up; and therefore if we were asked to allow a proof of facts tending to shew that the testator did not intend to revoke the will,—tending to set aside the presumption of law,—then it would be quite right and necessary that all relevant facts on the other side should be admitted to probation also. But in a case like the

No. 132. present, where no such proof is asked, it appears to me that it would be contrary to settled rules of law to admit evidence of such facts as are alleged in the claim that we are sustaining for the purpose of fortifying the presumption. If the presumption of law is not sufficient of itself, it cannot in my opinion be set up by parole evidence of expressions of intention by the testator or of his opinion as to the legal effect of his son's birth. I therefore agree with Lord Adam that the claim should be sustained as it stands.

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The effect of that finding upon the other questions raised upon the record I do not know that we are asked to consider.

LORD PRESIDENT.—I concur.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—"Recall the Lord Ordinary's interlocutor: Sustain the first alternative of the claim for the respondent Mrs Margaret Blair or Elder, as guardian or tutor to Thomas Elder, her son; rank and prefer her as guardian or tutor foresaid to the whole heritable property of the deceased Thomas Elder with the revenues thereof since 24th October 1891, and decern: Find the respondent the said Mrs Margaret Blair or Elder entitled to expenses out of the moveable estate of the deceased Thomas Elder, and find the trustees of the said deceased Thomas Elder entitled to retain their expenses out of the fund *in medio*, and remit the accounts thereof to the Auditor to tax and to report to the Lord Ordinary, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

WEBSTER, WILL, & RITCHIE, S.S.C.—SIMPSON & MARWICK, W.S.—
J. & J. GALLETLY, S.S.C.—Agents.

No. 133.

Mar. 16, 1894.
Emslie v.
Young's
Trustees.

ROBERT EMSLIE, Pursuer (Respondent).—*Craigie—Kemp.*
JAMES DUNCAN AND OTHERS (Young's Trustees), Defenders (Reclaimers).
—*Dickson—W. Campbell.*

Lease—Reparation—Claim by tenant for damages for breach of conditions of lease—Personal objection—Mora.—The tenant of a farm, three years after the farm had been sold, brought an action against his former landlord, averring that on each occasion during a period of seven years on which he had paid his rent, and at various other times, orally and in writing, he had protested against and complained of the landlord's failure to implement conditions of the lease under which the landlord was bound to burn a certain proportion of the heather annually, and to keep the fences of the farm in repair, and concluding for damages for the alleged breach of these conditions.

Held (rev. judgment of Lord Stormonth-Darling) that the pursuer's averments were irrelevant, as they shewed that he had paid his rent during the seven years without reservation of a specific claim for damages.

Broadwood v. Hunter, Feb. 2, 1855, 17 D. 340, *followed*.

1ST DIVISION.
LdStormonth-Darling.

AT Martinmas 1883, Robert Emslie entered into possession of the farm of Wester Durris Hills, Kincardineshire, in virtue of a minute of agreement for a lease between him and the proprietors, the trustees of the late Dr James Young, of Durris.

The minute of agreement contained, *inter alia*, the following clause:—"The trustees are bound to burn the heather, weather permitting, in regular strips as near as possible to the tenth shift rotation." And also the following,—"The trustees to put the fence into repair, and supply larch

posts during the lease for repairing same; also to overhaul the fencing in the spring of each year." No. 133.

At Martinmas 1890 Young's trustees sold the estate of Durris, including the farm of Wester Durris Hills, to Henry Robert Baird, Emslie being continued in possession of that farm under the foregoing minute of agreement. Mar. 16, 1894.
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On 29th May 1893 Emslie raised an action concluding for decree for £250 against Young's trustees, and for decree for the same amount against Baird.

The pursuer averred in his record as amended,—(Cond. 2.)—(After setting forth the clauses of the minute of agreement above quoted);—"Neither of these obligations has been fulfilled, either by the said trustees . . . or by the said Henry Robert Baird since he became proprietor of the said estate. On every occasion on which pursuer paid his rent, and at various other times, orally and in writing, he protested against and complained of the manner in which he was being treated in this matter, until at last the pursuer refused to pay his rent altogether, and the defender, the said Henry Robert Baird, raised an action in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Stonehaven, against pursuer to recover said rent. In that action pursuer ultimately paid the rents due, under the express reservation of all claims against the present defenders for the loss, injury, and damage he had sustained through their continued and systematic neglect to fulfil the obligations entered into between them and the pursuer." The pursuer then set forth items of damage, accruing each year from 1883-84 down to 1892-93, and amounting in all to the sums concluded for.

In defence Young's trustees pleaded, *inter alia*,—(2) The pursuer's averments are irrelevant, and *separatim*, are not sufficiently specific to be admitted to probation. (3) The pursuer having paid his rent without protest or reservation, is barred from maintaining the claim which he now puts forward.

On 14th February 1894 the Lord Ordinary (Stormonth-Darling) pronounced an interlocutor, which, *inter alia*, repelled the second plea in law for Young's trustees, and allowed a proof.

Young's trustees reclaimed, and argued;—The case was ruled by *Broadwood v. Hunter*,¹ which settled that a tenant intending to claim damages on grounds like the present must make a specific claim and reservation on each occasion of paying his rent; otherwise he would not be entitled to go back and claim in respect of losses which he alleged he had suffered in bygone years. General protests were not sufficient to preserve his claim, the presumption being that a general protest not followed up had been abandoned, and the landlord in consequence might reasonably omit to preserve evidence to meet the claim. Here there was nothing averred beyond general complaints. The action, therefore, in so far as directed against the present defenders, was irrelevant. There was no distinction between game damage and damage such as was here averred.²

Argued for the pursuer;—The Lord Ordinary's judgment was well founded. What *Broadwood v. Hunter* settled was that mere grumbling on the part of the tenant was not sufficient to preserve his claim to damages. Nothing more than a mere grumble was there averred. Here there was an averment of distinct protests by the pursuer. It might be that the protests in fact made were not sufficient to preserve the pur-

¹ *Broadwood v. Hunter*, Feb. 2, 1855, 17 D. 340, 27 Scot. Jur. 587.

² *Macdonald v. Johnstone*, 10 R. 959, per Lord President Inglis, at p. 970.

No. 133. suer's claim; but evidence ought to be admitted to determine the exact nature of the protests,—the action ought not to be thrown out upon relevancy.¹ Further, damage caused by game must be estimated at the time or it could not be estimated at all, whereas the damages here alleged could as easily be estimated after a lapse of years as at the time. The principle, therefore, upon which *Broadwood v. Hunter* proceeded did not apply here.

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At advising,—

LORD PRESIDENT.—The defenders, Dr James Young's trustees, have put forward the plea that "The pursuer's averments are irrelevant, and *separatim*, are not sufficiently specific to be admitted to probation."

When the case was before the Lord Ordinary, an amendment of the record was proposed by the pursuer, and allowed by his Lordship. It is not, therefore, a case in which any defects in the averments may be ascribed to a failure on the part of the pursuer to observe the points which he may be called upon to meet.

Cond. 2 sets forth a clause in the lease by which the trustees bind themselves "to burn the heather, weather permitting, in regular strips as near as possible to the tenth shift rotation," and "to put the fences into repair, and supply larch posts for repairing the same; also to overhaul the fencing in the spring of each year." The case averred on record is, that for a long course of years there was each year an actionable failure on the part of the landlord to implement these obligations of his lease; and yet it is admitted that the rent was paid every year by the tenant without any reservation. The pursuer's case, therefore, is brought at once into direct collision with that of *Broadwood v. Hunter*, 17 D. 340. In order to explain his position he states on record that "on every occasion on which the pursuer paid his rent, and at various other times, orally and in writing, he protested against and complained of the manner in which he was being treated in this matter, until at last the pursuer refused to pay his rent altogether."

It is plain on the authority of *Broadwood v. Hunter*, that a tenant in such circumstances has a natural and appropriate remedy against his landlord on the occasion of his rent day. On that occasion it is his duty either to tell his landlord that he will not pay his rent till his claim for damages is satisfied, or to state a specific claim, and reserve it in a definite way. Now, there is no averment on record of this having been done, but merely one of a protest by the tenant. The words are very vague, and as I have already indicated we are bound to criticise very closely the averments on this record, which has been already amended by the pursuer before the Lord Ordinary, in view of the very plea which we have now to consider.

In my opinion the arguments which have been advanced against the relevancy of the pursuer's case, are sufficient, and I am therefore for assoilzieing the defenders, Dr Young's trustees.

LORD ADAM.—The pursuer in this action was the tenant of a farm which was formerly the property of the defenders, Dr Young's trustees, and Thomas Graham Young. He entered in 1883, and continued in possession till 1893; and the claim now made is for damages from the commencement to the termina-

¹ *Hardie v. Duke of Hamilton*, Feb. 2, 1878, 15 S. L. R. 329; *Macdonald v. Johnstone*, June 12, 1883, 10 R. 959.

tion of his occupancy. Three years ago the property was sold to Mr Baird, and accordingly it is for the first seven years of the period in question that liability is ascribed by the pursuer to these defenders, a liability which they deny. The pursuer's claim is founded on a clause in his lease. [His Lordship quoted the clause.] That is to say, the high heather was to be burned in strips every year, so that at the end of ten years the whole extent of it should be burnt. It is said that the landlord did not fulfil his obligation, and accordingly damages are asked for.

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I agree that this claim is barred by *mora*. The plea of *mora* is not enough by itself unless it amounts to prescription, but where as the result of the *mora* the defender is unable to state his defence, then I think the plea does come in. The claim made is for damages extending over ten years, and the allegation of the pursuer is that during the whole of that time there was a failure of duty on the part of the landlord. But how could the landlord, without having received some notice of claim during that period, state an adequate defence at the end of it? For example, it is stipulated that he should carry out the obligation "weather permitting." But who could now give evidence as to the weather ten years ago? The case, I hold, must fall under the principles laid down in *Broadwood v. Hunter*, 17 D. 340, where the answer made to the claim for damages was,—“It is too late to claim now, you should have given me warning at the time when the alleged damages were being inflicted upon you.” There is no allegation here of the pursuer having intimated his claim in a specific manner, or having insisted upon it in such a way as to keep it alive. All that is said is that he protested. Accordingly he left the landlord in the belief that he was not making any such claim, or at anyrate that he was not persisting in it. I am of opinion, therefore, that the Lord Ordinary's interlocutor should be reversed.

LORD KINNEAR.—I am of the same opinion. I think the case is ruled by *Broadwood v. Hunter*, 17 D. 340. To exclude the rule, the tenant must shew that he gave notice of his claim in so specific a form as to exclude the inference that when he paid his rent he had no claim for compensation to set off against his landlord's demand. I cannot construe the averment on record as indicating any such intimation. The pursuer brings this action against the trustees three years after they have sold the estate, and complains of damage which he has sustained ten years ago, and yearly since that date. I agree that it would be a hardship upon the landlord if at this distance of time he were called upon to make a defence against such a claim. The pursuer says that, owing to the landlord's breach of contract, he could not pasture so many sheep upon the land as he would otherwise have done, and that there was not sufficient food for those he had. But the landlord has no possibility of refuting this statement or meeting the claim, because no due notice of it was given to him during the lease. Apart, however, from this consideration I think the rule is fixed that when a tenant has paid his rent regularly year by year, without reservation, he cannot afterwards set up a claim for abatement in the form of damages for byepast injury; such a claim must be restricted to the year preceding the demand.

I am therefore of opinion that the Lord Ordinary's interlocutor, so far as it deals with these defenders, should be reversed.

LORD M'LAREN was absent.

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THE COURT pronounced an interlocutor which, *inter alia*, recalled the Lord Ordinary's interlocutor (in so far as it repelled the second plea in law for the defenders, Young's trustees, and allowed a proof), and assoilzied the defenders, Young's trustees.

PHILIP, LAING, & Co., S.S.C.—BLAIR & FINLAY, W.S.—Agents.

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Mar. 16, 1894.
Buntine v.
Buntine's
Trustees.

JAMES ROBERTSON BUNTINE, Pursuer (Respondent).—*Sol.-Gen. Asher—D. Dundas.*

JOHN GLAS SANDEMAN AND OTHERS, Defenders (Reclaimers).—*Johnston—Fleming.*

WILLIAM FINNIE AND OTHERS, Defenders.—*Johnston—Fleming.*

Marriage-contract—Construction—Jus relictæ—Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), secs. 6 and 8.—By antenuptial contract of marriage, dated in 1874, the wife conveyed her whole estates *acquisita et acquirenda* to trustees, for the purpose, *inter alia*, that in the event of the dissolution of the marriage by her death, without issue, her husband should enjoy the liferent of her whole estates, the trustees being, in that event, directed to hold the fee for behoof and at the absolute disposal of the wife or her heirs or assignees. The husband, *inter alia*, renounced his "*jus mariti* and rights of courtesy and of administration in, of, and in relation to the whole estate and effects, heritable and moveable, now owing and belonging, or which may hereafter be owing and belonging to" the wife.

The marriage was dissolved in 1883 by the death of the wife, intestate, and without issue.

The husband thereafter for several years enjoyed the liferent of his wife's estate, and then brought an action against his marriage-contract trustees and his wife's next of kin, in which he concluded for declarator that he was entitled to one-half of the moveable estate, in virtue of the Married Women's Property (Scotland) Act, 1881, sec. 6.

The Court (*rev. judgment of Lord Low*) assoilzied the defenders, holding that the husband's claim to one-half of his wife's moveable estate was inconsistent with the provisions of the marriage-contract.

1ST DIVISION.
Lord Low.

MR JAMES ROBERTSON BUNTINE, advocate, was married to Miss Jane Sandeman in 1874. By antenuptial contract Mr Buntine, after making certain provisions for his intended wife and the children of the marriage, renounced "his *jus mariti* and rights of courtesy and of administration in, of, and in relation to, the whole estate and effects, heritable and moveable, now owing or belonging to or which may hereafter be owing or belonging to his intended wife." She then, on her part, conveyed to trustees her whole estate, heritable and moveable, belonging, or which should belong, to her during the subsistence of the marriage, except legacies of £500 or under, revenue falling to her from estate separately settled on her, and revenue due to her from the trust-estate prior to the last date of the contract, and that in trust for the following purposes:—(1) To pay the expenses of the trust; (2) for behoof of Mrs Buntine in liferent; (3) in the event of the pursuer surviving her, for his behoof in liferent for his liferent alimentary use alienably; (4) to hold the fee of the trust-estate for behoof of the children of the marriage; and in the last place, failing children of the marriage, the trustees were directed to "hold the said estate for behoof and at the absolute disposal of the second party [Miss Sandeman] or her heirs or assignees." The deed contained further a declaration "that the provisions hereinbefore conceived in favour of the said Jane Sandeman shall not be taken as in lieu or in full satisfaction to her of her rights of terce or *jus relictæ*," which rights were specially reserved.

The marriage was dissolved by the death of Mrs Buntine in 1883. No. 134.
She died intestate, and without issue.

Thereafter Mr Buntine enjoyed the liferent of his wife's estate.

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On 8th June 1893 Mr Buntine, founding on section 6 of the Married Women's Property (Scotland) Act, 1881,* raised an action against his marriage-contract trustees, and also against his wife's next of kin, in which he concluded for declarator that he was entitled, as his own absolute property, to one-half of the whole free moveable estate belonging to his wife, or to which she had right at the time of her death, and for payment of £15,000, or such other sum as should amount to the said one-half.

The pursuer pleaded ;—(1) In respect of the provisions of the statute quoted, the pursuer is entitled to decree as concluded for. (2) On a sound construction of the said marriage-contract and Act of Parliament, and in the circumstances which have arisen, the pursuer is not barred from insisting in his present claim. (3) The defences stated are irrelevant.

The defenders pleaded ;—(1) The pursuer's statements are irrelevant. (2) The pursuer, having by antenuptial marriage-contract renounced his whole legal rights in his wife's estate, is barred from insisting in his present claim. (3) The pursuer, having by antenuptial contract accepted, and farther, and *separatim*, having enjoyed for ten years the liferent of the whole of his wife's estate, is barred from insisting in his present claim. (5) Farther, if he has not already elected, the pursuer is now bound to elect between his conventional provisions under the marriage-contract, and his rights at common law.

On 9th November 1893 the Lord Ordinary (Low) pronounced an interlocutor repelling the first, second, third, and fifth pleas in law for the defenders, granting decree of declarator, appointing the cause to be enrolled for further procedure, and granting leave to reclaim.†

* The Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), sec. 6, enacts,—“After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.”

Sec. 8 enacts,—“This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts. . . .”

† “OPINION.—There are two questions in this case,—First, whether the pursuer is barred from claiming one-half of his wife's estate under the 6th section of the Married Women's Property Act of 1881, by reason of the renunciation of his legal rights contained in his antenuptial contract of marriage ; and second, whether, assuming the first question to be answered in the negative, the pursuer's claim is barred by the provision to him in the marriage-contract of a liferent of his wife's whole means and estate.

“I have no difficulty in answering the first of these questions in the negative. The renunciation by the pursuer in the marriage-contract applied only to his legal rights as they then existed, and cannot, in my opinion, be extended so as to include a legal right which was brought into existence for the first time by subsequent legislation. Further, the point seems to me to be settled by the case of *Simons' Trustees*, 18 R. p. 135.

“The second question is attended with more difficulty. It seems to have been raised in argument in the case of *Simons' Trustees*, but I think that the opinions delivered shew that the learned Judges did not consider the determination of the question necessary for the decision of the case. The late Lord

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Mrs Buntine's next of kin reclaimed, and argued ;—The pursuer's contention was that he was entitled to the *jus relictæ* created by the Married

President, however, expressed a very clear opinion that the husband would have been entitled to enjoy the liferent, and also to claim *jus relictæ*, while Lord M'Laren took the view that it would not be consistent with our practice to allow legal and conventional provisions to be claimed concurrently.

"The 6th section of the Married Women's Property Act provides that the husband shall take by operation of law the same share and interest in his wife's moveable estate which is taken by a widow in her deceased husband's moveable estate, 'subject always to the same rules of law in relation to . . . the exclusion, discharge, or satisfaction thereof, as the case may be.'

"The question is, whether applying the rules applicable to *jus relictæ*, the pursuer's claim must be held to be excluded or satisfied by the provision of a liferent of his wife's whole estate?

"The case put by the defenders as being analogous to, and ruling, the present case, was that of a husband by antenuptial marriage-contract giving to his wife a liferent of his whole estate. In such a case, the defenders argued that although the wife did not renounce her legal rights, she would be barred from claiming both *jus relictæ* and a liferent of the remainder of the estate.

"There is a good deal of authority for that proposition, and I shall assume it to be sound. I do not, however, think that the principles upon which it rests are applicable to the present case.

"In entering into a contract such as that supposed, both husband and wife know that the wife will, in the event of the husband's death, be entitled to one-third or one-half of his moveable estate, as the case may be. When, therefore, the husband offers, and the wife accepts, a liferent of the whole estate, the natural implication is that the intention and agreement of the parties is that the fee of the whole estate should be at the husband's disposal. In such circumstances, for the wife to claim *jus relictæ* in addition to a liferent, would be to make a claim inconsistent with the contract—that contract not only being one to which she was herself a party, but also her only title to the liferent.

"The wife's claim to both provisions in the case supposed would be rejected (1) on account of the implied intention of the parties arising out of the inconsistency between the provision made for the wife in the contract, and her legal rights, which the parties are assumed to have known and had in view ; and (2) because the implied intention being read into the contract, the wife cannot claim both the liferent and *jus relictæ* without approbating and reprobating the same deed.

"In the present case there is no room for implied intention in regard to the right which the pursuer now claims, because as it did not exist at the date of the contract, it is certain that the parties had no intention in regard to it, the one way or the other.

"The question then is, whether the pursuer's claim is inconsistent with the contract, so that he cannot make it without reprobating the contract which he has already approbated?

"The answer to that question seems to me to depend upon whether the wife, or anyone else, is deprived by the pursuer's claim of anything which was stipulated for in the contract, because if not, I do not see how the pursuer can be regarded as reprobating the contract. In the supposed case which I have been considering, the husband would, in the event of the wife getting both provisions, be deprived of the power, which by implication he had stipulated for, of disposing of the *jus relictæ*. I do not think that there is anything analogous to that in this case. The wife as the counterpart of the liferent which she gave to her husband made two stipulations in regard to her estate. In the first place, she stipulated that the pursuer should renounce his *jus mariti* and right of administration ; and in the second place, that failing children, the trustees should hold the estate for behoof, and at the absolute disposal, of her and her heirs and assignees. The pursuer is asking nothing contrary to these stipulations ; indeed, they are the foundation of his claim. It is because his *jus mariti*

Women's Property Act, 1881, as well as to the liferent of the whole of his wife's property which he took under his marriage-contract, on the ground that the statutory right had not been discharged or renounced by him. But (1) section 8 of the Act provided that the Act should not affect marriage-contracts nor the law relating to such contracts. If, therefore, the pursuer's claim to *jus relictæ* was inconsistent with the provisions of his marriage-contract, no *jus relictæ* enured to him in virtue of the passing of the Act. On a sound construction of the marriage-contract, the pursuer's claim was inconsistent with its provisions. By the marriage-contract the wife bargained that the fee of her whole estate should be at her own absolute disposal or at the disposal of her heirs or assignees; what the pursuer now proposed to do was to appropriate one-half of that estate, retaining at the same time his own liferent under the contract, and without giving any consideration. To sustain such a contention would be to upset the provisions of the marriage-contract. The pursuer's contention, therefore, ought to be rejected, both because a marriage-contract was one of the most solemn and binding contracts known to the law, and because of the express saving clause in section 8 of the Act. (2) If the pursuer's claim was not to be rejected on the ground just stated, it was struck at by the concluding words of section 6 of the Act, which provided that the new statutory right should be subject to the same rules in relation to its exclusion, discharge, and satisfaction as regulated the widow's *jus relictæ*. That implied that the widower was not to be in a better position than the widow would have been, and also that the *jus relictæ* was to be regulated by the same rules whether the marriage had taken place before the Act or after it. In other words, the pursuer's claim was to be determined in the same way as if his marriage had taken place after the passing of the Act, and as if it had been a claim by his widow to *jus relictæ*. Now, with respect to *jus relictæ*, it was a settled rule that a widow who had accepted the liferent of her husband's whole estate was not entitled to her *jus relictæ*.¹ The same rule must consequently

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was excluded, and because the trustees held the estate for his wife's absolute behoof, that the pursuer is in a position to make the present claim.

"It seems to me that the only ground upon which it could be held that the pursuer's claim is contrary to the marriage-contract is that the succession of the wife's heirs is protected. The defenders did not argue that that was the case, and I think that any such argument would be untenable. I think that the mention of heirs and assignees does not add anything to the declaration that the estate is to be held for the wife's behoof; at all events, it does not give the heirs and assignees any *jus crediti* under the contract.

"All that the marriage-contract does in regard to the fee of the estate (in the event which has happened, of there being no children of the marriage) is to ensure that it shall belong to the wife. If there had been children, the question might have been materially different, but there being no children, the result of the contract was that the fee of the estate remained the absolute property of the wife. A subsequent statute has enacted that in such a case the husband is to be entitled to a certain share of the wife's estate. I am unable to see anything to prevent the husband taking advantage of that enactment. He cannot be prevented from doing so on the ground of the intention of the parties, because there is no expressed intention, and there is no room for implied intention. And he cannot be prevented from doing so on the ground that the claim involves a reprobation of the contract, because the contract has been implemented in every term, and the pursuer, so far from claiming against the contract, rests his claim upon its provisions.

"I am therefore of opinion that the pursuer is entitled to one-half of the free moveable estate belonging to his late wife."

¹ M'Kinnon v. M'Donalds, 1763, M. 2278; Young v. Buchanans, 1664, M.

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apply to *jus relictæ*, and the pursuer therefore was not entitled both to his legal and to his conventional provision. The utmost that the argument for him came to was this, that he had the right of election between the two provisions, seeing that at the date of the marriage he had no knowledge of the legal provision, which then was nonexistent. That view of the pursuer's position imposed on him the duty of electing at the dissolution of the marriage, or at least of electing now, and if he chose his legal provision, of imputing to that provision what he had hitherto received in name of liferent. The pursuer's claim, however, was not that he had the right to elect between his legal and his conventional provisions, but that he was entitled to the benefit of both provisions. In *Fotheringham's*¹ case, the circumstances did not admit of this question being decided, and in *Simons'*² case the present point was not taken. (3) The fee of Mrs Buntine's property therefore fell, in terms of the marriage-contract, to her heirs *ab intestato*, she having left no will. The pursuer, claiming *jus relictæ*, was not one of his wife's heirs *ab intestato*; for a widow, claiming *jus relictæ*, was a creditor, not an heir, of her husband,³ and a widower claiming *jus relictæ* must under the Act be in the same position. The Lord Ordinary's interlocutor ought therefore to be recalled, and the defenders assoilzied.

Argued for the pursuer;—It was settled that section 6 of the Act was not confined to marriages entered into after the passing of the Act, but included also marriages contracted before its date.⁴ The only question, therefore, was, had the right created by that section been excluded in the present instance by the provisions of this marriage-contract? There was no question of election, for the matter arose upon an antenuptial marriage-contract, and a spouse, by entering into such a contract, must be held to have accepted the provisions in his or her favour therein contained without the right of thereafter electing the legal provision in lieu of the conventional provisions. Nor was there any room for the rule, to which the defenders appealed, that a wife who under her marriage-contract took on her husband's predecease the liferent of his whole estates was not entitled to *jus relictæ*. That rule, assuming it to be sound law, proceeded on the ground of implied discharge. The parties in entering into the marriage-contract were understood to have had in view, and to have intended to adjust, their whole mutual legal rights and obligations existing at the time, and known to each party. Therefore there could be no implied discharge of a legal right, such as that now in question, which was created by a statute passed after the date of the marriage-contract, and of which, of course, the parties could have no knowledge at that date. The question was thus narrowed down to the construction of the marriage-contract. Now, the marriage-contract contained no express discharge or renunciation by the husband of possible legal rights which the Legislature might create in the future; and the clause by which he

6447; *Menzies v. Burnets*, 1666, M. 6448; *Riddell v. Dalton*, 1781, M. 6457; *Bell v. Lawrie*, May 14, 1801, Hume, 486; *Caithness' Trustees v. Caithness*, June 20, 1877, 4 R. 937; *Johnstone v. Coldstream*, June 30, 1843, 5 D. 1297, 15 Scot. Jur. 541; *Dunlop v. Greenlees' Trustees*, June 2, 1865, 3 Macph. (H. L.) 46, 37 Scot. Jur. 470; *Leighton v. Russell*, Dec. 1, 1852, 15 D. 126, 25 Scot. Jur. 63; *Edward v. Cheyne*, March 12, 1888, 15 R. (H. L.), 33; *Ersk. Inst.* iii. 3, 30.

¹ *Fotheringham's Trustees v. Fotheringham*, June 27, 1889, 16 R. 873.

² *Simons' Trustees v. Neilson*, Nov. 20, 1890, 18 R. 135.

³ *Inglis v. Inglis*, Jan. 28, 1869, 7 Macph. 435, 41 Scot. Jur. 234; *Gregory's Trustees v. Alison*, April 8, 1889, 16 R. (H. L.) 10.

⁴ *Poë v. Paterson*, July 16, 1883, 10 R. (H. L.) 73.

renounced his *jus mariti*, &c., could not be construed to include such possible future rights. Such a clause included only rights existing at its date.¹ Any objection, therefore, to the pursuer's claim, on the ground that he had renounced or discharged his right, was out of the case. From which it followed that he was entitled to one-half of the moveable property which might belong to his wife absolutely at the time of her death. The fee of her whole moveable property was in that position. It was said that the clause which provided that in the event (which had happened) of the dissolution of the marriage by the death of the wife without issue, the fee of her property should be at her absolute disposal and that of her heirs and assignees, imported a contractual obligation by the husband inconsistent with his present claim. That argument was ill-founded. Property belonging to a wife and at her absolute disposal, the *jus mariti* being as here excluded, was simply her property, to be disposed of as she might direct, subject to her obligations, legal and conventional, and failing direction by her then as the law might direct. The fact that the property was vested in the marriage-contract trustees was of no moment, for they held it *quoad* the fee, not for any matrimonial purpose, but for behoof of the wife as an individual, just as they would have held it for her behoof in virtue of her radical right had there been no clause regarding the disposal of the fee. Nor was the destination to her heirs and assignees of any materiality. A destination in a marriage-contract of property belonging to one of the spouses to the heirs or assignees of that spouse was simply a destination to the spouse himself or herself, and gave the heirs or assignees no *jus quæsitum*.² The fee of Mrs Buntine's estates being thus her absolute property, and the statutory right not having been renounced or discharged by the pursuer, his claim to one-half of that estate fell to be sustained.³

At advising,—

LORD PRESIDENT.—The present question depends primarily upon the provisions of the pursuer's antenuptial marriage-contract, and these, so far as relevant, may be stated in two sentences. The property of the wife was placed in the hands of trustees; the husband renounced his *jus mariti*, and (regarding the event which has happened of the wife's predecease without issue) agreed that the estate should be held for behoof of and at the absolute disposal of the wife and her heirs and assignees. On the other hand the husband was to get, in the event which I have stated, the income of the estate paid over to him by the trustees during his life.

These stipulations are clearly and directly reciprocal. In return for the husband giving up his *jus mariti*, and engaging that the capital of the wife's estate shall be hers and her heirs', he gets a liferent of the whole.

What then is the pursuer's present demand? He proposes to carry off from the hands of the trustees, and from the disposal of his wife's heirs, one-half of the capital of his wife's estate. This claim is rested on the 6th section of the Married Women's Property (Scotland) Act, 1881, which gives what for shortness may be called a *jus relictæ* to the husbands of women who have died domiciled in Scotland. Now, while this section is applicable to persons married

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¹ Dunbar's Trustees v. British Fisheries Society, July 12, 1878, 5 R. (H. L.) 221.

² Mackie v. Herbertson, July 4, 1885, 12 R. 1230—(sequel to Mackie v. Herbertson, March 6, 1884, 11 R. (H. L.) 10).

³ Fotheringham's Trustees v. Fotheringham, June 27, 1889, 16 R. 873; Simons' Trustees v. Neilson, Nov. 20, 1890, 18 R. 135.

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If we give effect to the pursuer's claim, shall we be allowing the Act to affect Mrs Buntine's marriage-contract? It seems to me that only one answer can be given. If to upset a contract be to affect it, then this contract is affected. The result of holding the Act to apply would be that whereas under the contract before the Act the pursuer had the liferent and none of the capital, under the contract after the Act he has the whole liferent and half of the capital besides. To put it in another way (although rather to understate it) on the pursuer's contention the Act would operate so as to let him retain all that he stipulated for and also carry off one-half of the consideration of that stipulation.

The only answer to this view of the case which is suggested is, that the husband is really claiming as in right of his wife. But this answer seems to me to rest on an omission to remember the nature of *jus relictæ*, and therefore of *jus relictî*. When a widow claims her *jus relictæ* she claims not in right of her husband but against her husband, and as his creditor. This is very clearly stated by the Lord President in *Inglis*, Jan. 28, 1869, 7 Macph. 435. The pursuer is in no sense of the term a representative of his wife. If he has a claim, he is claiming because he is by statute a creditor of her estate. Now, I hold that when he executed this marriage-contract he guaranteed to his wife that, so far as he was concerned, her estate should be dealt with according to the contract. I take the first case suggested by the words of the marriage-contract. The pursuer agreed that his wife should have the right of absolute disposal of the capital of her estate after they were both dead. If Mrs Buntine had left a will giving the estate to some of her own relations, the pursuer would, according to his contention, have had right to defeat that will by carrying off one-half of what it purported to bequeath. As it happens Mrs Buntine has died without leaving a will. In my opinion she was entitled to rely, so far as the other party to the contract was concerned, on her succession being determined by the clause in her marriage-contract, which in express terms gave it to her heirs. It is, as I think, contrary to the contract for the pursuer to plead any right not derived from Mrs Buntine against the execution of the contract, and this *jus relictî* is not a right derived from Mrs Buntine.

I am therefore for recalling the Lord Ordinary's interlocutor and assoilzieing the defenders.

LORD ADAM.—Mr and Mrs Buntine were married in 1874. They executed an antenuptial marriage-contract dated 12th October, and recorded 22d December 1874. By this marriage-contract Mrs Buntine conveyed her whole estate, both *acquisita* and *acquirenda*, with some exceptions, to certain trustees, who were directed, in the event of Mrs Buntine predeceasing her husband, to pay the income of the trust-estate to her husband for his liferent alimentary use alienarly, and to hold the fee for behoof of the children of the marriage, and failing children for behoof and at the absolute disposal of Mrs Buntine, or her heirs and assignees. The marriage was dissolved by the death of Mrs Buntine, without issue, in 1883. Since that date Mr Buntine has enjoyed the income of the trust-estate. In 1881 the Married Women's Property (Scotland) Act, was passed, and by section 6 of this Act it was declared [quotes section]—that is, the husband was to have a *jus relictî* just as the wife had a *jus relictæ*, "subject always to

the same rules of law in relation to . . . the exclusion, discharge, or satisfaction thereof as the case may be." No. 134.

In this case, there being no children of the marriage, Mr Buntine claims one-half of the fee. In my opinion that claim is excluded by the terms of the marriage-contract. In that deed Mr Buntine renounced his "*jus mariti* and rights of courtesy, and of administration in, of, and in relation to the whole estate and effects, heritable and moveable, now owing and belonging, or which may hereafter be owing and belonging" to his wife. Now, the right with which we are dealing in this case is neither a right of courtesy nor does it depend on the *jus mariti*, and the cases of *Fotheringham* and *Simons* are authorities to the effect that such a clause of renunciation as the one I have quoted would not discharge a legal right not existing at the date of the contract. In such circumstances, the estate vests subject to all legal claims that may subsequently be created, and therefore to the claim of *jus relictæ*, if these be not excluded by the terms of the marriage-contract. In this case, as I have said, the husband bound himself, so far as he was concerned, that her estate should be at the absolute disposal of his wife, or her heirs and assignees. Now, I do not see how his claim to one-half of the fee of that estate is consistent with that obligation. I think the two things are totally irreconcilable. For the heirs of Mrs Buntine do not take *ab intestato* her estate, but under the provisions of the marriage-contract, and under the same contract Mr Buntine has bound himself that his wife's estate should be at the absolute disposal of his wife, or her heirs and assignees. Accordingly, in my opinion, it is quite impossible to sustain the claim made by him in this action.

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LORD M'LAREN.—The Married Women's Property Act, 1881, while taking from the husband rights which were usually excluded by contract where the wife had property, has given to the husband an interest in the wife's succession, which is equivalent to the *jus relictæ* of the common law, and has subjected this new right to the conditions and incidents which belong to *jus relictæ*. One of the incidents of *jus relictæ* was that the claim might be excluded by antenuptial contract, and that this exclusion might be either express or by implication. If the husband in the antenuptial contract completely disposed of his whole estate in contemplation of death, say by giving his wife a liferent or an annuity, and directing the division of what remained of his estate amongst the children of the marriage, the wife could not successfully claim *jus relictæ*, because by becoming a party to the contract she had assented to a disposal of the husband's estate which made it impossible to satisfy such a claim. This principle is very well illustrated by the case of *Edward v. Cheyne*, 15 R. (H. L.) 33; for, while the deed there in question was not a contract, but a mutual will, the principle of the decision is not the less applicable to the case where the promised spouse, being free to contract, agrees before marriage to a particular disposition of the property of the other spouse. But again, if any part of the husband's estate, great or small, be undisposed of, and whether this be the result of the failure of objects or of failure to dispose of the particular subject, the wife, if she has not expressly renounced her *jus relictæ*, will be entitled, in addition to her liferent provision under the contract, to claim her half or third, as the case may be, of the undisposed-of succession. The reason of this distinction is, that an implied extinction of the *jus relictæ* can only be where there is an inconsistency between the claim which the lady is preferring against her husband's estate and the disposition of that estate to which she has

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assented. But, plainly, there is no inconsistency in claiming or taking a conventional provision out of property which is disposed of and a legal provision out of that which is undisposed of.

Applying these principles (as we are required to do by the statute), *mutatis mutandis*, to the case of the husband's claims against his wife's estate, I find that Mr Buntine has assented by antenuptial contract to a scheme of disposition of his wife's estate under which he receives a life interest through trustees, while the fee is destined in the first place to the lady's children by that or any subsequent marriage, and failing issue it is to be at the "absolute disposal" of Mrs Buntine or "her heirs and assignees." Observing that the lady's property is by the contract vested in trustees, I consider that this declaration is equivalent to a direction to the trustees to hold the capital for the benefit of Mrs Buntine's testamentary heirs, if any, or failing these, for her heirs *in mobilibus*. I think it is perfectly fixed in the law of Scotland that a gift to the heirs of A takes effect in favour of the heirs *in mobilibus* on the failure of the preceding branches of the destination, also that the rights of a wife or husband are not covered by such a destination. On this subject I shall only refer to the case of *Gregory* in the House of Lords (16 R. (H. L.) p. 10), where it is laid down that destinations to "heirs" and destinations to "next of kin" are to be interpreted on common principles.

It appears to me that in the event which has happened Mrs Buntine's moveable estate is destined to her heirs *in mobilibus*, and as this destination is contained in an antenuptial contract to which the husband is a consenting party, Mr Buntine cannot claim his *jus relictii* consistently with his antenuptial obligation. The Married Women's Property Act, 1881, reserves entire the effect of marriage-contracts, and independently of that provision I should have assumed that marriage-contract obligations were not intended to be rescinded by the Act of Parliament.

LORD KINNEAR.—I am of the same opinion. I think that the validity of a claim of this kind depends on the construction of the marriage-contract whether the parties have entered into the contract before or after the passing of the Act. If the claim is inconsistent with the provisions of the marriage-contract, then it is excluded by the Act; if it is not inconsistent, then there is nothing in the Act to prevent it receiving effect.

The Lord Ordinary has sustained the claim made in this action, because, in his opinion, it is a claim not against but in accordance with the terms of the marriage-contract. The Lord Ordinary considers that the direction to the trustees to hold the wife's estate for behoof of and at the absolute disposal of the wife or her heirs and assignees is equivalent to a stipulation that upon the wife's death without issue her estate should go to the persons entitled thereto by the law in force at the time of her death; and accordingly his Lordship holds that Mr Buntine, as her husband, has a right to one-half of her moveable estate. His Lordship's view, therefore, is, that Mr Buntine is claiming not against but in accordance with the terms of the marriage-contract.

Now, when the antenuptial contract of marriage between the parties has been conceived in terms which will bear the construction put upon them by the Lord Ordinary, I agree with his Lordship in his opinion as to the husband's right. But I agree with your Lordship that that is not the true construction of the marriage-contract in question. The wife has stipulated that—[His Lordship quotes clause].

Now, if the estate was at her absolute disposal she could have disposed of it by testament, and that is, I think, the obvious and irresistible meaning and effect of the clause; and if she did not so dispose of it then it was to be at the absolute disposal of her heirs *in mobilibus*. Her husband, however, says that by a supervening law he has acquired a right to defeat her testament if she had made one, because the right given to the husband in his wife's moveable estate is the same and subject to the same rule of law as the widow's right in the moveable estate of her husband, and therefore it is a right which, like legitim, cannot be prejudiced or affected by will. It is true that Mrs Buntine left no will. But the husband's right to exclude the heirs *in mobilibus* must rest, as the Solicitor-General contended, upon precisely the same conditions as his right to defeat the wife's will. In either case he would carry off one-half of the moveable estate, contrary to the provisions of the marriage-contract.

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Trustees.

Now, the Act of Parliament says that the right which it gives "shall not affect any contracts made or to be made between married persons before or during marriage." And the only question is whether the husband here is not claiming in terms to affect the contract between him and Mrs Buntine. Under that contract the wife and her heirs have an absolute right to the whole of her estate. But founding on the Act her husband says he is entitled to the half. Is that or is that not a claim to affect the contract? It is quite impossible, in my opinion, to answer that question otherwise than as your Lordships propose.

THE COURT recalled the Lord Ordinary's interlocutor, and assolized the defenders.

COWAN & DALMAHOY, W.S.—MURRAY, BEITH, & MURRAY, W.S.—
TODS, MURRAY, & JAMIESON, W.S.—Agents.

MRS ELIZABETH ADAMSON OR MURRAY, Pursuer (Reclaimer).—

W. Campbell—James Mackintosh.

WILLIAM MURRAY, Defender.

No. 135.

Mar. 17, 1894.
Murray v.
Murray.

Husband and Wife—Divorce—Desertion.—In an action for divorce on the ground of desertion by a wife against her husband, evidence upon which it was held (*rev. judgment of Lord Stormonth-Darling*), distinguishing from the case of *Gibson v. Gibson*, Feb. 1, 1894, *supra*, p. 470, that the husband, who had expelled his wife from the house, and had acted with great cruelty towards her, had so acted with the view of putting an end to conjugal cohabitation, and, consequently, that she was entitled to decree of divorce.

On 3d March 1893 Mrs Elizabeth Adamson or Murray brought an action for divorce on the ground of desertion against her husband William Murray, sometime grocer in Haddington, then clerk, residing at 90 Blenheim Street, Newcastle-upon-Tyne.

2D DIVISION.
Ld Stormonth-
Darling.

The action was undefended.

A proof disclosed the following facts: The spouses were married in 1861. From an early period the marriage was an unhappy one, owing, so far as it appeared, to the drunken habits of the defender. The pursuer deposed that on several occasions prior to 1875 she had been obliged by his violent conduct to leave him and go to reside with her own relatives, but that she had always returned to him. In July 1875 he assaulted her, and was convicted and fined for this assault. In the same month he allowed the furniture in the house in Clerk Street, Edinburgh, where they were then living, to be sold off. The pursuer deposed that she did

No. 135. not know beforehand that the sale was to take place. "The sale took place, and I was turned out of the house with my children entirely destitute, and all my effects were sold off. A neighbour . . . asked me to stay with her for a few days, until I had made other arrangements. I stayed with her . . . I had not a farthing in my pocket at that time, and I did not know where my husband was." The neighbour, "is now in Australia. . . . I had afterwards to apply for out-door relief from the parochial authorities at North Leith, and I got support for some weeks from the parochial authorities. I ultimately took a house of one room and kitchen in George Street, Newhaven. I took that house in my own name, and I tried to support myself by keeping lodgers." After the pursuer had received parochial relief the parochial authorities proceeded against the husband for desertion, and these proceedings were stopped only by a relative of his coming forward and paying the amount of the relief.

Mar. 17, 1894.
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Murray.

The pursuer gave this further evidence,—“On the 1st February 1876 my husband came to the house [in Newhaven], without warning, at nine o'clock at night. When he came in that night there was a young lad, a clerk, there, and my husband said that he had come to take the children and the house. . . . When he did take them he took me by the back of the neck, and put me to the door without a bonnet or anything. He swore when he turned me out. I went to” a friend's house “for the night, and next morning at eight o'clock I went to my sister's house in Broughton Place. At that time all my children were quite young. (Q.) Did any of them happen to see his conduct towards you that night? (A.) They did not see him put me out, because he shut the door and came out to the little lobby, and opened the door to throw me out. He shut the door so that the whole building shook. . . . I did not leave of my own accord on that occasion; I was put out, and I was asked neither one thing nor another. My sister, Mrs Gordon, to whose house I went at that time, is now dead. My husband was quite well aware of where Mrs Gordon lived, and he knew that I was going there. I remained for two years with my sister, helping her as nurse to her children. She had a large young family. Her husband is dead now also, but some of the children are still living. During these two years, while I was in Edinburgh, my husband never made any offer to take me back or to make any provision for my support. I afterwards went to Elgin, and was in service there for a year. I was then, for several years, travelling companion to an old lady, and I was abroad with her a good deal. During the last six years I have been in Edinburgh, maintaining myself by nursing. I have had a good deal of employment in that way. I have never seen my husband since February 1876, and he has never communicated with me. I never knew where he was during that time. About the time I raised this action I ascertained that for the past ten or twelve years he has been in Newcastle-on-Tyne. During the time I was in service the family were with my husband. . . . The family were all just children when I left them, and I have never seen any of them since, with the exception of my son James, who is in Edinburgh. I have no information about the others except what I have derived from him. . . .” By the Court.— . . . “There was no one present except him and me at the time he turned me out. There was no quarrel, and I have just told what happened after he received the house and the children. I had taken the house myself, but I gave my home for my family, as they were young; and giving the home, my husband took charge of the children in the home. . . . After my husband and I parted in the way that I have just described, I was willing to have gone back to him if he had invited me. I expected

him to renew communications with me. The reason I did not communicate with him myself was that I did not know whether I would be knocked down, or what would be done with me; and I thought that if my husband wanted me to come as his wife, he would have come for me. I say that if he had come I was willing to go.”

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The pursuer further deponed—being recalled,—“When I was turned out of the house there were only two of my children at home, a third being in the hospital, and a fourth with his grandfather in the country. The two children who were at home came to see me in Mrs Gordon’s at least three times . . . my children stopped coming to see me, and I believe they were prevented by their father. I don’t know how long the children remained with my husband, but when I went down to the house in George Street, Newhaven, within six weeks after I was turned out, I found that there was nobody in the house, and that the house was closed up. . . . My reason for going down to the house . . . was that I heard that one of the children was ill. I went down to make inquiries, expecting to find them there, and I found the house shut up. After that I went repeatedly to the school to see the children, but they were not allowed to speak to me. . . .” By the Court.—“I lost all trace of the children about a year after February 1876.”

There was no direct evidence corroborative of the pursuer’s account of what took place on 1st February 1876.*

On 18th July 1893 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—“The Lord Ordinary . . . finds that it has not been proved to his satisfaction that there has been wilful and malicious desertion on the part of the defender; therefore dismisses the action,” &c.†

* Mrs Murray, a sister of the pursuer’s, deponed in answer to the Lord Ordinary,—“When I saw the pursuer in Mrs Gordon’s she spoke to me about her husband’s cruelty and desertion, and not providing for her. (Q.) Did she speak as if she had left her husband voluntarily, or as if she had been put away? (A.) He did turn her out; he sold everything she had in the house, and she had nowhere to stay, and my sister was obliged to take her in. The defender did not remain in the house. (Q.) I am referring to the time when she went to your sister as nurse; how did she speak of that? (A.) Still in the same strain as I have just described; she had to leave him for his bad behaviour, and also because he sold the things in the house, and turned her completely out. (Q.) As I understand, the defender did not sell the things in the house, because he remained there with the children? (A.) She had to leave him for his cruelty. (Q.) Did she speak as if she had left voluntarily, or as if she had been put away against her will? (A.) She was put away decidedly against her will, as she would not leave the children; it was the children that kept her so long with him. (Q.) Did she speak as if she would be willing to go back if he invited her? (A.) Well, she was afraid to go back, he was so cruel and so wicked to her. She had gone back several times at my father and mother’s request. . . . (Q.) Attached as she was to her children, was she willing and anxious to go back to her husband, or was her fear of him so great that she would not have gone back in any case? (A.) I could hardly tell you; he was so wicked and so cruel to her that it would have been almost murder if she had gone back; and he was not providing for her.”

† “OPINION.— . . . *Prima facie*, these facts do not disclose a case of desertion by the husband, but rather a case of the wife forsaking the conjugal residence, and it would require clear and satisfactory evidence to convert that into desertion by the husband. I am of opinion that the evidence here is not sufficient for that purpose, because there is really nothing except the testimony of the wife herself to shew that her departure from her husband’s house was other than voluntary. If it was voluntary it may have been justified by the

No. 135. The pursuer reclaimed.¹
At advising,—

Mar. 17, 1894.
Murray v.
Murray.

LORD JUSTICE-CLERK.—This case was heard some time ago, and delayed until the result of another case raising a cognate question,² which had been sent for hearing before seven Judges, was known.

This case is a peculiar one in several respects, and there is one peculiarity which renders the decision of it more difficult than it might have been in other circumstances, because the spouses who are the parties to the case have not cohabited since 1876, and as the action was brought only in March 1893, much evidence has, as was almost inevitable, been lost, which would have been available had the action been brought immediately on the termination of four years from the date of the alleged desertion. The pursuer thus comes to the Court in some respects at a disadvantage.

I have considered the case carefully, and after giving full effect to the case of *Watson*, 20th March 1890, 17 R. 736,—in which a majority of the whole Court were of opinion that it was not an essential prerequisite to obtaining divorce for desertion that the spouse who alleges desertion should have used efforts to resume cohabitation, but that it was a question of circumstances depending upon husband's long-continued cruelty ; but such a state of facts could never, in my opinion, found an action for divorce at the wife's instance on the ground of desertion.

"On the other hand, it may be the pursuer's misfortune, and not her fault, that she is unable to bring any corroboration of her own testimony ; but the fact remains that neither the children, who were in the house at the time, and who are still alive, nor any neighbour, nor anybody at all, is adduced to corroborate this material part of her story.

"That, I think, is sufficient for the decision of the case. But I must observe that, in my view, the case also fails because of the entire want of any evidence to shew that the pursuer really desired to renew cohabitation.

"When I say that there is an entire want of such evidence, I do not lay out of view that she herself said, in answer to a question of mine, that she would have been willing to go back to her husband if he had asked her. But I must test that answer by her conduct, and where a woman leaves her husband's house, for whatever cause, and remains away for a number of years, without making any inquiries for either her husband or her young children, I cannot accept her own unsupported statement that she was willing and anxious to go back. On this matter I think the opinions of the majority of the Judges in the whole Court case of *Watson v. Watson* (17 R. 736) are conclusive. They are probably most compendiously stated in the opinion of Lord Shand (page 743), where his Lordship says that 'desertion must be wilful ; it must be obstinately persisted in ; it must be without lawful excuse ; and it must clearly appear that the pursuer of the action throughout the period of four years of alleged desertion was desirous of cohabitation, and ready to renew it.' Now, if that be the law, as I think it is (and as I must take it to be, whether I agreed with it or not), I cannot say that it 'clearly appears,' in the present case, that this pursuer, throughout the period of four years, was 'desirous of cohabitation, and ready to renew it.' She may have had very good reason for not being ready to renew it ; it may even be that her husband had treated her so badly as to make her afraid to renew it. But the remedy for such a state of matters is not divorce for desertion, but judicial separation on the ground of cruelty ; and therefore, upon that ground, as well as upon the ground that desertion itself is not to my mind conclusively or satisfactorily proved, I must refuse the remedy which the pursuer here asks."

¹ *Gow v. Gow*, Jan. 29, 1887, 14 R. 443 ; *Winchcombe v. Winchcombe*, May 26, 1881, 8 R. 726 ; *Watson v. Watson*, March 20, 1890, 17 R. 736.

² *Gibson v. Gibson*, Feb. 1, 1894, *supra*, p. 470.

the merits of the particular case, and that no general rule could be laid down,— No. 135.
I have come to the conclusion that, although no doubt the case is a narrow one, Mar. 17, 1894.
the pursuer has established her right to obtain divorce. Murray v. Murray.

It is quite true that the defender treated his wife with great cruelty, and that that had some effect upon the pursuer's mind in regard to her desire to resume cohabitation. But, at the same time, I do not find in the evidence any distinct indication that she was not ready to resume cohabitation with the husband, if he was willing to take her back after he had turned her out of doors. On the other hand, it is plain, from the evidence, that he treated her with great violence and drove her from her home; that he took away the children from her, refused to let them speak to her, and that he made no effort to communicate with her himself. In short, his whole conduct was, in my opinion, that of a man who was desirous not to resume cohabitation with his wife. It is entirely a matter of circumstances, and in this case I think the pursuer is entitled to the remedy which she seeks.

LORD RUTHERFURD CLARK.—I also am of opinion that the pursuer is entitled to decree of divorce. The evidence is slender, but I think that we may hold it to be sufficient. It shews that the husband was cruel to his wife in order to produce and maintain a separation; that he withdrew himself and his children from her society, and concealed from her his place of residence. The case differs in very material respects from that of *Gibson*.

LORD TRAYNER.—The Lord Ordinary thinks that this is a case of a wife leaving or forsaking the conjugal residence on account of her husband's cruelty. If I thought that that was the proper or necessary view of the facts proved I should agree with the Lord Ordinary in refusing a decree of divorce. But I think the fact is quite otherwise. The pursuer did not leave the conjugal residence. She was extruded from it. The defender put his wife out of the house, sold off the furniture, and took away the children, having previously forbidden them to speak to their mother, the pursuer. The defender's conduct leaves no doubt on my mind that what he so did was done with the intention and purpose of putting an end to conjugal cohabitation with the pursuer. He has since lived away from the pursuer for about eighteen years, has never communicated with her, and has done nothing towards her support. That, I think, is desertion, and entitles the pursuer to the decree concluded for. This case is distinguished from the recent case of *Gibson*, in respect that there the facts were regarded by the majority of the Court as warranting the conclusion that the wife acquiesced in the husband's conduct, which (however cruel and unjustifiable in itself) did not necessarily lead to the view that he desired or intended to put an end to conjugal cohabitation. The Court thought that the parties living separate was a matter as to which both spouses were agreed. Such a view is, I think, excluded by the evidence in this case. I am therefore for recalling the Lord Ordinary's interlocutor and giving decree. I differ from the Lord Ordinary's opinion that a deserted wife, before being entitled to decree of divorce, must satisfy the Court that during the whole or any part of the statutory period of desertion she was desirous of returning to conjugal cohabitation.

LORD YOUNG was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and granted decree of divorce.

SNODY & ASHER, S.S.C., Agents.

No. 136. FREDERICK CLARK BISHOP AND OTHERS (John Baillie Bishop's Trustees),
First Parties.—*Sym.*

Mar. 17, 1894.
Bishop's Trus-
tees v. Bishop.

MRS ISABELLA BISHOP, Second Party.—*Rankine—Crabb Watt.*

Succession—Legitim—Amount of legitim fund—Father twice married—Whether legitim of children of first marriage diminished by provisions to children under antenuptial contract of second marriage.—A testator, who had been twice married, was survived by seven children, five of the first marriage and two of the second, and was predeceased by his second wife. The children of the first marriage had not discharged their legitim, but with respect to those of the second, the testator, by antenuptial contract with his second wife, in order to make a provision for the children of that marriage, bound himself to pay to them, at the first term after his death, “a just proportion and share of the means and estate that may happen to belong to him at his decease, along with the children of his former marriage, and along with the children of any future marriage,” and that equally or in such proportions as he might appoint, which provision was declared to be in full of legitim. By his settlement the testator directed his whole estate to be divided among all his children equally, but in terms which postponed vesting until the first term of Whitsunday or Martinmas occurring a year after his death. One of the children of the first marriage, who had survived the testator, died before the period of vesting under the settlement, and his representative in consequence claimed the share of legitim which had vested in him at his father's death. The father's testamentary trustees maintained that two-sevenths were to be deducted from the executry before computing the amount of the legitim fund, on the ground that under the marriage-contract the two children of the second marriage were each creditors for one-seventh of the executry. These children made no claim under the marriage-contract.

Held that, whether the children of the second marriage were creditors under the marriage-contract or not, as they made no claim under that contract, it could not be put forward as a ground for diminishing the amount of the legitim fund.

Succession—Legitim—Interest.—*Held* that interest at the rate of 5 per cent per annum was due upon a child's legitim from the date of the father's death, although the funds in the hands of the father's testamentary trustees had been earning only about 2 per cent.

2D DIVISION.

MR JOHN BAILLIE BISHOP, sometime secretary of the Royal Bank of Scotland, died on 17th March 1892. He was twice married. By his first wife he left five children, and by his second wife, who predeceased him, he left two.

There was no contract of marriage between Mr Bishop and his first wife, and none of their children discharged or transacted their claims for legitim.

By antenuptial contract of marriage between Mr Bishop and Miss Shaw, his second wife, dated 8th September 1855, Mr Bishop, for a provision to his then intended wife, conveyed to trustees for behoof of her in liferent allanarly, and the issue of the marriage in fee, a policy of insurance upon his life amounting to £499, 19s., and his household furniture, which provisions were accepted by Miss Shaw as in full of her legal claims. The contract then proceeded,—“And for a provision to the child or children who may be procreated of the said intended marriage, the said John Baillie Bishop hereby binds and obliges himself, and his heirs, executors, and successors, to content and pay to the issue of the said marriage, at the first term of Whitsunday or Martinmas that shall occur after his death, a just proportion and share of the means and estate that may happen to belong to him at his decease, and exclusive of the sum that may be received under the said policy of insurance, along with the children of his former marriage, . . . and along with the children of any future marriage he may contract, and that either among them

equally or in any other proportion, and either *per capita* or *per stirpes*, No. 136. in such manner and under such conditions and restrictions, including a power to restrict the interest of all or any of the said children to a life-rent provision, as he may appoint by a writing under his hand, which failing, among the said children equally *per capita*, which provisions shall be in full satisfaction to said children respectively of all bairn's part of gear, legitim, executry, and all other claim whatever which they, or any of them, can ask or demand out of the subjects and estate of their father in and through his decease, or out of the goods in communion between their parents respectively, excepting what further provisions the said John Baillie Bishop may hereafter think fit to bestow on them of his own goodwill and accord"; for which causes and of the other part Miss Shaw conveyed her whole estate to the marriage-contract trustees for behoof of herself, and of her said husband, in liferent, and of the issue of the marriage, whom failing, her own heirs, in fee.

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Bishop's Trustees v. Bishop.

Mr Bishop left a holograph trust-disposition and settlement, dated 23d November 1888. By this deed, which contained no reference to the foregoing marriage-contract, he conveyed to trustees his whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, then owing and belonging, or which should be owing and belonging to him at the time of his death; and, after directing payment of his debts and sickbed and funeral expenses, and of a small legacy to his only daughter for mournings for herself and servants, he, in the third place, directed that his trustees should, "at the first term of Whitsunday or Martinmas occurring one year after my death, divide the residue of my means and estate by equal shares between" his seven children, *nominatim*, "declaring that in the event of the death of any of them, leaving lawful issue, such issue shall succeed to their parent's share, equally among them, and in the event of any of them dying without leaving lawful issue, the share that would have fallen to them shall be divided equally among the survivors and the lawful issue of such as shall have died leaving such issue."

Thomas Bishop, a son of the testator by his first marriage, died without leaving issue on 7th July 1892, and having thus died before the period appointed for the division of the residue of the testator's estate, he (as was admitted by the parties to the special case after mentioned) took no vested right under his father's settlement. The widow of Thomas Bishop, as his sole executrix and universal legatory, then claimed the share of legitim which had vested in her husband at his father's death, and questions having arisen with respect to the amount to which she was thus entitled a special case was presented, the trustees of Mr Bishop senior being the first parties and Mrs Thomas Bishop being the second party.

The questions in law were:—“(1) Whether or not two-sevenths of the free personal estate of the truster falls to be deducted before striking the amount of legitim due to the late Thomas Bishop? (2) Ought the rate of interest payable by the trustees in respect of legitim to be restricted to the rate actually earned, and if not, what is the rate payable?”

With respect to the first question, the first parties maintained that in computing the legitim fund two-sevenths of the executry was to be deducted on the ground that the testator's two children by his second marriage were, under their parents' marriage-contract, creditors for one-seventh each of the executry. In this view, the second party was entitled to one-fifth of one-half of the executry after it had suffered diminution to the extent of two-sevenths, and the entire remainder of the testator's property not otherwise disposed of and including the said two-sevenths fell to be divided among the testator's six surviving chil-

No. 136. *Bishop's Trustees v. Bishop*. Mar. 17, 1894. dren in equal shares. On the other hand the second party, while not disputing that the division should take place according to the proportions just mentioned, maintained that the legitim fund ought to be calculated on the basis of taking the whole free executry without deducting two-sevenths in respect of the provision to the children of the second marriage under the marriage-contract, on the ground that these children were not thereby constituted creditors whose debts were to be deducted before striking the legitim fund.¹

With respect to the second question, the first parties maintained that the second party was entitled to interest only at the average rate actually earned—about 2 per cent. The second party claimed interest at the rate of 5 per cent.²

At advising,—

LORD RUTHERFURD CLARK.—Mr Bishop was twice married. He was survived by seven children, of whom five were by the first marriage and two by the second. His wife predeceased him.

There was no marriage-contract on his first marriage. But when he married his second wife he entered into an antenuptial contract. By that deed, in order to make a provision for the children of the marriage, he bound himself to pay to them on his death “a just proportion and share of the means and estate that may happen to belong to him at his death, along with the children of his former marriage,” and any children that might be born of any future marriage, “and that either among them equally or in any other proportion as he may appoint.” These provisions were made in full of legitim.

Mr Bishop left a settlement under which he directed his trustees at the first term of Whitsunday or Martinmas occurring one year after his death to divide his whole estate equally among his children, declaring that the issue of deceaseds should take the parents' share, and “in the event of any of them dying without leaving lawful issue, the share that would have fallen to them shall be divided equally among the survivors.”

One son survived Mr Bishop, but died before the period of distribution without leaving issue. Consequently no right vested in him, and under the will the estate is divisible in equal shares among the six survivors. The son left a widow, whom he made his universal legatee. She claims his legitim, to which she is no doubt entitled. But she further maintains that the legitim fund is one-half of the entire estate, and is not to be diminished by the amount payable under the contract to the children of the second marriage.

On the other hand, the trustees maintain that two-sevenths of the executry estate is to be deducted before the legitim fund is struck. They do so on the ground that the children of the second marriage are under the marriage-contract creditors for that amount. The remainder of the estate would then be divisible

¹ *Authorities cited on the first question*:—Goddard v. Stewart, March 9, 1844, 6 D. 1018, 16 Scot. Jur. 449; Marquis of Breadalbane's Trustees v. Marchioness of Chandos, August 16, 1836, 2 S. & M. 377; Threshie v. Threshie's Trustees, Feb. 11, 1845, 7 D. 403, 17 Scot. Jur. 200; Minto v. Kirkpatrick, May 23, 1833, 11 S. 632; Rait v. Arbuthnott, March 18, 1892, 19 R. 687; Macdonald v. Hall, July 24, 1893, 20 R. (H. L.) 88; Fraser, Husband and Wife, p. 1001.

² *Authorities cited on the second question*:—Hardie v. Kay's Trustees, Feb. 12, 1823, 2 S. (N. E.) 187; M'Murray v. M'Murray's Trustees, July 17, 1852, 14 D. 1048, 24 Scot. Jur. 639; Sharpe's Trustees v. Kirkpatrick, Nov. 15, 1878, 6 R. (H. L.) 4; Baird's Trustees v. Duncanson, July 19, 1892, 19 R. 1045; Fraser, Husband and Wife, p. 909.

among the children in equal shares—and with this result, that the children of the second marriage would take more than they could claim under the contract of marriage, and all the children more than they could take as legatees.

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I have grave doubts whether the children of the second marriage are under the antenuptial contract creditors for two-sevenths of the executry. It may well be that they have no higher right than to receive as much as the others. But whatever view is taken of that question it is plain that the will of Mr Bishop satisfied all the obligations which he undertook. For the children will receive more under the will than under the contract. I assume, therefore, that they do not repudiate the will. It is their interest to accept it, and I take it for granted that they do so. But in that case they have no other claim than that the estate shall be distributed according to the will. They cannot claim two-sevenths of the executry under the marriage-contract and two-sixths of the remainder under the will. It follows that in claiming under the will they surrender the less valuable marriage-contract provisions, and these provisions being surrendered cannot form a charge against the executry estate.

Of course if the children were creditors for a debt of which they could exact payment, and at the same time claim their rights under the will, the debt must be deducted before the legitim fund is struck. But a debt which is surrendered can have no effect. It is in the same position as if it had never been due.

It is not proposed to exact payment of the two-sevenths of the executry. The marriage-contract is put forward only as a means of diminishing the amount payable as legitim, but without diminishing the amount of the dead's part. When the legitim at its reduced amount is paid, the residue will be divided in equal sixths amongst all the children. So that the shares of the legatees are increased. In my opinion this is wholly illegitimate. If there be a debt, it diminishes dead's part as well as legitim, and if it does not diminish both it diminishes neither. The children of the second marriage cannot plead the marriage-contract against the other children, because they are claiming as equal legatees, and the latter cannot found on it in order to enlarge their legacies.

It seems to me that the case of the trustees would have been more plausible if they had maintained that the children of the second marriage were creditors for as much as might be given to the other children, and that they were entitled to exact their share as a debt. But even on this view they would not in my opinion be entitled to prevail. For the debt due under the marriage-contract is not defined by that deed. It is the amount due under a will. Consequently it cannot be ascertained without deducting legitim; for nothing can be due under a will until that deduction be made.

Again the claim under the marriage-contract is for a just proportion and share with the other children. It follows, I think, that both sets of children are to have equal shares in the same fund.

The marriage-contract which gives a claim for equality cannot be used to produce inequality. In the view which I am now considering inequality would be the necessary result, because each of the children of the second marriage would take one-sixth of the entire executry, while each of the other children would take a fourth of the remainder after deducting from that remainder the legitim due to the second party. It might be said that this is not a just inference inasmuch as all the children would take an equal share of the remainder after the payment of legitim. But this equality is only attained by a surrender of the claims under the marriage-contract, after they are used to diminish the

No. 136. legitim, and with the result of giving to the children more than they can claim as legatees.

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In this case the testator has disposed of his whole estate by a universal settlement, which embraces the legitim fund as well as the dead's part. It is, as I have said, the interest of the children of the second marriage to surrender their marriage-contract provisions in order to obtain the greater benefit which they take under the will. The share of each child under the will is a sixth of the estate after deduction of the legitim due to the second party, and in my opinion the marriage-contract cannot be used to obtain more either for the children of the second marriage or for the children of the first.

Legitim is a debt due at the date of the father's decease, and it bears interest at five per cent from that date till payment. I need not enter on this question. It is sufficient to refer to the case of *M'Murray*, 14 D. 1048, and especially to the interlocutor of the Court.

LORD JUSTICE-CLERK.—That is the opinion of the Court.

LORD YOUNG was absent.

THE COURT found that two-sevenths of the free personal estate of the truster did not fall to be deducted before striking the amount of the legitim fund, and that the rate of interest payable by the trustees in respect of the legitim found due to the second party was five per cent per annum.

WILLIAM C. BISHOP, W.S.—IRVINE & GRAY, S.S.C.—Agents.

No. 137.

JOHN WILSON, Pursuer (Respondent).—*Watt—Mac Watt.*

R. CARMICHAEL & SONS, Defenders (Appellants).—*Dickson—Cook.*

Mar. 20, 1894.
Wilson v.
Carmichael &
Sons.

Sale—Disconformity to contract—Timeous inspection by buyer—Loss of profit—Consequential damages.—In June 1891, W, a market gardener, ordered from a firm of seed-merchants 30 lbs of "Enfield market cabbage" seed, an early variety of cabbage. The invoice and the packet in which the seed was sent bore that the seed was of the variety ordered. W sowed the seed in his own garden, and retailed the plants to customers who ordered early cabbage plants, some in September 1891, but the bulk in March, April, and May 1892. In May 1892, when most of the plants were sold, W discovered that the crop was of a late variety, and ploughed down the remaining plants. In an action for damages against the seed-merchants it was proved that a skilled gardener could have discovered in September 1891 that the plants were disconform to contract. *Held* (1) that W was entitled to damages in respect that, owing to the defenders' breach of contract, his ground had been for a considerable time occupied with an unremunerative crop; but (2) that inasmuch as he had failed to discover, as he would have done had he made an inspection, the mistake in the variety of plant in September 1891, he was not entitled to damages on the grounds that claims of damages had been made against him by the buyers of the plants, and that he had lost business owing to the disappointment of his customers.

1ST DIVISION.
Sheriff of
Berwickshire.

In December 1892, John Wilson, gardener, Crailing Orchard, near Jedburgh, raised an action in the Sheriff Court at Duns, against R. Carmichael & Sons, agricultural seedsmen, Coldstream, concluding for £200 damages for breach of contract.

The pursuer averred that in May 1891 he met one of the partners of the defenders' firm at Kelso, and ordered from him 30 lbs of "Enfield market cabbage seed," an early kind of cabbage. The seeds were sent on 4th June, in a parcel marked "Enfield market cabbage." They had

been procured by the defenders from well-known seed-merchants in No. 137. Edinburgh.

The seed was sown in the pursuer's own garden in July 1891, and a good crop having come up the pursuer retailed them to his customers as early cabbages in September 1891, and in March, April, and May 1892. (Cond. 6) "After he had disposed of the greater portion of the plants, the pursuer discovered that the seed which he had received from the defenders had not been Enfield market cabbage," but that of a common or late cabbage. (Cond. 7) "In consequence of the pursuer having sold the plants grown from the seed supplied by the defenders, marked 'Enfield market' to his customers as early cabbage, he has since been threatened by claims of damages by several of the persons who received the plants. Explained that about 200,000 plants were sold to the pursuer's customers, and that said customers numbered about one hundred." (Cond. 8) "The pursuer has suffered, and will suffer, much loss to his business in consequence of his having (through the fault of the defenders) sold late cabbage in place of early ones."

The pursuer pleaded;—(1) The defenders having failed to deliver Enfield cabbage seed as contracted for, they are liable in damages. (2) The defenders having delivered a late variety of cabbage seed in place of the variety contracted for, they have caused loss and damage to the pursuer as condescended on, and he is entitled to the amount of damages sued for, with expenses.

The defenders pleaded;—(2) The pursuer having known that the plants sold by him were of a late variety of cabbage, is barred from claiming damages.

Proof was led, from which it appeared that it was impossible to tell early from late cabbages in the seed, but that by September a skilled person could have told whether they were of an early variety. This was admitted by the pursuer, but he explained that in that and the succeeding autumn months he did not go near the field in which they were growing, being unable to do so from illness, and that the crop was superintended by his son, who had not the same knowledge of gardening as he had. Up to the end of May about 200,000 plants were retailed to customers, all as early cabbages. About the middle of May the pursuer transplanted a number of the plants to another part of his garden with the view of selling them as grown cabbages. He then discovered that they were of a late variety, ceased to sell them and ploughed down the remaining plants—about 70,000 to 100,000 in number. Many customers complained to the pursuer of the plants supplied to them, and several of them made claims for damages.

On 31st March 1893 the Sheriff-substitute (Dundas) assolizied the defenders. On appeal the Sheriff (Hope) found that the defenders had committed a breach of contract, and allowed additional proof of the amount of damage. After additional proof on 27th October the Sheriff assessed the damages at £80.

The defenders appealed, and argued;—The pursuer should have discovered the fact that the cabbages were late cabbages in September at latest, and should have sold them as such, and called on the defenders to supply early plants. He had neglected his duty of inspection, and was not entitled to damages consequent on his neglect. The duty of the pursuer was to discover the disconformity to contract, and then to minimise the damage by selling the plants as late plants, and to claim from the defenders the difference in price, or to ask them to give him early plants to satisfy his customers. He should have taken this course even after finding out that they were late plants in May, and cer-

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tainly had no right to plough down the remainder of the crop. In estimating damages in such cases as this where an innocent mistake had been made, the lowest possible scale of damage should be adopted; and further, the defenders were not liable in damages incurred by subvendees.¹

Argued for the pursuer;—When he bought the seed it was impossible to know early from late seeds. The defenders did not attempt to prove that he could have known. That being so, it was not his duty to make any minute examination of the plants in September. The question was whether he had taken reasonable means to mitigate the damage. The *onus* of shewing how he could have done more in that direction was on the defenders, and they had not pointed at anything which he could have done. The ploughed-down plants were unsaleable, and the defenders had not even averred that they were saleable.² The damages were not in the circumstances excessive. The defenders were liable for damages incurred by the subvendees.³

At advising,—

LORD PRESIDENT.—The argument in this appeal proceeded upon the footing that the seed supplied was disconform to contract, the difference being that it was seed of late cabbages, whereas the contract was for the seed of early cabbages. The difficulty in the way of the pursuer's case arises from the facts relating to a later stage of events. The defence that the goods were not timeously rejected is plainly inappropriate. The question is therefore really as to the amount of damage; but although the tendency of the Court is to support a Sheriff's award of damages we cannot evade the decision of such definite questions as the defender has raised under this appeal, although the amount involved is not large.

The seed was sown in July 1891 in the pursuer's own market garden, and the plants came up. The evidence of the pursuer himself seems to shew quite clearly (indeed he says so in so many words) that by the month of September any skilled gardener can tell the difference between early and late cabbage plants. Unfortunately the difference was not noticed, the reason apparently being that the pursuer's son had not had much experience at that time, and the pursuer personally was not about. But not the less is it the case that, in the ordinary course of events, the difference would have been noticed. Well, then, from September onwards, sales were made of the plants as early cabbage plants, and the two first heads of damage arise (1) from claims of damages by the purchasers of those plants; and (2) loss of business arising from the disappointment of customers, leading them to give up dealing with the pursuer. I have come to the opinion that the pursuer cannot recover on those grounds. The proximate cause of the mistake of the customer's getting late instead of early plants was the omission of the pursuer or his son to notice that the plants which he sold to his customers were late cabbages, and this was not a natural consequence of the defenders' breach of contract.

The next head of damage relates to certain of the plants which were trans-

¹ *Borries v. Hutchinson*, 1865, 34 L. J. C. P. 169; *Grébert Borgnis v. J. & W. Nugent*, 1885, L. R., 15 Q. B. D. 85; *Thol v. Henderson*, 1881, L. R., 8 Q. B. D. 457; *Duff & Co. v. Iron and Steel Fencing and Buildings Co.*, Dec. 1, 1891, 19 R. 199; *Smith & Son v. Waite, Nash, & Co.*, March 9, 1888, 15 R. 533.

² *Roper v. Johnston*, 1873, L. R., 8 C. P. 167; *Smith & Son v. Waite, Nash, & Co.*, March 9, 1888, 15 R. 533.

³ *Randall v. Roper*, 1858, Ell., Black., & Ell. 84, also 27 L. J. Q. B. 266.

planted about the middle of May and dealt with by the pursuer as early cabbages for retail sale. But unfortunately here the same answer applies. It was only after the transplanting that the discovery was made, which, in ordinary course, should have been made the September before, and if the discovery had been made, the transplanting would never have taken place. No. 137.
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The disallowance of the three heads of damage which I have now gone over would strike £60 off the sum which the Sheriff has awarded. The remaining £20 was mainly supported in argument by a theory about "ploughing down" in May, which comes perilously near the objection which wrecks the other claims. I think, however, that an award of damages to the amount of £20 may be justified upon somewhat broader grounds. It was directly due to the breach of contract that the pursuer's nursery ground was to a considerable extent, and for a considerable time, occupied with seed which, on the evidence, was not remunerative. Even if the pursuer had made the discovery in September, the general facts of the case warrant the inference that he had already to a certain extent irretrievably lost the profitable occupation of his ground, and a certain amount of labour. It is to be regretted that the pursuer has not, in evidence, made this aspect of his case clearer, his attention having been too much given to claims which are unsound in law. But the evidence seems to me adequately to support an award of £20.

I am for recalling the last interlocutor of the Sheriff, finding in fact that the seeds supplied were disconform to contract, and that the pursuer has suffered damage to the amount of £20. On these two findings in fact, and the appropriate and obvious finding in law, I would give the pursuer decree for £20.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff dated 27th October 1893: Find in fact that the seeds supplied by the appellants (defenders) were disconform to contract: Find in law that the defenders are liable in damages: Find in fact that the pursuer has suffered damage to the amount of £20: Decern for payment by the defenders to the pursuer of £20: Find the pursuer entitled to expenses in the Sheriff Court, and to half the expenses in this Court, and remit," &c.

WINCHESTER & NICOLSON, S.S.C.—PRINGLE, DALLAS, & Co., W.S.—Agents.

HUGH TENNENT, Pursuer (Respondent).—*Dickson—Ure—John Wilson.* No. 138.
MAGISTRATES AND COMMISSIONERS OF PARTICK, Defenders (Reclaimers).—*Lees—D. Dundas.*

Mar. 20, 1894.
Tennent v.
Magistrates of
Partick.

Process—Title to sue—Declarator—Construction of statute—Public-House. The magistrates of a police burgh having intimated that they claimed, under the Burgh Police (Scotland) Act, 1892, to be the licensing authority for the sale of exciseable liquors within the burgh, a publican holding a licence for premises in the burgh, which had been granted by the county Justices, brought an action for declarator that the licensing jurisdiction within the burgh had not been transferred from the county Justices to the burgh magistrates, and for interdict against the magistrates acting as the licensing authority.

Held that the pursuer had a title to sue.

Public-House—Burgh—Police—Certificate—Licensing authority—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 38.—Held that the right of granting, refusing, renewing, and transferring certificates, under the

No. 138. Public-Houses Act, for premises within police burghs has not been transferred under the Burgh Police (Scotland) Act, 1892, sec. 38, from the county Justices to the magistrates of such burghs.

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LdStormonth-Darling.

ON 6th November 1893 Hugh Tennent junior, wine and spirit-merchant, 191 Byres Road, Partick, in the Lower Ward of Lanarkshire, who held a public-house certificate for these premises, granted by the Justices of the Peace of the Lower Ward, brought an action against the Magistrates and Police Commissioners of Partick, and also against George Gray, clerk of the peace for the Lower Ward, as representing the Justices, for any interest competent to them, in which he concluded for declarator that the defenders the Magistrates of Partick had no right or title to act as the licensing authority for the said burgh in so far as regarded the granting or refusing of certificates or the renewal or transfer of certificates for licensed premises under the Public-Houses Acts, and in particular, or otherwise, that the said defenders had no right or title to assert or exercise jurisdiction as regarded the granting, refusing, renewing, or transferring of a certificate for the pursuer's said premises, and for interdict against the said defenders acting as such licensing authority.

The Magistrates and Police Commissioners of Partick alone lodged defences.

The circumstances out of which the action arose were as follow :—

Previous to the passing of the Public-Houses Acts Amendment (Scotland) Act, 1862, the right of granting and renewing licences for the sale of exciseable liquors in Scotland was vested in two sets of authorities, viz., the Justices of the Peace for counties and districts, and the magistrates of royal burghs for such burghs. By the Act of 1862 the magistrates of parliamentary burghs were invested with the licensing authority for these burghs.

The question raised in the present action was whether the magistrates of police burghs—of which Partick was one—had been constituted the licensing authority for such burghs, by the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55).

This question depended primarily on section 38 of that Act, which was in these terms :—"The magistrates and commissioners elected in virtue of this Act shall, within the limits of the burgh, for the purposes of this Act, possess such and the like rights, powers, authorities and jurisdiction, as are possessed by the magistrates and council of royal and parliamentary burghs in Scotland." The other clauses of the Act founded on by the parties in argument are sufficiently set forth in the opinions of the Lord Ordinary and the Court.

On 9th June 1893 the Justices of the Peace of the Lower Ward, at a general meeting of Quarter Sessions, passed a resolution to the effect that their jurisdiction with respect to the granting, &c. of public-house certificates had not been taken away nor in any way interfered with by the Burgh Police (Scotland) Act, 1892. This resolution was, on 14th June, intimated to the pursuer.

On 17th June the Magistrates of Partick issued a circular, of which the pursuer received a copy, notifying that they claimed under the Burgh Police (Scotland) Act, 1892, to be the licensing authority within the burgh of Partick, and that as such they would from that date proceed to deal with the granting, &c. of licences within the burgh. Further, at a meeting held on 22d August, they proceeded to grant transfers for the current year of certain certificates which had been granted by the Justices of the Lower Ward, and on 17th October the magistrates held a meeting, which had previously been intimated to the pursuer and the other licence holders in Partick, as being the half-yearly statutory Licensing Court.

The pursuer pleaded;—The pursuer is entitled to decree of declarator No. 138. and interdict, with expenses, as concluded for, in respect that the defenders, the Magistrates of the said burgh of Partick, have unwarrantably asserted and exercised jurisdiction as regards the granting, refusing, renewing, and transferring of certificates under the Public-Houses Acts for premises situated in the burgh of Partick, and, in particular, for the licensed premises in the said burgh occupied by the pursuer.

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The defenders pleaded;—(1) The action is irrelevant. (2) On a just and sound construction of the provisions of the Burgh Police (Scotland) Act, 1892, the right of granting, refusing, renewing, and transferring certificates under the Public-Houses Acts for premises within the burgh of Partick at meetings of the licensing authority held subsequent to 15th May 1893, and the right of imposing punishment for the breach of said or existing certificates, or for other contraventions of said Acts, have been conferred on these defenders.

On 13th February 1894 the Lord Ordinary (Stormonth-Darling) granted decree of declarator and interdict as craved.*

* "OPINION.— . . . Admittedly, in all the 518 clauses of which the Act consists, there is no mention of the Public-Houses Acts except in sections 501 and 515, which relate to offences against these Acts. But it cannot be said that the right to try offences against these Acts implies the right to grant certificates under them, because during the thirty years from 1862 to 1892 the magistrates of police burghs possessed the first of these rights and not the second. If, therefore, the right of licensing in burghs which are neither royal nor parliamentary has been taken away from the justices and conferred on the magistrates, it must be by implication from some general clause. I state the question as one of transfer from the one body to the other, because the notion of a concurrent jurisdiction is quite inadmissible. No such thing has ever existed in licensing law, and the objections to it are too obvious to require argument.— (See *Booth v. Lang*, 5 Irv. 371.)

"The first observation which occurs to one is that an existing jurisdiction is not usually taken away except by clear and precise words. The defenders endeavour to meet that difficulty by pointing to the Public-Houses Amendment Act of 1862, in which the divestiture of the justices and the investiture of the magistrates in parliamentary burghs with the power of licensing is accomplished mainly by the interpretation clause, which defines 'burgh' as including any royal or parliamentary burgh. But the whole tenor of the Act makes it plain that in the limited class of parliamentary burghs the justices are no longer to exercise their former jurisdiction. The provisions as to meetings and procedure, the forms of applications and certificates, the reference in sections 6 and 10 to the 'respective jurisdictions' of the justices and magistrates, all shew conclusively that the Legislature intended to substitute the one authority for the other. Above all, there is, in section 32, a careful provision for protecting the vested interests which would be damaged by the transference. I refer to the provision that the town-clerks of parliamentary burghs should pay to existing clerks of the peace, during their tenure of office, one-half of the fees received by them in connection with licensing business. The Act of 1862, therefore, affords no aid to the argument that a transfer of jurisdiction may be accomplished by mere implication.

"Now, what are the words by which the transfer is said to be effected— [His Lordship quoted sec. 38]. The defenders' argument is, that as licensing is one of the rights, powers, authorities, and jurisdictions possessed by the magistrates of royal and parliamentary burghs, it is conferred on the magistrates of police burghs by this clause.

"The first answer made by the pursuer to this argument, and I confess I think it a formidable one, is that the clause professes to deal with the rights, powers, authorities, and jurisdictions, not of the magistrates, but of the magistrates and council, of royal and parliamentary burghs, and similarly that

No. 138. The defenders reclaimed.

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At the hearing, doubts having been expressed from the bench as to the

it confers these, not on the magistrates, but on the magistrates and commissioners of police burghs. If this be sound, it is conclusive of the question, because the right of licensing was never vested in the magistrates and council of any burgh. Licensing is a discretionary power, to be exercised judicially—(*Sharp v. Wakefield*, 1891, App. Ca., per Lord Chancellor, at p. 179), and it belongs to the magisterial office, as distinguished from the deliberative functions of the council. The defenders say that the clause ought to be read distributively. I do not know what warrant there is for this, in the absence of any distributive phrase like 'or either of them,' or 'respectively.' Without such words, I think it would be a very loose reading of the clause to apply to it powers which the magistrates possess apart from the council. And I am confirmed in this view by finding in the Act another section (the 454th) by which it is declared, *inter alia*, that the magistrates of a police burgh 'shall have the like jurisdiction within the burgh, as any magistrate of a royal burgh, or any dean of guild of a royal burgh, has by the law of Scotland.' It is conceded by the defenders that this clause truly refers to police offences, and does not help their case in the question of licensing. But if section 38 had been intended to have the wide effect for which they contend, there was no need for any other words assimilating the jurisdiction of the magistrates of police burghs to that of the magistrates of royal burghs. If they are right, the thing has been done already.

"The second answer made by the pursuer to the defenders' argument on section 38 is that the assimilation of powers thereby enacted is controlled by the words 'for the purposes of this Act.' The commas inserted by the Queen's printer rather look as if these words referred merely to the limits of the burgh, and that is what the defenders say they do refer to. But there is no punctuation in the rolls of Parliament, and therefore Courts of law are not bound by the punctuation in the printed copies—(see C. J. Cockburn's opinion in *Stephenson*, 1 Best and Smith, at p. 106, and Lord Romilly's in *Barrow*, 24 Beav. at p. 327). I am disposed to regard the words in question as governing the whole clause. The Dean of Faculty referred to some other sections, particularly sections 8, 11, and 13, in which the words clearly refer to the boundaries of the burgh. But these are sections dealing exclusively with boundaries, and therefore the words could not refer to anything else. Here, on the other hand, the subject-matter of the clause is the powers of the magistrates and commissioners, and it seems natural to refer the restrictive words to the matter in hand. In the other clause relating to jurisdiction (the 454th) the words 'within the burgh' are not followed by the words 'for the purposes of this Act,' shewing that the words 'within the burgh' were thought sufficient to describe the area within which jurisdiction was to be exercised, and therefore that the words 'for the purposes of this Act' where they do occur ought to receive a wider application. Admittedly the assimilation of powers in the 38th section is not a complete or universal assimilation, for one of the rights of the magistrates and council of a royal burgh is to return a representative to the Convention, and it cannot be pretended that the right is conferred on police burghs. If the rights and powers (whatever they may be) are conferred only for the purposes of this Act, the clause is perfectly intelligible, and (as I shall presently shew) harmonious with the rest of the Act, and with the previous Acts on the same subject. So read, its effect is simply to invest the municipal authority of police burghs with such rights and powers, not otherwise conferred, as had been found useful in the older class of burghs in enabling the corresponding authorities to perform their functions. That, I think, is the true meaning of the clause; but it is a meaning entirely inconsistent with the notion that the clause has the effect of sweeping in a kind of jurisdiction which is not to be found among the declared purposes of the Act.

"There is yet a third answer made by the pursuer to the defenders' construction of the clause, which is to my mind conclusive in itself. It is this, that

competency of the action, the pursuer was called upon to submit argument on that point, and argued accordingly;—The action was competent. **No. 138.**

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the defenders' construction is inconsistent both with the other parts of the statute and with prior statutes on the same subject.

"Taking first the statute itself, we find in section 431 an express provision that the magistrates shall be the local authority for the purposes of the Weights and Measures Acts, 1878 and 1889, and that the word 'burgh' in these Acts 'shall include any burgh under this Act.' Now, if the defenders' argument be sound, that provision was entirely unnecessary, for the Weights and Measures Act of 1878 (by section 50 and schedule IV.) provided that the local authority should be the magistrates of a burgh, and burgh was defined (by section 74) as including royal and parliamentary burghs. According to the defenders, then, the framers of the Act ought to have been content with the sweeping effect of section 38, which had already conferred on the magistrates of police burghs all the rights, powers, authorities, and jurisdiction of the magistrates of royal and parliamentary burghs. Again, by section 432 it is enacted that the commissioners of any burgh under this Act shall be the local authority under the Sale of Food and Drugs Act, 1875. Why take the trouble to say that if by section 38 (reading it distributively as the defenders say it ought to be read) all the rights and powers of the councils of royal and parliamentary burghs had already been conferred on the commissioners of police burghs, seeing that among these rights and powers the power of acting as local authority under the Food and Drugs Act had been included by sections 10 and 33 of the Act itself? I mention these as instances which have resulted from my own examination of this voluminous statute, but I daresay there are others.

"It is, however, when we come to consider the effect of clauses almost identical that we realise the full difficulty of attributing to it the meaning for which the defenders contend. [His Lordship then referred to the Act 3 and 4 William IV. cap. 77, section 30.] The two clauses are in substance identical, and the clause in the Act of 1833 would have been just as good for conferring jurisdiction in licensing matters on the magistrates of parliamentary burghs as the clause in the Act of 1892 can possibly be for conferring it on the magistrates of police burghs. Yet we know that the magistrates of parliamentary burghs had no such jurisdiction until it was conferred upon them by the Public-House Act of 1862.

"Again, in the Police and Improvement Act of 1850 (13 and 14 Vict. cap. 33) there was a clause (section 345), not indeed identical with section 38, but I cannot see why, if the defenders' argument be sound, it should not have been read as conferring licensing jurisdiction on the magistrates of police burghs. For it provided that the magistrates should have 'all such and the like jurisdiction' within such burgh as any magistrate of a royal burgh. Yet not even the defenders allege that the magistrates of police burghs had licensing jurisdiction until the Act of 1892 came into operation. I say the same of section 408 of the Police and Improvement Act, 1862.

"Both parties appealed to the general scope and tenor of the Act of 1892. The pursuer maintained that the terms of the preamble excluded the notion that it was intended to deal with licensing. I do not assent to that, for I think that the preamble is wide enough to cover it. But neither can I adopt the defenders' view that the leading purpose of the Act was to gather into one administrative body all the functions of local government within police burghs. In many police burghs, county councils and district committees still exercise important powers of administration and assessment as regards roads, the police force, and other matters. There may be many reasons why licensing jurisdiction should have been conferred on police burghs so populous and important as that which the defenders represent, but there may also be some reasons why it should not have been conferred on the newer and smaller burghs. Possibly a solution might have been found in drawing a line in respect of population. But these are matters of policy with which I have nothing to do. The only question which I have to decide is whether the effect of the Act is to transfer

No. 138. It was well settled that the Court had jurisdiction both to compel inferior judicatories to exercise their powers and to restrain them from exceeding their powers. This jurisdiction had been recognised in regard to presbyteries,¹ magistrates,² inspectors of poor,³ commissioners of supply,⁴ and arbiters.⁵ [LORD KINNEAR.—It is hardly doubtful that the Court has jurisdiction. The question is,—Have you, an individual, a title to sue a general declarator against a body of magistrates?] It was not a general declarator merely, for there were particular operative conclusions directed with reference to the pursuer's individual position and rights; and the pursuer, who was a licence-holder and not merely one who desired to obtain a licence, and who was threatened with the interference of a body which, he believed, had no right to interfere, had a sufficient patrimonial interest entitling him to sue the action.⁶

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The defenders, who did not maintain that the action was incompetent, were not called upon to argue the question of competency.

LORD PRESIDENT.—The Court are satisfied that the pursuer has a sufficient title to sue.

The arguments on the merits sufficiently appear from the opinions.⁷
At advising,—

LORD PRESIDENT.—The Magistrates of Partick maintain that, by section 38 of the Burgh Police (Scotland) Act, 1892, the Justices of the Peace for the

licensing jurisdiction from the justices to the magistrates. My opinion is that, if such had been the intention, there ought to have been, and there would have been, a careful enactment making the provisions of the Licensing Acts of 1828 to 1887 (which were fully in view of the framers of the Act, for they are mentioned in section 501) applicable to the new *régime*. I take the words of Lord Halsbury in *Sharp v. Wakefield*, at p. 182 of App. Ca. 1891, and I say, —‘In a matter so constantly before the Legislature as the licensing laws, I cannot but think that if it was intended to alter the law in this respect it would have been done in plain and unambiguous language.’

“For these reasons I have come to the conclusion (I confess without any hesitation) that the right of granting and renewing certificates remains unaffected by the Act, and that the pursuer is entitled to decree as concluded for.”

¹ *Heritors of Corstorphine v. Ramsay*, March 10, 1812, F. C.

² *Ashley v. Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708, 45 Scot. Jur. 440, aff. April 17, 1874, 1 R. (H. L.) 14.

³ *Edinburgh and Glasgow Railway Co. v. Meek*, Nov. 23, 1849, 12 D. 153, 22 Scot. Jur. 17.

⁴ *Lord Advocate v. Commissioners of Supply of Edinburgh*, June 5, 1861, 23 D. 933, 33 Scot. Jur. 484.

⁵ *Forbes v. Underwood*, Jan. 22, 1886, 13 R. 465.

⁶ *Gifford v. Trail*, July 8, 1829, 7 S. 854; *Morton, Whitehead, & Greig v. Smith*, Nov. 7, 1864, 3 Macph. 29, 37 Scot. Jur. 14; *Morton v. Gardner*, Feb. 24, 1871, 9 Macph. 548, 43 Scot. Jur. 266; *Edinburgh Street Tramways Co. v. Torbain*, May 18, 1876, 3 R. 655, July 6, 1877, 4 R. (H. L.) 87; *Hogg v. Parochial Board of Auchtermuchty*, June 22, 1880, 7 R. 986; *Glasgow City and District Railway Co. v. Magistrates of Glasgow*, July 18, 1884, 11 R. 1110.

⁷ *Authorities cited*.—*Johnston v. Laing*, March 25, 1876, 3 Coup. 250; *Booth v. Lang*, April 27, 1867, 5 Irv. 371; *Sharp v. Wakefield*, L. R. [1891] App. Cas. 173; *Greaves v. Towfield*, 1880, L. R., 14 Chanc. Div. 563; *Galsworthy v. Durrant*, 8 Weekly Reporter, 594; *Police Commissioners of Oban v. County Council of Argyllshire*, March 9, 1894, *supra*, p. 644; *King v. Bristol Dock Co.*, 6 Barn. and Cres. 181.

Lower Ward of Lanarkshire have been divested of the power and duty of granting certificates for licences to sell excisable liquors within the police burgh of Partick, and that that power and duty is now vested in themselves. I agree with the Lord Ordinary that the idea of a concurrent jurisdiction in granting licences is impossible; and the defenders' argument necessarily involves the idea of transfer from the county magistrates.

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Now, I shall assume, throughout this opinion, that the effect of the section is, for the purposes of the Act, to give to the magistrates of police burghs such powers as the magistrates of royal and parliamentary burghs possess. The grant of powers, however, is qualified by these words "for the purposes of this Act," for it is impossible to hold them confined to the words "limits of the burgh." Now, the proper and professed function of a clause like section 38 is to effectuate the other provisions of the Act; it is executive of the purposes of the Act; for those purposes it gives the magistrates the powers which certain other magistrates possess. Accordingly, section 38 is not a self-contained section, it bids us look outside its own terms for its scope, and points to the other sections of the Act for information as to what its purposes are. I shall briefly state the result of my examination of the statute.

First of all, the preamble of the Act is legitimately referred to for ascertaining the purposes of the Act. The laws which are to be amended are the laws relating to the police and sanitary administration of towns and populous places. Now, I do not think that, even if the word "police" receive a very wide construction, it would necessarily or probably be expected to include the licensing of public-houses, especially when we find historically that changes in the licensing bodies have been effected, not in Police Acts, but in Acts relating directly to the liquor laws.

Another part of the Act which bears on this general question of its purposes is the 5th section. There the Act is said to supersede and come in place of local Police Acts,—treating therefore presumably of the same or similar matters.

When we go on to examine the very numerous specific enactments contained in this statute, the antecedent impression which one derives from those initial passages to which I have referred is entirely confirmed. The Act is very busy with a vast number of things, and has plenty to say about the minutiae of all that it interests itself in. If so distinct a branch of magisterial duty as the licensing of public-houses were in its view, it would certainly have said something about it, more especially as there was an existing licensing body to oust. And yet the subject of granting licences is never so much as named. This is the more striking that the liquor laws are mentioned in sections 501 and 515, for the purpose of seeing that the magistrates deal with prosecutions for offences against them. Again, the string of sections about licensing theatres is in marked contrast to the blank about licensing public-houses, although the omitted subject is of at least equal importance. Those sections, in explicit terms, authorise magistrates to grant licences to theatres.

On a review of the whole statute I can find no indication that the amendment of the law relating to the licensing of public-houses is one of the purposes of the Act. There are in the Act no specific provisions on this particular subject; it is not necessarily or naturally within the general terms employed as descriptive of the purposes of the Act, and the scheme of the Act makes the conclusion to my thinking irresistible that the reason why it is not specifically provided for is that it was not in contemplation.

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I may add that it cannot be said that, if we hold the granting of licences to be within the Act, it has rendered the police burghs entirely autonomous; the smaller burghs are not allowed to establish police forces,—that is done by the county,—and in one or two other matters the county authorities still regulate.

I have said that I assume that the 38th section deals with the magistrates and the commissioners distributively. I say so for this reason that, looking to the interpretation clause, *voce* “commissioners”; to section 55; to the immense series of sections in which the expression “the commissioners” is used, and to the absence of any (other than that in dispute) in which the phrase the magistrates and commissioners occurs as equivalent to the commissioners, I am not convinced of the soundness of the argument that section 38 gives no separate power to the Magistrates as distinguished from the Commissioners. With that reservation, I agree with the Lord Ordinary, and I am for adhering to his Lordship’s interlocutor.

LORD ADAM.—It appears to me that the decision of this case is primarily—almost altogether—dependent on the proper construction of section 38 of the Act. It was said to us that the effect of that clause was to confer on the magistrates and commissioners elected by virtue of the new Act all the powers, authorities, and jurisdictions of whatever kind conferred upon the Magistrates and Council of royal burghs. If that had been the proper construction of the Act it would have conferred upon the Magistrates and Commissioners of Partick, as the licensing authority, the right of issuing licences and so on. The other view which was presented to us was that that was not the true construction of the clause, but that it was limited by the words “for the purposes of this Act.” In the latter view we require to go to the other clauses of the Act to see what the purposes of the Act are. If we do not find within the Act words authorising and empowering the magistrates of new burghs to issue licences, then such a power is not within this 38th section.

I concur with your Lordship on the construction of this clause. I think that the intention of the clause is to confer on magistrates and commissioners elected in virtue of the new Act the like rights which were possessed by the magistrates of royal and parliamentary burghs “for the purposes of this Act,” and not otherwise. I think that is the only possible construction.

That being so, I have gone to the Act to find what the purposes of the Act are, and I agree with your Lordship that when we look to the 500 or 600 sections of this Act we do not find that there is any provision dealing with the granting, refusing, renewing, and transferring of certificates under the Public-Houses Acts. I do not think therefore that the Act confers upon the magistrates of police burghs the powers, in respect to these matters, which the magistrates of royal and parliamentary burghs had.

Therefore, I agree with your Lordship that the Lord Ordinary’s interlocutor should be adhered to.

LORD KINNEAR concurred.

LORD M’LAREN was absent.

THE COURT adhered.

JAMES PURVES, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

ARCHIBALD MACRAE (MacLearn's Judicial Factor), Pursuer and
Real Raiser.

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THE LORD ADVOCATE, Claimant (Reclamer).—*Comrie Thomson—Young.*

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DAVID MURRAY (Mr and Mrs Freckleton's Judicial Factor), Claimant
(Respondent).—*D. Dundas—M'Nair.*

STATE SCHOOL COMMISSIONER FOR THE STATE OF GEORGIA, U.S.A., Claimant.

JOHN KINLOCH AND OTHERS, Claimants.

Revenue—Legacy-duty—Legacy compounded for less than the amount thereof—Act 36 Geo. III. cap. 52, secs. 23 and 37.—The Act 36 Geo. III. cap. 52, sec. 23, enacts that where a legacy shall be released for a consideration or compounded for less than the value thereof, legacy-duty shall be paid in respect of such legacy according to the amount taken in satisfaction thereof.

A competition between a person claiming a bequest on behalf of a class of beneficiaries under a will and the next of kin (a niece) of the testator, who maintained that the bequest was void from uncertainty, was terminated by joint minute under which each party received one-half of the subject of the bequest. The Court interposed authority to the minute, and in terms thereof ranked and preferred each claimant to one-half of the fund.

The Crown then claimed legacy-duty at the rate of 10 per cent on the whole fund, on the ground that as the bequest had not been set aside the rate of duty for the whole was that payable by strangers in blood to the testator. The testator's next of kin maintained that the rate of duty on the half payable to her under the arrangement ought to be 3 per cent only.

Held that, under section 23 of the Act, the bequest having been released for payment of one-half of its amount, duty at the rate of 10 per cent was payable on that half only, and that the half payable to the next of kin was liable to 3 per cent duty.

JOHN MACLEARN, residing in Renfrew Street, Glasgow, died on 9th^{1st DIVISION.} July 1836, leaving a trust-disposition and settlement, dated 27th August 1834, by which he conveyed his whole estates to trustees for the purposes therein specified, and, *inter alia*, directed his trustees to convey to certain persons named, who were resident in Savannah, State of Georgia, United States of America, one-half of whatever sum he might be found entitled to receive out of the estates of a deceased brother and nephew, the said sum to be applied by these persons in the education of the negro or slave population upon the plantation of Gourie on the Savannah River, so soon as the laws of the State of Georgia should permit the education of the negro or slave population.

The persons named declined to accept this trust on the ground that, by an Act of the Legislature of Georgia passed in 1829 it was a punishable offence to teach a slave or a free person of colour to read or write. The testator's general trustees then brought an action of multiplepinding and exoneration, which resulted in the sum of £262, 3s. 2d. (being one-half of the estates above mentioned after deduction of expenses) being consigned to await the contingency contemplated by the testator, and the general trustees were exonerated and discharged.

Nothing was done with regard to the consigned money until September 1890, when Archibald Macrae, accountant, Glasgow, was appointed judicial factor on the fund, in a petition at the instance of certain of the residuary legatees and next of kin of the testator.

The factor having uplifted the consigned money, which with interest amounted to £734, 18s. 11d., then brought the present action of multiplepinding for its distribution.

Claims were lodged for David Murray, judicial factor on the marriage-contract trust of Mr and Mrs Freckleton, Mrs Freckleton having been a niece of the testator and his next of kin; and for John Kinloch and

No. 139. Mar. 20, 1894. Lord Advocate v. Freckleton's Judicial Factor. others, the representatives of certain of the testator's residuary legatees. Both these claims proceeded on the footing that the bequest to the negroes was void from uncertainty, Freckleton's factor *primo loco* claiming the whole fund *in medio* as having fallen into intestacy, and the other claimants claiming to share in it as having fallen into residue. Freckleton's factor also claimed alternatively to be ranked and preferred as representing one of the testator's residuary legatees.

A claim was also lodged for D. S. Bradwell, State School Commissioner for the State of Georgia, who maintained that the bequest was effectual. He stated,—(2) “The State Board of Education, of which the claimant, the State School Commissioner, is the executive officer, is by law authorised to receive donations and bequests for educational purposes, and to expend the same in accordance with the terms on which they may be granted. There is now nothing in the laws of Georgia to prevent the bequest from being applied to the purposes intended. The descendants of the negroes who were on the Gourie plantation in 1821 can still be traced. There has been little or no emigration among the negroes on the Georgia coast. . . . Further, there are still negroes who labour on the Gourie plantation. Education is now free in the State of Georgia to both races, but the amount of the legacy could be expended by the claimant in enabling the negroes intended to be benefited to attend the Coloured University, near Savannah, which is in the vicinity of the Gourie plantation.”

On 20th October 1892 the Lord Ordinary (Wellwood) allowed the claimant Bradwell a proof of his averments, and to the other claimants a conjunct probation; but the litigation between these claimants was terminated by a joint minute, to which the Lord Ordinary, on 18th October 1893, interposed authority, and in terms thereof ranked and preferred Bradwell to one-half of the fund *in medio*, and Freckleton's factor to the other half, repelled the claim for Kinloch and others, the representatives of the residuary legatees, and ordained the pursuer and real raiser to make payment to Bradwell and Freckleton's factor accordingly, “but under deduction always of the expenses necessarily incurred by the pursuer and real raiser, including the whole Government duties payable in respect of the succession of the respective claimants to the fund *in medio*.”

The Lord Advocate, on behalf of the Board of Inland Revenue, then lodged a claim for legacy-duty at the rate of 10 per cent on the whole fund *in medio*, maintaining that as the parties had not submitted their claims to the decision of the Court, but had entered into a compromise, the bequest to the negroes remained operative and unrevoked, and that consequently, being a bequest to strangers in blood of the testator, it was liable to legacy-duty at the rate of 10 per cent.

Freckleton's judicial factor, founding on section 23, or alternatively on section 37 of the Act 36 Geo. III. cap. 52,* maintained that the half of

* The Act 36 Geo. III. cap. 52, section 23, enacts,—“That where any legacy or part of any legacy, or residue or part of residue, wherewith any duty shall be chargeable by this Act shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then and in such case the duty shall be charged and paid in respect of such legacy or part of legacy, or residue or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same.”

Section 37 enacts,—“That if the authority under or by colour of which any person shall have administered the estate or effects of any person deceased, or

the fund *in medio* payable to him as representing the next of kin of the testator, was liable to duty only at the rate of 3 per cent. No. 139.

On 31st January 1894 the Lord Ordinary (Wellwood) pronounced an interlocutor sustaining the Lord Advocate's claim to duty at 10 per cent only to the extent of the half of the fund *in medio* payable to Bradwell, and as regarded the other half payable to Freckleton's judicial factor to the extent of 3 per cent.*

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any part thereof, shall be void, or be repealed, or declared void, and such person shall before the avoidance, repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former Acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said Commissioners of Stamp Duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said commissioners out of any moneys in their hands arising from the duties imposed by this Act or the said former Acts; but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case the payment of such duty shall be valid and effectual notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid."

* "OPINION.—The Crown claims duty at the rate of 10 per cent on the whole fund *in medio*, on the ground that the bequest is in terms a bequest to strangers in blood; that it has never been set aside or declared inoperative; and that it is immaterial that one-half of it only has been paid to the strangers in blood. The Crown founds on the decision in *Stracey's case*—*The Queen v. Commissioners of Stamps and Taxes*, 1844, 6 A. and E. (Q. B.) p. 657. In that case, after probate had been obtained by the executors named in the will, who were strangers in blood to the testator, and duty paid at the rate of 10 per cent, the will was of consent declared to be null, it being arranged that the executors named should retain about one-half of the personal estate. The Commissioners of Taxes, having been asked for a return of duty on the footing that, in respect of the will being annulled, only 3 per cent was due on the whole of the personalty, proposed only to return so much as represented 10 per cent on the money paid by the original executors to the next of kin. But it was held that the case fell under the 37th section of 36 George III. c. 52, and that the will having been avoided, only 3 per cent was due upon the whole sum, and that it was immaterial that the will was avoided by consent, and that the strangers in blood had retained one-half. That judgment told against the Crown's claim. It is now appealed to by the Crown as an authority that, if a will is not set aside, the duty chargeable must be regulated according to its terms, whatever arrangement may be privately made as to the disposal of the estate. Assuming that case to be well decided, it is not against the argument for the residuary legatee. Not only in point of fact, but as a matter of form, and by decree of the Court, the bequest has been refused effect to the extent of one-half. No doubt, this was done by arrangement, and not *causa cognita*; but according to *Stracey's case* you cannot inquire into the grounds on which the Court proceeds; the result alone is regarded. Here no reduction was required. If the case had been fought out, and I had decided in favour of the residuary legatee and next of kin, I should have ranked and preferred him to the whole of the legacy, without necessarily stating the grounds on which I proceeded. It would not have been necessary to expressly declare that the legacy had lapsed or become inoperative, although that would really have been the ground of judgment. As matters stand, I have ranked and preferred him to one-half; and that decree constitutes his right to so much of the legacy.

"The Crown assumes that here the strangers in blood have given up half of their legacy to the representatives of the residuary legatee and next of kin for the sake of compromise. It may as well be said that the latter has given up half of the legacy falling to the residuary legatee and next of kin, to the

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The Lord Advocate reclaimed, and argued;—The 37th section of the Act did not apply here. *Stracey's*¹ case decided that where a will was set aside the estate was liable to the duty payable by the next of kin of the deceased although the will was set aside of consent, and although *de facto* part of the estate was made over to strangers in blood of the deceased. Conversely where the will was not set aside it must regulate the rate of duty. Here the bequest had not been set aside, either of consent or *causa cognita*. Consequently it must be held to be still operative notwithstanding any arrangement which the parties might have made *inter se*; a bequest must either be valid to its full extent or not valid at all—it could not be valid to the extent of a half. As the bequest was thus valid to its full extent, and as the beneficiaries under it were strangers in blood to the testator, the rate of duty was 10 per cent. The next of kin took the one half of the estate neither directly under the will nor *ab intestato*, but as assignee of the legatees mentioned in the will;² consequently the next of kin took subject to all the incidents affecting the bequest, including the rate of legacy-duty. The Lord Ordinary's interlocutor of 18th October 1893 ranked and preferred the claimant, Freckleton's factor, to one-half of the fund *in medio*; but his claim was alternative, either on the footing of intestacy or as representing one of the residuary legatees, and there was nothing to shew upon which alternative he took. If it was on the latter alternative, then he was under obligation to share with the other next of kin, some of whom, at all events, would not have been entitled to payment in their own name on a 3 per cent duty. Nor did section 23 of the Act apply. That section referred solely to transactions between beneficiaries, and those in the administration of the estate; it did not cover the case of transactions between competing claimants.

Argued for Freckleton's judicial factor;—This was not a bequest to negroes in general, but a particular bequest to the negroes on a particular estate. The State Commissioner was allowed a proof of his averments as to the existence of such negroes, and of his title to represent them; but to avoid the expense of that inquiry, the parties came to an arrangement to which the Lord Ordinary interposed his authority; and the interlocutor ordering payment of one-half of the fund to the present claimant was the pursuer's warrant for payment. The Crown was not entitled to inquire into the grounds of the Lord Ordinary's interlocutor; to that extent at least *Stracey's* case was in point. The fallacy of the argument for the Inland Revenue lay in this, that it assumed that if the original competition had been litigated to the end the State Commissioner would have

strangers in blood. According to the formal decree, the Court has given each of the parties one-half.

"Apart from this, I think that the 23d section of 36 Geo. III. c. 52, applies. The 23d section provides, *inter alia*, that where a legacy is released for a consideration, or compounded for less than the amount or value thereof, the duty shall be charged and paid in respect of such legacy, according to the consideration for release thereof, or composition for the same. Here it may be said that the strangers in blood have compounded for half of the legacy left to them in favour of the next of kin and residuary legatee; and therefore, while admittedly 10 per cent must be paid on what the strangers in blood receive, only 3 per cent will be charged on the remainder, a result in accordance with equity, and not, I think, against the law.

"I need scarcely add that in the present case there is no suggestion that the arrangement was fraudulent or collusive."

¹ The Queen v. The Commissioners of Stamps and Taxes, 1844, 6 Ad. & Ell. 657.

² Nisbet's Trustees v. Learmonth, Nov. 19, 1845, 8 D. 69, 18 Scot. Jur. 34.

carried off the entire fund ; whereas the present claimant might have been found entirely successful. If the case did not fall under section 37 at least it fell under section 23. The State Commissioner had compounded for payment of less than the full amount of the bequest, and under the latter section he was liable to duty only on the amount actually received by him. There were no words of limitation in section 23, and being thus capable of a construction which would include the present case, it ought to receive that construction.

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At advising,—

LORD ADAM.—In my opinion the Lord Ordinary is right. I think this case falls within the 23d section of 36 George III. c. 52. That section enacts that where any legacy whereon any duty shall be chargeable shall be released for consideration, or compounded for less than the amount or value thereof, then and in such case the duty shall be charged and paid in respect of such legacy, according to the amount taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same.

It appears to me that Mr Bradwell has released this legacy and compounded for less than the amount thereof, and that therefore the duty to be charged and paid thereon must be according to the amount taken as the consideration for the release, or composition for the same—which in this case is one-half of the amount.

I think this ground of judgment is sufficient for the decision of the case, and that it is unnecessary to consider the first ground on which the Lord Ordinary has rested his judgment, but I must not be held as at all dissenting from his Lordship's opinion in that respect.

Had there been any reason to suppose that the agreement between the parties was not a *bona fide* agreement, but was entered into merely for the purpose of evading the duties payable to the Crown, the result might be different, but no such suggestion was made, or apparently could be made in this case.

I am therefore of opinion that the Crown is not entitled to 10 per cent on the whole amount of the legacy in question. That was the only question argued to us, and I therefore think that the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN.—The statutes which impose duties on legacies and successions are, I think, in every case statutes applicable to the whole United Kingdom, and although the laws both of intestate succession and of the transmission of rights of succession by deed necessarily vary in different parts of the kingdom yet the statutes imposing the duties are expressed in such terms as to be applicable to those various legal systems, and that is because in the imposition of a tax—at all events of a tax relating to succession—it is understood that the substance of the right is what is dealt with, and that the duty cannot be evaded by merely altering the form of the deed whereby the succession is created, or by going through any form after that succession has accrued. It is plain enough, for example, that where duty at the higher rate has accrued in respect of the succession given to a distant relative he cannot evade the duty by putting forward a nearer heir who shall make a claim and pay the duty, and then reconvey to the one who is really entitled. If this were competent the Crown would never obtain duty at any rate higher than the minimum. But on the other hand where, in consequence either of intrinsic defects applicable to a will as a whole, or objections to a particular clause in the will in respect of

No. 139. the uncertainty or failure of objects, the rights of the next of kin are let in—
 Mar. 20, 1894. Lord Advocate v. Freckleton's Judicial Factor. the persons truly entitled are only to pay the duty at the rate which is properly applicable to such rights. Now, the rights of next of kin, I think, are safeguarded by the 23d and the 37th clauses. The 37th clause deals with the case of a will being set aside as a whole, the 23d deals with objections to legacies which have led to transaction or compromise of the claim, and in each case duty is to be paid at the rate which is applicable to the person in whose favour the compromise has been made, and only upon the benefit which he has received. It is noticeable that, while under the 37th section the statute only treats of the case of a will being set aside by a Court of law, it was held in the case quoted by the Lord Ordinary that it is immaterial whether the decree setting aside the will has been obtained by consent in respect that the will could not be defended or after a contested litigation, and that principle will evidently support us in the conclusion which your Lordships have reached—that in the construction of the 23d section, although what the Legislature immediately contemplates is an extrajudicial compromise of the legacy, yet the statute is equally applicable where the compromise has taken place with reference to a succession that has been the subject of a multipointing or distribution decree, and where it takes the shape of a decree giving only partial effect to the claim of the legatee. In order that duty may be payable either at a lower rate or upon a lesser sum than appears from the face of the will the case must be brought within one of these sections, but I agree with Lord Adam that this is a case falling in substance and effect under the 23d section, that it is truly a release of the legacy for a sum which in the present case is one-half of the claim, and that the duty should accordingly be paid only upon the sum actually received. It follows, of course, that, as regards the benefit which has resulted to the next of kin from this arrangement they shall only pay duty upon the other half of the provision at the rate properly applicable to their relationship.

LORD KINNEAR.—I am of the same opinion. I cannot say that I think *Stracey's* case, which was founded upon by the respondent, is directly in point. There is no judgment for or against the validity of this legacy. All that we know is that the party claiming to represent the legatee has claimed payment of the legacy in full, and has been content to accept half of the amount of the legacy in satisfaction of his demand. I agree with your Lordships that that is a case which falls directly under the provisions of the 23d section of the Act 36 Geo. III. c. 52, because the legatee has compounded his legacy for less than the amount or value thereof. The duty therefore must be paid upon the consideration for composition. The practical result is, as the Lord Ordinary has found, that the legatee must pay 10 per cent, and that the representative of the next of kin is liable to pay a duty of 3 per cent.

LORD PRESIDENT.—I concur.

THE COURT adhered.

SOLICITOR OF INLAND REVENUE—J. & J. ROSS, W.S.—Agents.

WILLIAM MACALPINE LENY AND ANOTHER, Pursuers (Respondents).—
Johnston—John Wilson.

MAGISTRATES AND TOWN-COUNCIL OF DUNFERMLINE, Defenders
(Reclaimers).—*Rankine—Dickson.*

No. 140.

Mar. 20, 1894.
Leny v. Magis-
trates of Dun-
fermline.

Process—Record—Amendment—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 29.—An action concluded for declarator that the pursuer had a right of common property along with the defender in a loch and in the *solum* thereof and minerals thereunder. The pursuer moved for leave to amend the summons by substituting a conclusion for declarator that he had a right of common property along with the defender in the loch and the waters thereof, and an exclusive right of property in a specified portion of the *solum* of the loch and the minerals thereunder.

Held (rev. judgment of Lord Low) that under section 29 of the Court of Session Act, 1868, the amendment was incompetent.

ON 23d May 1893 William Macalpine Leny, of Dalswinton, Dumfriesshire, proprietor of the lands of Bellyeoman and others in Fifeshire, and Robert William Will, S.S.C., in whom the lands of Bellyeoman and others were then vested, brought an action against the Magistrates and Town-council of Dunfermline, and after the record had been closed moved for leave to amend the conclusions of their summons and the condescendence and pleas in law.

1ST DIVISION.
Lord Low.

The defenders opposed the motion on the ground that the proposed amendments were not within the 29th section of the Court of Session Act, 1868.*

The paragraphs immediately following in the text shew the nature of the original summons, &c., the passages printed in italics being those which the pursuers desired to delete, and in the footnotes are printed the amendments which they desired to insert.

The summons concluded for declarator “that the pursuers and their authors acquired from the defenders, their authors and predecessors, and have, along with the other proprietors, or some of them whose lands lie around and border on the loch called Moncur or Town’s Loch, lying in the county of Fife, *a joint right or common property in said loch, and in the solum thereof, and minerals therein or thereunder,*”† and for declarator

* The Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 29, enacts, —“The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always, that it shall not be competent, by amendment of the record or issues under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment.”

† For the passage in italics the following was proposed in substitution:—“A good and undoubted joint right or right of common property in the said loch and the waters thereof, and that, subject to said joint right or right of common property and the incidents thereof, the pursuers and their authors acquired from the defenders, their authors and predecessors, and have a good and undoubted right of property, in the *solum* of said loch, extending to the *medium filum* of said loch *ex adverso* of the lands of All and Whole these three parks of land on the north of Kingseathill, lying south of the said loch . . . bounded . . . by the said loch on the north parts, conform to disposition by the Magistrates and Town-council of Dunfermline, dated 30th May and 1st June 1829, and a good and undoubted right of property in the minerals therein or thereunder.”

No. 140. that the defenders "have no exclusive right either of property or of use in or over the said loch *or the solum thereof*,"* and for decree ordaining the defenders "to desist and cease from molesting and interrupting the pursuers in the exercise of any of their rights in the said loch and *solum thereof*." †

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The pursuers averred that in 1829 the Magistrates and Town-council of Dunfermline sold to the pursuers' author, Mr Downie, the three parks of land on the north of Kingseathill, bounded, *inter alia*, by the Town's Loch on the north, with the whole parts, pertinents, pendicles, and privileges of the said lands; that the pursuers and their predecessors had from time immemorial, and at least for upwards of forty years, possessed the said loch as part and pertinent of the said lands, and "have exercised all the rights of riparian proprietors in the said loch, without interruption or hindrance during the said period. The loch is girt by the lands, not only of the pursuers and the town of Dunfermline, but by the lands of other contiguous proprietors; and there underlies the loch a very valuable mineral field." (Cond. 6) "The defenders and their predecessors, in breach of the warrandice contained in their disposition in favour of Mr Downie . . . have in violation of the pursuers' rights and title, wrought from the side of the loch *ex adverso* of the pursuers' boundary a very large portion of the said mineral field." ‡

The pursuers pleaded;—1. The pursuers' title condescended on confers upon them a right of common property in the said loch and a joint right to use the same, along with the other proprietors whose lands lie along the shore or margin of the said loch, § and they are therefore entitled to decree as concluded for, with expenses. 2. By virtue of their title and their possession thereon the pursuers are entitled to decree of declarator as craved.

The defenders denied the pursuers' averments of possession, and pleaded;—1. The action is irrelevant. 3. The pursuers' title to the parks south of the loch being a bounding charter, excluding the loch, they have (1) no interest to raise any question as to the ownership of the *solum* or of the water, and (2) no right of property therein.

On 16th February 1894 the Lord Ordinary (Low) allowed the proposed amendment, and granted leave to reclaim.

The defenders reclaimed, and argued;—The amendment which the pursuers proposed was in substance to convert an action for declarator of a right of common property in the *solum* of the loch and the minerals therein, into an action for declarator of a right of exclusive property in a part of the *solum* and minerals. Such an amendment was struck at by the proviso at the end of section 29 of the Court of Session Act, 1868, since the effect of allowing the amendment would be to subject to the adjudication of the Court another "property" than that specified in the

* For the words in italics the pursuer proposed to substitute the following:—"And have no right in or over the *solum* thereof so far as *ex adverso* of the pursuers' said lands or in the minerals therein or thereunder."

† It was then proposed to add this:—"And minerals therein or thereunder."

‡ For the portion in italics the following was the proposed amendment:—"In course of working the minerals under that portion of the *solum* of the loch *ex adverso* of the lands mentioned in condescendence 2 retained by them, encroached upon the minerals under that portion of the *solum* of the loch which belongs to the pursuers, and is *ex adverso* of the pursuers' lands described in the summons, and have wrought out a very large portion thereof."

§ The following words were proposed to be inserted at this point:—"And also a right of property in the *solum* and the minerals therein and thereunder *ex adverso* of their lands described in the summons."

original summons. It was not enough to preserve identity of the "property" that the physical subject of the dispute was unchanged, if the right which it was proposed to vindicate with respect to that subject was different.¹ Such a construction would justify the conversion of a declarator of right of way over a subject into a declarator of a right of property in the subject. It could not be said that "the real question of controversy between the parties" was the same.

Argued for the pursuers;—The enacting portion of section 29 was imperative; the Court had, subject to the proviso, no option but to allow the amendment if it was necessary to determine in the existing action "the real question in controversy between the parties."² Here the real question in controversy was as to the right to the minerals. That was clear from the condescendence, which it was not proposed to change in any material particular. In order to determine the right to the minerals, it was necessary to determine the right to the loch and to the *solum*. All three subjects were certainly within the original summons, but the terminology used was erroneous, in respect that declarator of a joint right in each of the three was sought. It was now proposed to conclude for declarator of a joint right in the loch and its water only, and of a several right in a particular portion of the *solum* and the minerals therein. But the real question in controversy was, as before, the pursuers' right to the minerals *ex adverso* of their property. It was not proposed to subject to the adjudication of the Court a different property from that specified in the original summons. The subject was the same—the minerals; and the right to be vindicated was the same—a right of property. Whereas to convert a declarator of a right of way into a declarator of property, was to convert an action relating to a right of user into one relating to a right of property.

LORD KINNEAR.—I think the question raised by this reclaiming note is a somewhat narrow one, but it appears to me that the change which the pursuers propose to make in the summons will have the effect of substituting for a claim to have a declarator of a common right of property in the *solum* of the loch a claim to have an exclusive and separate right of property in a particular part of that *solum*, and will substitute for a conclusion that the Magistrates have no exclusive right of property in the *solum* of the loch a conclusion that they have no right whatever in a particular part of the *solum*.

But it is not possible to convert a declarator of a common right of property into a declarator of separate and exclusive right without subjecting to the adjudication of the Court an entirely new and different right.

It appears to me, therefore, that the amendment proposed goes beyond the purposes of the clause in question, and ought not to be allowed.

LORD ADAM.—I have come to be of the same opinion, though with some regret, for no very definite statement has been made to us of any prejudice which the defenders would suffer if the proposed amendment were allowed. It is quite true, as Mr Johnston said, that the Court has no alternative but to give effect to all such amendments "as may be necessary for the purpose of determining in the existing action or proceeding the real question in contro-

¹ Forbes v. Watt's Trustees, Nov. 9, 1870, 9 Macph. 96; Gibson's Trustees v. Fraser, July 10, 1877, 4 R. 1001; Turnbull v. Veitch, July 18, 1889, 16 R. 1079.

² Guinness, Mahon, & Co. v. Coats Steel and Iron Co., Jan. 21, 1891, 18 R. 441.

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No. 140. very between the parties." But then it appears to me that in order to ascertain what is the "real question in controversy" we must look to the conclusions of the summons. It will not do to say that the real question is, after all, what is my right in the lands in question, whatever may have been the claim at first put forward, and that because the question raised by the amendment is connected with the same property that is sufficient to justify the amendment. If that were so it would be possible to substitute for what was originally a claim to a right of way over lands a claim to the lands themselves. I think that we must look to the conclusions of the action and see whether the proposed amendments do enlarge and make so essentially different the original conclusions as to subject to the adjudication of the Court a different right to that which was originally specified in the summons. I agree with Lord Kinnear that the proposed amendments would have that effect.

Mar. 20, 1894.
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LORD PRESIDENT.—I think the conclusion your Lordships have come to is sound. I do not think the proposed amendment can be justified unless we hold that so long as the lands are identical it is competent to substitute one dispute about the lands for another.

LORD M'LAREN was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to proceed as should be just.

WEBSTER, WILL, & RITCHIE, S.S.C.—**MORTON, SMART, & MACDONALD, W.S.**—Agents.

No. 141. **SCOTTISH VULCANITE COMPANY, LIMITED, Petitioners.**—*Lorimer.*

Mar. 20, 1894.
 Scottish
 Vulcanite Co.,
 Limited.

Company—Reduction of capital—Companies Act, 1867 (30 and 31 Vict. cap. 131), secs. 9 and 15.—A limited company, incorporated under the Companies Acts, 1862 to 1867, passed a special resolution, under sections 9 and 15 of the Companies Act, 1867, by which 10 per cent of its capital was to be returned to its shareholders "upon the footing that the amounts returned, or any part thereof, may be called up again." The Court held that the resolution was competent and fell to be confirmed.

2D DIVISION. ON 28th November 1894 the Scottish Vulcanite Company, Limited, incorporated under the Companies Acts, 1862 to 1867, presented a petition praying the Court to make an order confirming a proposed reduction of capital, and to approve of a minute to be registered in terms of the Companies Act, 1867, sec. 15.*

The petition set forth that the original capital of the company was £60,000, divided into 500 A shares of £100 each, and 500 B shares of £20 each, all fully paid up; that in 1884 the capital was increased to £70,800, by the addition of 540 fully paid up B shares of £20 each; that a considerable portion of the additional capital could now be dispensed with; and that in consequence the company had, on 24th January and 12th February 1894, passed and confirmed the following special resolution (being the resolution of which confirmation was prayed for);—"That in respect of each share of £100 in the company's capital upon which the sum of £100 has been fully paid up, and in respect of each share of £20 in the company's capital upon which the sum of £20 has been paid up,

* The memorandum of association authorised the company "to increase or reduce the capital of the company, to provide sinking or reserve funds, to issue debenture or other bonds, to borrow and accept money on mortgage or otherwise, and to undertake and carry out such financial operations as may be incidental or useful to the general business of the company."

capital be paid off to the extent of £10 on each of the £100 shares, and No. 141.
£2 on each of the £20 shares, upon the footing that the amounts returned,
or any part thereof, may be called up again.”

After intimation and advertisement the Court remitted to Mr Edward
Young, W.S., to inquire and report as to the regularity of the proceedings
and the reasons for the proposed reduction. Mar. 20, 1894.
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Mr Young reported generally in favour of the petition, but drew the
attention of the Court to the qualification of the proposed reduction and
return of capital, which made the capital returned liable to be called up
again.¹ Mr Young also pointed out certain errors in the procedure, and
suggested the propriety of making intimation and advertisement of new
in consequence of these errors.

THE COURT (the LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK,
and LORD KYLLACHY) ordered intimation and advertisement to be
made of new, and remitted to the Lord Ordinary on the Bills to
grant the prayer of the petition after such intimation and adver-
tisement had been made.

BOYD, JAMESON, & KELLY, W.S., Agents.

A. M'DOUGAL (Surveyor of Taxes for the County of Bute), Appellant.— No. 142.
D.-F. Sir Charles Pearson—Young.

REV. A. N. SUTHERLAND, Respondent.—*Jameson—C. J. Guthrie.* Mar. 20, 1894.
Inland
Revenue v.
Sutherland.

Revenue—Income-tax—Abatement—“Income”—Official residence—Manse—
Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 167, Schedules A and E—
Customs and Inland Revenue Act, 1876 (39 and 40 Vict. cap. 16), sec. 8.—
The Customs and Inland Revenue Act, 1876, sec. 8, allows an abatement from
income-tax to a person assessed when “his total income from all sources” is
less than £400. *Held* that the annual value of a manse occupied rent free by
the minister of a congregation of the Free Church of Scotland, the feudal title
to which was in trustees for behoof of the congregation, did not fall to be
reckoned as “income” of the minister in the sense of the above section.

Tennant v. Smith, March 14, 1892, 19 R. (H. L.) 1, *followed*.

AT a meeting of the Commissioners of Income-tax for General Purposes, Exchequer
held at Rothesay on 30th October 1893, the Rev. A. N. Sutherland, Cause.
minister of the Free Church, Rothesay, appealed against an assessment 1ST DIVISION.
made upon him under schedule E of the Income-Tax Acts, for the year
1893-94, on £374, 10s., less £10 for expenses, making a net sum of
£364, 10s., on the ground that under the Customs and Inland Revenue
Act, 1876, section 8,* he was entitled to an abatement of £120 from this
sum in respect that his income was under £400.

The Surveyor of Taxes resisted the appeal on the ground that Mr
Sutherland's income, as in a question of abatement, was over £400, in

¹ [See Fore Street Warehouse Company, W. N. 1888, p. 155.]

* The Customs and Inland Revenue Act, 1876 (39 and 40 Vict. cap. 16),
sec. 8, enacts,—“The following relief or abatement shall be given or made to a
person whose income is less than £400,—that is to say, any person who shall
be assessed or charged to any of the duties of income-tax granted by this Act,
or who shall have paid the same, either by deduction or otherwise, and who
shall claim and prove in the manner prescribed by the Acts relating to income-
tax that his total income from all sources, although amounting to £150 or
upwards is less than £400, shall be entitled to be relieved from so much of the
said duties assessed or paid by him as an assessment or charge of the said duties
upon £100 would amount unto.”

The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 146, enacts,—“The

No. 142. respect that there ought to be included in it the annual value of the manse, which the Surveyor stated to be £46, 10s., making a total assessable income of £411.

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The Commissioners sustained the appeal, and allowed the abatement of £120.

The Surveyor obtained a case for the opinion of the Court of Exchequer. The Lord Ordinary in Exchequer (Wellwood), on the motion of the parties, appointed the case to be heard by the First Division.

The question of law was whether the annual value of the manse was to be reckoned as part of Mr Sutherland's income for the purposes of a claim of abatement under Customs and Inland Revenue Act, 1876, sec. 8.

The facts stated in the case were:—"1. Mr Sutherland is minister of the Free Church at Rothsay, and his whole income is derived from that office, and, exclusive of the annual value of the manse, amounts to £374, 10s., or after deducting £10 allowed for expenses, £364, 10s.

"2. He is entered in the Valuation-roll for the burgh of Rothsay as owner and occupier of the Free Church manse of Rothsay, the annual value of which is £50, and is assessed under schedule A of the Income-Tax Acts for the said manse" as under.* [At the hearing before the Court, the Assessor did not dispute that this assessment was always repaid to Mr Sutherland by the Deacons' Court.]

duties hereby granted contained in the schedule marked (E) shall be assessed and charged under the following rules. . . ."

"SCHEDULE (E).

"*Rules for charging said duties.*

"First: The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said schedule E, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions. . . ."

The employments of profit mentioned in schedule E include "any office or employment of profit held under any ecclesiastical body."

Section 167 enacts,—“That the annual value of lands, hereditaments, or heritages belonging to or in the occupation of any person claiming the said exemption, shall be estimated for the purpose of ascertaining his title to such exemption according to the rules and directions contained in the said several schedules (A) and (B) respectively. . . .”

The same Act, section 63, under the head “No. IX., Rules for charging the said duties under schedules (A) and (B),” contains, *inter alia*, the following,—“Second, every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act as the occupier of such lands and tenements.”

* The following was the entry:—

No.	Occupier.	Property.		Proprietor.	Rent or Annual Value in Valuation-Roll.	Gross Rent or Annual Value assessed.	Deductions. Rates and Land-Tax.	Net Annual Value assessed.	Duty.
		Name or Situation.	Description.						
1944	Proprietor.	Serpentine Road.	House.	Rev. A.N. Sutherland.	£50	£50	£ s. 3 10	£ s. 46 10	£ s. d. 1 7 1

"3. He is also assessed to Inhabited House-duty as occupier of the No. 142. said house on the sum of £50.

"4. The manse, in terms of a disposition, dated 17th June 1859, and which disposition, and the model trust-deed referred to in it, it is agreed may be referred to as part of this case, is vested in trustees for behoof of the Free Church congregation of Rothesay, and it is thereby declared that the manse is to be for the use of the minister for the time being of the said congregation, during his life and so long, but so long only, as he shall remain minister thereof, and shall not be debarred from the use, occupation, and enjoyment of the same by or in virtue of a sentence judicially pronounced by a competent judicatory of the Church." The other terms of the disposition and the model trust-deed are sufficiently set forth in the opinion of Lord Adam.

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"5. The whole manse is in the possession of the appellant, and is used by him as his residence as minister of the congregation.

"6. The appellant stated that no use is made by him of the house except in direct connection with the duties of his office, and that he is bound to remove from the said manse in the following circumstances:— (1) If he were transferred by the Church Courts from the ministry of the said congregation to the ministry of another congregation of the Free Church, and (2) if, on the appointment of a colleague minister in the said congregation, the manse were made a residence for the colleague minister."

Argued for the Surveyor;—Under section 167 of the Income-Tax Act, 1842—which applied to cases of abatement as well as to cases of exemption¹—a person assessed to income-tax under schedule E, who claimed abatement, in order to make good his claim, must shew that he was not the proprietor or the occupier of subjects in respect of which income-tax was due under schedule A or schedule B, and of which the annual value, added to his income assessable under schedule E, made £400 or upwards.² Tried by this test, the respondent's claim to abatement failed. He referred to *Tennant's case*,³ but all that *Tennant's case* decided was that the bank-house in question there was not part of profits of the bank-agent's employment so as to subject him to income-tax in respect thereof under schedule E, and that he was neither the proprietor nor the occupier of the house in the sense of the Act. In *Tennant's case* the bank was assessed as the occupier, the house forming part of the business premises of the bank, the agent was removable at the will and pleasure of the directors, and was required to occupy the house for the protection of the bank, just as any caretaker would have been obliged to do. He was, in short, the servant of the bank,⁴ and section 167 had no application to his case. Here, on the other hand, the respondent was entered in the Valuation-roll as the proprietor and occupier of the manse, which belonged to him as an official liferenter,⁵ and which he used solely as a place of residence, and it had no connection with other property belonging to the church. He might let the manse, and ministers in his position were entitled to vote for a member of Parliament as being the owners or occupiers in liferent of their manse.⁶ The determination of the Commissioners ought therefore to be reversed.

¹ 39 and 40 Vict. cap. 16.

² *Tennant v. Smith*, March 14, 1892, 19 R. (H. L.) 1, per Lord Macnaghten, at p. 8.

³ *Tennant v. Smith*, *supra*.

⁴ *Tennant v. Smith*, *supra*, per Lord Watson, at p. 6.

⁵ Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), sec. 42.

⁶ *Rutherford v. Young*, Dec. 2, 1863, 2 Macph. 180, 36 Scot. Jur. 79; *Robbie v. Meiklejohn*, Dec. 19, 1868, 7 Macph. 296, 41 Scot. Jur. 176.

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The argument for the respondent sufficiently appears from the opinions of the Court.

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At advising,—

LORD ADAM.—The question in this case is whether the respondent, who is the Free Church minister at Rothesay, is entitled to an abatement of income-tax under the 8th section of the Customs and Inland Revenue Act, 1876, in respect that his total income from all sources is under £400 per annum.

It is stated in the case that his whole income is derived from his office of minister of the Free Church, and amounts, after deducting £10 allowed for expenses, to £364, 10s.

The appellant, however, proposes to add to that sum the value of the manse, which the respondent occupies, which he estimates at £46, 10s., thus making the total income amount to £411.

The question, therefore, is whether the value of the manse ought to be added to the respondent's income from other sources, in considering whether he is entitled to the abatement claimed or not.

In this case the respondent is assessed under schedule E of the Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), as holding an office or employment of profit under an ecclesiastical body, viz., the Free Church of Scotland.

It was held in the case of *Tennant v. Smith*, in the House of Lords, 19 R. (H. L.) 1, that the duties chargeable under schedule E on persons holding such offices or employments, for "all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices and employments," did not include the annual value of a house occupied rent free by the agent of a bank, and forming part of the bank premises, and that such value ought not to be taken into consideration in estimating the amount of his income. In that case the bank-agent was bound to occupy the house personally and could not let it, so that he could not convert his right to occupy it into money, and it was said by Lord Hannen that different considerations would apply to the case of an agent who as part of his remuneration has a house provided for him which he might let. That, he says, which could be converted into money might reasonably be regarded as money.

That leads to the consideration of the terms on which the respondent occupies his manse.

It is stated in the case that the manse is vested in trustees for behoof of the Free Church congregation, in terms of a disposition dated 17th June 1859, and the model trust-deed therein referred to, which are held to be parts of the case. I do not find any statement of the terms on which the respondent holds the manse under them, but I presume the terms are the same as those under which the trustees are vested in the building.

Now, I find that there is appended to the model deed the form of a simple disposition for a manse which seems to be appropriate to this case. From this form it appears that the subjects conveyed to the trustees are held by them in trust, that the manse shall in all time coming be used, occupied, and enjoyed as and for a manse in connection with the Free Church of Scotland, and that by and for the use of the minister of the congregation during his life, and so long, but so long only, as he shall remain minister thereof, but always under the conditions, provisions, and declarations contained from *tertio* to *duodecimo*, both inclusive, in the model trust-deed there referred to.

That model trust-deed is very lengthy, and seems adapted to the case of a

church rather than to that of a manse. The only provision I can find in it which seems to have a bearing on the present question is contained in article 3, which declares that the building shall be under the immediate charge and management of the elders and deacons, or elders acting as deacons for the time being of the congregation, in the use, occupation, and enjoyment at the time of such building.

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It appears, accordingly, that this dwelling-house is provided to the respondent as the minister of the congregation, and is in all time coming to be used, occupied, and enjoyed by him as and for a manse in connection with the Free Church. It does not appear to me that the right to occupy a dwelling-house on these terms is one which was intended to be convertible into money. I think, therefore, that the principle of the case of *Tennant v. Smith* applies to this case, and that the value of the manse ought not to be added to the respondent's income. It may possibly be that such manses are occasionally let without objection by the trustees, and if so the income so obtained will be assessable. But that cannot affect the present question.

But the appellant farther maintained, as I understood his argument, that in estimating a person's "total income from all sources" there fell to be included the annual value of all property for which he was chargeable under schedule A, and the annual value of the occupation for which he was chargeable under schedule B, and that the 167th section of the Act of 1842 contained directions for estimating these values for the purpose of ascertaining the title to abatement when abatement was claimed. That would appear to be so, but the question remains whether the respondent is chargeable either under schedule A or schedule B.

Section 167 provides that the annual value of lands, tenements, &c., belonging to or in the occupation of any person claiming exemption, shall be estimated for the purpose of ascertaining his title to such exemption, according to the rules and directions contained in the said several schedules A and B respectively. It was not said that the respondent was chargeable as occupier of the manse, but it was said that he was proprietor of the manse in the sense of the Act, that he was chargeable as such proprietor, and had in fact been assessed as proprietor, and had paid such assessment.

It appears to me that the respondent is in no sense proprietor of the manse. The trustees are proprietors, and are the persons who are chargeable as owners in respect of it.

It is true that the respondent is entered in the Valuation-roll as proprietor, but that will not make him proprietor, or liable as proprietor. It is also true that he has been in use to pay the property-tax assessment, but he was bound to do so as occupier of the manse, and it was stated, and not disputed, that it has always been repaid to him by the Deacons' Court of the church.

The decisions which were quoted to us to the effect that ministers in the position of the respondent had been found entitled to vote as owners or otherwise of their manses have no bearing on the present question.

I am therefore of opinion that the determination of the Commissioners was right, and that the appeal should be refused.

LORD M'LAREN.—The case is so far different from that of the bank-agent, *Tenant v. Smith*, 19 R. (H. L.) 1, that, in the case cited, the Bank of Scotland was undoubtedly the proprietor of the bank office at Montrose, including the agent's

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residence, and was liable to assessment under schedule A, unless it could be shewn that the bank had given its agent a right which might be treated for the purposes of revenue legislation as a qualified ownership. Now, in the present case, the feudal owners of the subject are a body of trustees, who hold the manse in trust for the benefit of the minister of the congregation for the time being, and no one but the minister derives any benefit from the manse, directly or indirectly. If I were approaching the consideration of this case without the aid of previous decisions, I should be disposed to hold that the primary question was, whether the minister was liable (without relief) for property-tax under schedule A. If he is so liable, then the occupation of this house is part of his income, and he is not entitled to the abatement claimed. This way of looking at the case seems to be consistent with the opening sentences of the opinions of Lords Watson and Macnaghten in the case referred to.

But then another criterion applicable to claims of this description is proposed in the opinion of the Lord Chancellor, and, I think, assented to by all their Lordships, viz., that in construing the statutory provision as to abatement, and in particular the expression "total income from all sources," nothing is to be treated as income unless it is capable of being turned into money. I think the circumstance that the bank-agent was not entitled to let his residence, but was under obligation to live in it, was the decisive element in that case, although other elements were referred to; for example, that the occupation of the bank-agent was that of a servant or manager under a contract of service, as distinguished from that of a tenant.

In the present case the manse is vested in trustees, and it is not said that the minister is a tenant. He is a beneficiary under the trust, and it is to my mind perfectly clear that, under the conditions of the trust, the minister has a residence provided for him to enable him to discharge the duties of his office, and that he would not be able to let this residence to a yearly tenant without committing a breach of contract. His equitable estate is therefore not a right capable of being turned into money, and I attach no importance to the consideration that, with the consent of the trustees, the minister might let the manse furnished for a few weeks in summer, when absent from his charge, or when his duties did not require that he should personally occupy the manse. It is no doubt true that the use of the manse is part of the consideration which the minister receives under his contract with the congregation or their ecclesiastical superiors, but if I rightly follow the decision in *Tennant's* case, it is not "income," and is not to be taken into account in estimating his right to an abatement of tax on the ground that his total income from all sources is under £400. I do not of course mean to imply that the manse is to escape taxation under schedule A. How it is to be assessed is a question not before us. In the present case we are only concerned with the question whether a value is to be put on the occupation for the purposes of the claim of exemption.

LORD KINNEAR.—I concur.

LORD PRESIDENT.—I concur.

THE COURT affirmed the determination of the Commissioners.

SOLICITOR TO THE BOARD OF INLAND REVENUE—COWAN & DALMAHOY, W.S.—Agents.

SUMMER SESSION.

JAMES MARTIN, Pursuer.

JOHN RHIND, Reclaimer.—*Salvesen.*R. J. LINDSAY AND ANOTHER, Defenders (Respondents).—*D. Dundas—Walton.*

No. 143.

May 16, 1894.
Martin v.
Lindsay.

Process—Concurring pursuer—Title to reclaim.—Held that a person who is a party to a cause only to the extent of giving his consent and concurrence thereto has no title to present a reclaiming note against an interlocutor pronounced in the cause.

In July 1892 James Martin, C.A., Edinburgh, judicial factor on the 1ST DIVISION. estates of the dissolved firm of Rhind, Lindsay, & Wallace, W.S., Edinburgh, with consent and concurrence of John Rhind, S.S.C., for his interest, raised an action against R. J. Lindsay, W.S., and Thomas Watt Wallace, W.S., for implement of an alleged agreement, by which the defenders undertook to perform certain acts, on payment by Mr Rhind of £500 to Mr Martin. Lord Low.

On various occasions while the cause was in the Outer-House Mr Rhind appeared by counsel and, on the ground that he was not a party to the action, objected to any interlocutor directed against him being pronounced. On 19th December 1893 in particular he opposed a motion at the instance of the defenders to have him ordained forthwith to consign the £500 above mentioned in the hands of the Clerk of Court. The Lord Ordinary (Low) pronounced an interlocutor in which he found that, by the agreement above referred to, the defenders had agreed, upon payment of £500 by the concurring pursuer to the pursuer, to discharge the concurring pursuer of all claims they or the dissolved firm might have against him, and that the said sum fell to be paid by the concurring pursuer to the pursuer, but refused, as incompetent, the motion by the defenders that the pursuer should be ordained to consign said sum.

On 8th March 1894 the Lord Ordinary pronounced this interlocutor:—“In respect that the concurring pursuer, John Rhind, has failed to pay to the pursuer, the judicial factor upon the estate of the dissolved firm of Rhind, Lindsay, & Wallace, the sum of £500 and interest thereon in terms of the interlocutor of 19th December 1893, assoilzies the defenders from the conclusions of the summons, and decerns.”

Mr Rhind reclaimed.

The defenders objected to the competency of the reclaiming note, on the ground that Mr Rhind was not a party to the cause.

Argued for the reclaimer;—He had undoubtedly an interest in the action. He had been recognised all along as a party to the cause, and had often appeared by counsel in it without objection. It would have been quite competent to pronounce a judgment for expenses against him.¹

LORD PRESIDENT.—When Mr Rhind gave his consent and concurrence to this action he entered into an agreement with all parties that, so far as he was concerned, Mr Martin should control any interest he might have in the matter in dispute. If that view of the agreement is correct, it is quite hostile to the idea that he who has agreed that another person shall be the *dominus litis* shall be entitled to shake himself free from his agreement at any one stage of the proceedings, and to come forward and himself present a reclaiming note against an

¹ Morison v. Gowans, Nov. 1, 1873, 1 R. 116.

No. 143. interlocutor pronounced in the cause. I think that he cannot be heard when he proposes to take such a course.

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LORD ADAM.—I am quite clear that this reclaiming note is incompetent. *Ex facie* of the record Mr Rhind is not a party to the cause. It might be in certain cases that something which has passed during the progress of the action might change the position of a concurring pursuer and make him a party to the cause, but what has passed here leads to an opposite conclusion, for Mr Rhind appeared at some stages in the Outer-House and objected to certain interlocutors being pronounced against him, on the ground that he was not a party to the cause. I do not think that he can now be heard when he attempts to take an opposite view.

LORD M'LAREN.—I agree that the position of a concurring pursuer is that he enters into a contract to be bound by the issue as that is determined in an action between the principal pursuer and the defender. It is sufficient here to say that a party who merely grants his consent and concurrence has no title to reclaim against an interlocutor assailing the defender. Such a step cannot be taken by anyone but by the principal pursuer himself.

LORD KINNEAR concurred.

THE COURT dismissed the reclaiming note.

CARMENT, WEDDERBURN, & WATSON, W.S.—PARTY—THOMAS WHITE, S.S.C.—Agents.

No. 144.

May 17, 1894.
Duncan v.
Brooks.

GEORGE DUNCAN, Pursuer (Respondent).—*Ure*—C. K. Mackenzie.
SIR WILLIAM CUNLIFFE BROOKS, BARONET, Defender (Appellant).—*Dickson*—W. Campbell.

Lease—Farm—Right to take peats from another part of estate—Sale of farm and of peat moss to different persons—Rent—Abatement—Retention—Act 1449, cap. 18.—In 1880 the tenant of a farm renewed his lease of the farm “all as possessed by him.” For many years he and his predecessors in the farm had been in use to take peats from a moss on another part of the landlord's estate, a particular lair being appropriated to the farm. Certain estate regulations were incorporated in the lease, under which, *inter alia*, the landlord reserved to himself “all the mosses on the estate, with power to regulate and divide them as circumstances may render necessary, . . . And in the event of the proprietor letting the mosses for cultivation, it is hereby specially conditioned and declared that he shall be under no obligation to find moss for the tenants in place thereof.” The tenant continued under the new lease to take peats from the moss, until 1887, when the proprietor sold the moss. The proprietor having subsequently sold the farm, *held* in a question between the tenant and the purchaser of the farm that the tenant had under his lease a right to take peats from the moss, and that he was entitled to an abatement from his rent corresponding to the value of the right to take peats of which he had been deprived.

Opinion (per Lord Young) that the tenant's right to take peats from the moss was not protected by the Act 1449, cap. 18, so as to be good against singular successors in the ownership of the peat moss.

2D DIVISION.
Sheriff of
Aberdeen-
shire.

By lease dated 30th June and 20th and 21st July 1880, the trustees of the Marquis of Huntly let to George Duncan the farm of Newton, on the Aboyne estates, “all as presently possessed by the said George Duncan,” for twenty years from Whitsunday 1878. The rent payable under the lease was £60.

The lease contained this clause:—“And whereas for the more effectually regulating the management of the said estate of Aboyne, the said . . . Marquis of Huntly has introduced certain conditions and regulations

which are to be obligatory on all tenants on the said estate, . . . a No. 144 printed copy whereof is signed of even date with these presents by the said George Duncan; the said George Duncan binds and obliges himself and his foresaids to conform thereto, and to observe the same and such modifications as may be made thereon, so far as not inconsistent herewith, and that to all intents and purposes as fully and effectually as if the said conditions and regulations had been engrossed herein.”

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These conditions and regulations were dated 1st December 1873, and were in substitution of earlier conditions and regulations in similar terms.*

Duncan's father and grandfather had been tenants of the farm before him, and they and he had all along been in the habit of casting peats on a moss known as the Moss of Tillychip, belonging to the Aboyne estates, but not on the farm of Newton. In this moss a special lair, known as the Newton lair, had been set apart for the special use of the tenants of Newton.

In 1888 Lord Huntly's trustees sold part of the Aboyne estates, including the Moss of Tillychip, to a Mr Wilson, and Lord Huntly's factor by letter intimated the sale to Duncan, adding, "you cannot be allowed, therefore, to go to that moss any more." In consequence Duncan refused to pay his rent in full, and during the next two years retained £10 per annum. Legal proceedings were threatened with the view of compelling payment of the portion of the rent so retained, but no proceedings were actually taken.

In 1890 the Huntly trustees sold to Sir William Cunliffe Brooks, another portion of the Aboyne estates, including the farm of Newton. Duncan refused to pay his rent in full to the new proprietor, and continued to retain £10 per annum.

In March 1893 Duncan raised the present action in the Sheriff Court at Aberdeen against Sir W. Cunliffe Brooks, praying for declarator "that the defender is bound to warrant and maintain the pursuer, as tenant of the farm of Newton of Glentana . . . in the enjoyment and possession of the allotment or peat lair in the Moss of Tillychip, known as the Newton lair, and till recently possessed by the pursuer as tenant forsaids . . . together with the right to dig, winn, and lead peats therefrom as fuel for his use as tenant of the farm of Newton of Glentana" from Martinmas 1890 to the termination of his lease at Martinmas 1897, "or otherwise, failing the defender so maintaining the pursuer," for declarator "that the pursuer as tenant of the said farm is entitled to an annual abatement on £60, the rent or tack-duty of the said farm and others for the years and crops 1891 to 1897 inclusive, and that to the extent of £15 sterling in each year, or to the extent of such other sum as the Court may modify," and that on payment of the stipulated rent of £60 under deduction of £15, or such other sum as might be fixed by the Court, the defender was bound to grant discharges in full of the rent.

* The 12th article of the conditions and regulations of 1873 was in the following terms:—"12. Mosses. The proprietor reserves to himself all the mosses on the estate, with power to regulate and divide them as circumstances may render necessary; and the tenants shall be bound to cast their peats and fuel in a regular manner, on the allotments set apart by the moss grieve, and shall replace the top sod, and shall not be entitled to sell or give away peats or turf; and each shall pay a portion of the moss grieve's salary, and of the expense of keeping the roads and drains through the mosses in repair, as well as of making new ones when required. And in the event of the proprietor letting the mosses for cultivation, it is hereby specially conditioned and declared that he shall be under no obligation to find moss for the tenants in place thereof."

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The pursuer pleaded ;—(1) The defender, as proprietor of the subjects from which the rent of £60 is claimed from the pursuer, and as holding the same, subject to the pursuer's lease thereof, is bound to warrant and maintain the pursuer in the full enjoyment of the same, and of all the rights, parts, and privileges thereof as let to him. At least he is bound to do so in so far as he seeks to draw rents therefrom. (2) The said allotment or peat lair in the said moss, being a material part and pertinent of the said farm as let to the pursuer, and no avoidance of the pursuer's rights thereto having arisen as against him, the defender is bound to warrant and maintain him in the said right, or suffer an abatement of rent commensurate with the value of the subjects not so warranted.

The defender pleaded ;—(1) All parties are not called. (2) The action is irrelevant. (3) The action is excluded by the terms of the pursuer's lease, and the conditions and regulations therein referred to. (6) The pursuer having, according to his own shewing, been excluded from an alleged part of his farm, and having taken no action against his landlords or their disponees, all before the defender acquired his estate, is not entitled to call on the defender to reinstate him, or pay damages, or allow abatements from the lease. (7) If the moss was, as alleged, part of the farm let to the pursuer, he was entitled to continue possession thereof against the purchaser of it, and cannot claim from the defender compensation for his failure to do so.

A proof was allowed. The evidence established the foregoing facts, in so far as they had been in dispute, and there was further evidence regarding the value of the peats to the pursuer.

The Sheriff (Guthrie Smith), on 20th January 1894, pronounced this interlocutor :—" Finds (1) that the pursuer is in possession of the farm at Newton under a lease which terminates at Whitsunday 1898, and, along with the other tenants of the estate, he and his predecessors in the farm had been accustomed to take peats from the Moss of Tillychip, part of the same estate ; (2) that this practice is recognised and rules laid down for the exercise of the right or privilege in the regulations which are incorporated by reference into the lease forming the contract between the parties ; (3) that in 1888 the defender's authors intimated to the pursuer that he could not be allowed 'to go to the moss any more,' the same having been sold to a third party ; (4) that the pursuer thereupon refused to pay his rent, which, under the lease is £60 per annum—except subject to an abatement equal to the value of the privilege which he had previously enjoyed, and in the knowledge of this claim the then owners of the property sold the farm to the defender : On these facts, finds in law that the pursuer is entitled to an abatement from his rent corresponding to the value of the right or privilege of which he has been deprived by his landlord's act without his consent : Assesses the same at the sum of £7, 10s. per annum : Repels the defences ; and substituting the foresaid sum of £7, 10s. for the £15 claimed, decerns in terms of the last alternative conclusion of the summons."

The defender appealed, and argued ;—The pursuer never had any right to get peat from any particular moss. No such right was given to him by the lease or the estate regulations. Even if the landlord was bound to let him cut peats, so long as there was a moss available, he could send him to any moss that he pleased, however inconvenient for the particular tenant. Further, if the tenant had such a right, then it fell under the Act 1449, and was good against Mr Wilson. It certainly could not be good against the defender, as the pursuer was not in possession of the lair at the date when he purchased Newton.

The pursuer argued ;—The pursuer's lease, coupled with proved long

possession, gave him a right to take peats from the Moss of Tillychip. No. 144. All that the landlord reserved to himself in article 12 of the estate regulations was the right of regulating the use of the mosses by the tenants, and of letting the moss for cultivation, which last event had not occurred. The landlord could not arbitrarily deprive the tenant of this right, which was indeed a material part of the subject let. Sir W. Brooks was only Lord Huntly's assignee, and in no better position.¹

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LORD YOUNG.—The present litigation relates to a matter of trifling pecuniary value, but it raises questions of some interest, although, in my opinion, of no great difficulty.

The broad facts may be stated in a few sentences: The pursuer is tenant, and has been so for over thirty years, of a farm on the Aboyne estates known as the farm of Newton, and this farm had previously been occupied by the pursuer's father, and before that by his grandfather. It is averred, and may be taken as a fact, that from an early period of this century—to go no farther back—the tenant of this farm has been in the enjoyment and possession of a peat allotment or lair in the Moss of Tillychip, known as the Newton lair. The current lease of the farm, which is dated in 1880, refers to and incorporates certain conditions and regulations which are to be observed by the tenants. The 12th article of these conditions and regulations refers to mosses, and is in these terms:—"The proprietor reserves to himself all the mosses on the estate, with power to regulate and divide them as circumstances may render necessary." I regard this reservation as a reservation by the landlord of the mosses from the lands let to the tenants. We are all familiar with such reservations in the case of woods and plantations, where a regulation such as this reserves all the woods and plantations on the estate to the proprietor, he giving to the tenant such liberties therein in regard to the taking of wood and otherwise as he may appoint. Then the article goes on,—“And the tenants shall be bound to cast their peats and fuel in a regular manner on the allotments set apart by the moss grieve,” and so on. That implies, and indeed expresses, a right on the part of tenants to cast their peat in the allotments set apart for them by the moss grieve. Such an allotment was made for Newton, and the Newton tenant has cast his peats there from the earliest period of which we have any notice. No doubt the article goes on to provide the condition that in the event of the proprietor letting the mosses for cultivation he should be under no obligation to find moss for the tenants in place thereof. That condition, however, is limited to a particular case which has not occurred, and which tenants, in taking their farms, might not regard with much anxiety. Now, I must say that I regard this article, taken along with the lease and the long possession prior in date to the regulation, and taken along with the possession for a period of a quarter of a century at all events subsequent to the regulations, as importing a right to the tenants of individual farms to take peats from allotments set apart for their respective farms, and I think that it would not be according to the fair meaning of their contract of lease for the landlord arbitrarily to deprive the tenants of this power to take peats.

Lord Huntly sold the estate of Aboyne to different persons; the part con-

¹ *Authorities*.—Brown v. Brown, Feb. 23, 1826, 4 S. 89; Campbell v. M'Kinnon, March 20, 1867, 5 Macph. 635, 39 Scot. Jur. 328; Muir v. M'Intyre, Feb. 4, 1887, 14 R. 470.

No. 144. taining Newton he sold to Sir W. Brooks, the present defender ; and the part
May 17, 1894. containing Tillychip moss he sold to Mr Wilson. On the sale of Tillychip,
Duncan v. which took place first, the tenant of Newton notified to his landlord, Lord
Brooks. Huntly, that he was disturbed in the possession of his right to take peat under
his lease, and that he must either have this right restored or have an abate-
ment from his rent granted. The landlord did not assent to this view, but the
tenant took the matter into his own hands by withholding £10 per annum
from the rent for two years. Then came the sale to Sir W. Brooks, and this
dispute between the tenant and the new proprietor as to whether the tenant is
bound to pay the whole rent or is entitled to deduct therefrom a proportionate
part in the event of the proprietor being unable to restore to him his allotment
or lair in the Moss of Tillychip. The tenant and Sir W. Brooks, the purchaser,
being unable to settle the dispute, the present action has been brought.

The action contains a prayer for declarator that the defender is bound to
warrant and maintain the pursuer as tenant of the farm of Newton of Glentana
in the enjoyment and possession of the allotment or peat lair in the Moss of
Tillychip known as the Newton lair, and till recently possessed by the pursuer
as tenant foresaid, together with the right to dig, winn, and lead peats there-
from as fuel for his use as tenant ; with an alternative prayer to the effect that
if the defender is not able to procure the pursuer the enjoyment of that right
he is bound to allow him a reasonable abatement from the rent. Criticisms
have been made on the form of the action, but I think that the question must be
taken as the same, and must be decided in the same way as if the present
defender was pursuer in an action for payment of the whole rent, and the pre-
sent pursuer were defending it on the ground that he was not getting the whole
subject let, and was therefore entitled to a reasonable abatement, unless the
landlord was able to restore the right to take peats from this moss, or to give
the tenant an equivalent privilege elsewhere.

Two questions are thus raised ; first, whether the tenant had a right under
his lease to take peats from Tillychip. As to this I have already expressed my
opinion that his lease does give him this right. The second question is
whether there is a right in the tenant, a right to take peats from this moss,
which is good against Mr Wilson, the purchaser of the moss. That raises a
question under the Act of 1449.

Now, I am inclined to think—although it is not necessary to decide the
point—that this right does not fall under the Act of 1449, and accordingly that
the lease, so far as the taking of peats is concerned, is not good against Mr Wil-
son, the new owner of the moss. In this view, therefore, we have to take the
case on the footing that the pursuer has by the action of his landlord been
deprived of a right for which he agreed to pay part of his £60 of rent. If
Lord Huntly had been here instead of Sir W. Brooks, I should have been
clearly of opinion that he could not in such circumstances have enforced pay-
ment of the whole £60, but would have been bound to suffer an abatement of
rent corresponding to the reasonable value to the tenant of the right to take
peats. The question therefore comes to be whether Sir W. Brooks is not in
the same position as his author Lord Huntly. I think that he is. I think
that he has no right save what he got from Lord Huntly, and that Lord Huntly
could give him no better right than what he himself had. I am, accordingly,
of opinion that the judgment of the Sheriff is right, and ought to be affirmed.
I assume that the fair value of the right to take peats is that fixed by the

Sheriff (namely £7, 10s.); indeed it would be ridiculous to have further inquiry into a matter of that kind. No. 144.

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LORD RUTHERFURD CLARK.—I am of opinion that the right to take peats from the Moss of Tillychip is part of the subject of the lease; that the tenant has been deprived of that right, and therefore that the whole rent is not due. I think that the abatement allowed by the Sheriff must stand good.

LORD TRAYNER.—While I agree in the judgment which your Lordships have proposed, I should like to say a word on the general conditions and regulations to be observed by the tenants on the Huntly estates, one of which is founded on by the pursuer in this action. In my opinion if the tenant had no right to take peats from the moss except what is given to him by the regulations, I should be slow to hold that any right was given to the tenant to take peats, or any obligation laid on the landlord to allow peat to be taken. But I think that the lease as interpreted by long possession gives the tenant a right to take peats from the Tillychip moss. Therefore, founding not on the regulations, but on the lease, I agree with the decision proposed.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff dated 20th January 1894: Dismiss the appeal: Of new assess the abatement from the rent payable by the pursuer to the defender at the sum of £7, 10s. per annum, and repel the defences; and of new decern in terms of the last alternative conclusion of the summons," &c.

J. & A. F. ADAM, W.S.—ALEX. MORISON, S.S.C.—Agents.

JOHN GILMOUR, Pursuer (Respondent).—*Jameson—C. N. Johnston.* No. 145.
NORTH BRITISH RAILWAY COMPANY, Defenders (Reclaimers).—*Dickson—Deas.*

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Gilmour v.
North British
Railway Co.

Railway—Statutory obligation to stop trains—"Ordinary trains."—A railway company was bound under its Act to stop "all ordinary trains" at a certain station.

Trains which were held to be ordinary trains in the sense of the Act.

(SEE *Gilmour v. North British Railway Company*, June 23, 1893, 20 R. (H. L.) 53.) 1ST DIVISION.
Ld Stormonth-Darling.

In an action of declarator raised in 1892 by John Gilmour, Esquire, of Lundin and Montrave, against the North British Railway Company, the House of Lords, on 23d June 1893, held that the defenders were bound to stop all "ordinary trains" on their line of railway between Thornton Junction and Anstruther, at the Lundin Links station, in virtue of the East of Fife Railway Act, 1855 (18 and 19 Vict. cap. clxv.),* and relative agreement, and remitted the cause to the Court of Session.

The question then arose, whether four trains running between

* Sec. 36 of the East of Fife Railway Act, 1855, enacted,—“That the company shall erect and maintain a temporary goods and passenger station at or near to Sunnybraes, Lundin Links, or at any other point on the said estate which may be agreed upon by and between the company and the owners of the said estate for the time; and at the said station all ordinary trains shall stop for the purpose of traffic.”

No. 145. Anstruther and Thornton Junction were "ordinary trains," and therefore fell to be stopped at Lundin Links station.

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The defenders stated that they were express trains, and contended, *inter alia*, that express or fast trains were not in contemplation of the parties in 1855, and that the statutory obligation did not apply to these trains.

The Lord Ordinary (Stormonth-Darling) allowed a proof.

From the defenders' time-tables it appeared that five trains in the day from Thornton Junction stopped at every station, including Lundin Links. Four of these trains were in connection with main line trains from Edinburgh, Glasgow and the North, and ran by Anstruther on to Dundee. The fifth train, in connection with a main line Edinburgh train and North train, stopped at all stations up to Anstruther including Lundin Links, and did not go further.

Two other trains in the day (being two of the trains in question, which the pursuer wished to have stopped at Lundin Links station) ran from Thornton in connection with fast trains from Edinburgh and the North, passed Lundin Links station and three other stations out of a total of eight without stopping, and ran on to Anstruther, and did not go further.

The trains in the opposite direction were similar in number, two trains, being the remaining trains in question, starting daily from Anstruther and running (without stopping at Lundin Links and three other stations) to Thornton, where they connected with fast trains to Edinburgh and the North, one also connecting with a fast Glasgow train.

The parole proof mainly consisted of the evidence of practical railway men. The witnesses adduced by the pursuer maintained that "ordinary trains," as those words were understood by railway men, were all trains which were advertised in a company's tables as being run regularly for the accommodation of the public, and that the antithesis to "ordinary" was "special," *i.e.*, trains run by the company for special purposes, or ordered by a member or members of the public for private and occasional use.

The defenders' witnesses said that the antithesis to "ordinary" was "fast" or "express," and that no train could be called "ordinary" which did not stop at all, or most, of the stations on the line.

It was further proved that the line in question, which was a single line, and skirted the coast of Fife along its south and eastern seaboard, left the defenders' main line at Thornton Junction towards the south, and after making a circuit joined the main line to Dundee again at Leuchars; that it was not the direct route from Edinburgh to Dundee and the north, but simply served the coast villages and towns of Fife. Anstruther, the terminus and starting point respectively of the four trains in question, was an ancient but small burgh.

On 23d December 1893, the Lord Ordinary pronounced an interlocutor in which he found that the defenders were bound to stop the four trains in question at the Lundin Links station.*

* "OPINION.—The defenders are bound by section 36 of the 'East of Fife Railway Act, 1855,' to stop 'all ordinary trains' at Lundin Links station, and the question is whether certain specified trains, *viz.*, the trains leaving Thornton Junction for Anstruther at 11.38 a.m. and 5.34 p.m., and the trains leaving Anstruther for Thornton Junction at 7.45 a.m. and 4 p.m., are ordinary trains within the meaning of that section. Two other trains are mentioned in the conclusions of the summons, but as to these the defenders now admit that they are ordinary trains and must be stopped at Lundin Links.

"It appears from the judgment of the House of Lords in *Burnett v. The Great North of Scotland Railway Company*, 10 App. Ca. 147, that a stipulation of this kind between a landowner and a railway company is not to be viewed

The defenders reclaimed.

No. 145.

The arguments of parties sufficiently appear from the opinions of the Lord Ordinary and of the Court.¹

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with any disfavour, but must be construed in its natural and reasonable sense. Except to that extent, the *Crathes* case is not a guide to the present, because the phrase there was 'all passenger trains,' which, of course, is a more comprehensive phrase than 'all ordinary trains.'

"The evidence shews that there is great difference of opinion among railway men as to the meaning of the word 'ordinary' when applied to a train, and probably the truth is that the meaning varies according to the connection in which the word is used. The pursuer's witnesses say that the proper antithesis of 'ordinary' is 'special,' and that all trains are ordinary which are advertised in the company's time-tables as running regularly for the accommodation of the public. Under 'special' they would include excursion trains, and also such Post-Office trains as are not under the control of the company, but have their hours and their places of call prescribed by the Postmaster-General. The defenders' witnesses, on the other hand, say that the proper antithesis of 'ordinary' is 'express' or 'fast,' and that no trains are ordinary except those which stop at all, or most, of the stations on the line.

"The pursuer's definition is, no doubt, the generic one, for it includes the whole regular train service of the company, and it excludes only what everybody would admit ought to be excluded. It is in this sense that the word is used in the Post-Office Act (1 and 2 Vict. chap. 98), in the defenders' Book of Rules, and in their time-tables, at pages 3, 118, and 126. On the last of these pages, for example, are the bye-laws and regulations made by the company with the approval of the Board of Trade, and one of the bye-laws provides that if a passenger travel by an 'ordinary' train in a class of carriage inferior to that for which he has a ticket, the difference of fare shall be immediately returned to him on application being made before the departure of the train. It is conceded that this would apply to an express train.

"On the other hand, if the word were used with reference to a question of speed, or of fare, it would be used as a rule in opposition to the word 'express.' In former days there was a very common distinction between the fares charged by ordinary and express trains, though it is almost unknown now, and to this hour there is a well-understood distinction between ordinary and express speed.

"In the present case the word occurs in a contract between a landowner and a railway company, for it is none the less a contract that it has received the sanction of the Legislature. Moreover, it refers to a line which was at the date of the contract, and still is, essentially a local line, serving a populous district with very frequent stations. By successive extensions the line has been connected with the defenders' main line to Dundee at both ends, *i.e.*, at Thornton and Leuchars; but there is no through service of trains in the proper sense, and of the four trains which are in question here, two commence their journey, and the other two complete their journey, at the town of Anstruther. No doubt there are through carriages and a through guard by these trains between Anstruther and Edinburgh, but it is no disparagement to that ancient burgh to say that it is not a terminus of importance in a railway sense. In short, the trains are run, not for the convenience of Anstruther in particular, but for the convenience of the group of stations along the Fife seaboard.

"The question, then, is what did the parties intend by using the phrase 'all ordinary trains' in this connection? It is plain that if ordinary trains meant trains which stopped at every station, the landowner took nothing by his clause. But the defenders say, 'a train may pass a few stations without stopping, and yet be an ordinary train.' Well then, I ask, how many? The trains in question stop at four and pass four. If they stopped at Lundin Links, as the pur-

¹ *Authorities*.—Burnett v. Great North of Scotland Railway Co., Feb. 24, 1885, 12 R. (H. L.) 25; Turner v. London and South-Western Railway Co., 1874, L. R., 17 Eq. 561.

No. 145. **LORD PRESIDENT.**—I think the Lord Ordinary's judgment is right, and his Lordship has stated the grounds of his conclusion with great clearness, and I think has taken a very judicious view of the construction of the contract. I therefore content myself with saying that I agree in his conclusion and reasons.

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LORD ADAM.—I am of the same opinion.

LORD M'LAREN.—I am quite satisfied to rest my judgment upon the grounds stated by the Lord Ordinary, but I desire to add this: The case has been argued to us on two grounds. It has been contended on behalf of the proprietor, on the one hand, that "ordinary" trains include all trains which are run daily and regularly, and that, on the other hand, if "ordinary train" in the contract is used in a sense which would distinguish express trains from those which are sometimes called "ordinary," even in that view it cannot be said that on this little line, which is only a single line and only serves local traffic, there are any trains which can be called "express" or other than "ordinary" trains. The latter is the view which the Lord Ordinary has taken, and it appears to me sufficient for the decision of this case. But it is plain in construing an expression of this kind that, apart from some special category or description suggested by the context, the word "ordinary" is a word of very vague and indeterminate meaning, and I should have difficulty in knowing what was intended to be excluded by the word "ordinary train" in the absence of expressions in the agreement pointing out trains of some extraordinary or special class. And therefore I should be disposed also to adopt the argument to the effect that in a line of this description every train which appears in the

suer says they ought to do, they would stop at five, and pass only three. Why should they not be classed as ordinary trains? The only answer is that they are 'fast' trains. I think the defenders' witnesses felt the difficulty of calling them express trains, and therefore they fell back on the word 'fast.' The slowest of them (the 11.38 from Thornton) takes forty-seven minutes to get to Anstruther, while the fastest of the stopping trains (the 9.40 from Anstruther) takes fifty-two minutes to get to Thornton—a difference of only five minutes. The average speed of the so-called fast trains is at the rate of $24\frac{1}{2}$ miles an hour, as against an average of $18\frac{1}{2}$ miles an hour for the stopping trains. The defenders' manager says that the trains in question have marks—two discs by day and two lamps by night—which distinguish them as express or fast trains. But I demur to the notion that a railway company can convert a train from an ordinary to an extra-ordinary train by simply putting on discs or running it past a few stations and then calling it 'fast.'

"In short, it seems to me that the character of these trains enables me to decide the case in favour of the pursuer, without attempting any precise definition of the word 'ordinary' as used in the Act. If the East of Fife Branch had become a great through route between (let us say) Dundee and Edinburgh, with real express trains running over it, the change of circumstances might have been so great as to make it unreasonable to hold that the parties had such trains in contemplation when they framed the clause under construction. But the trains in question have no such character. They are essentially local trains, serving not termini but a district, just as the trains on that line have done all along; and if they are local trains of the best class, that only makes it the more natural that the landowner should desire to have the benefit of them. He must be held to have stipulated for something which the voluntary action of the company was not likely to give him. When, therefore, he stipulated that all ordinary trains should stop, I think the agreement was that all trains should stop which did not clearly belong to some other category; and I am of opinion that the trains in question do not belong to any other category."

company's time-tables, and is one that is run daily for the conveyance of passengers, is to be called an ordinary train. The exclusion would then apply to special trains or excursion trains, or trains indeed of any description other than those that are advertised and that are regularly run. It may very well be that under other agreements between railway companies and owners of land adjacent a different principle of construction might be applied, and it may be an element of importance that the station is on a main thoroughfare, on which trains have been run at express speed, conveying passengers without stopping from one terminus to another. But there is nothing here either in the local situation or character of the line, or in the context of the agreement, which to my mind suggests a use of the word "ordinary" as meaning the exclusion of any trains such as run regularly for the conveyance of passengers.

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LORD KINNEAR.—I agree with your Lordship. I am not prepared to define exhaustively the kind or kinds of trains which would be excluded from the operation of the contract as being extraordinary. I think it sufficient for the judgment to say that I agree with the Lord Ordinary that the trains in question have not been shewn to us to be other than ordinary trains, and that as they do not belong to any other category they must necessarily fall within the clause in question.

THE COURT adhered.

MACPHERSON & MACKAY, W.S.—JAMES WATSON, S.S.C.—Agents.

WILLIAM WELSH, Pursuer (Respondent).—*Ure—Clyde.*
JAMES RUSSELL, Defender (Reclaimer).—*Johnston—Salvesen.*

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Sale—Sale of heritage—Warrandice.—The purchaser of a heritable subject, holding a disposition containing a clause of absolute warrandice, has no remedy under the warrandice clause other than a claim for indemnity for loss sustained through eviction.

The purchaser of a house and garden, holding a disposition containing a clause of absolute warrandice, two years after the purchase brought an action against the seller concluding for decree ordaining the defender to make payment to the pursuer of £750, "being the present value of the subjects." The pursuer founded on the warrandice clause, and averred that after the purchase the owner of an adjoining property had obtained decree against him establishing the existence of a servitude of way over the garden; that he had thus been evicted from the subjects; that their "present value" was £750; and that he was willing to reconvey the subjects to the defender on payment of £750. *Held* that in an action upon warrandice a purchaser in a case of partial eviction was not entitled to obtain from the seller the value of the subjects on tendering a reconveyance, his only right being to obtain indemnification for the loss sustained through the eviction, and that as the present summons contained no averment of the pursuer's loss through the existence of the servitude, and no conclusion applicable thereto, it fell to be dismissed.

Expenses—Taxation—Process—A. S., July 15, 1876, General Regulation 5.—The A. S., July 15, 1876, General Regulation 5, provides,—"Notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings."

The defender of an action, who, besides denying the pursuer's averments on the merits, pleaded that the action was incompetent, did not reclaim against an interlocutor of the Lord Ordinary repelling the plea to competency and allowing

No. 146. a proof. The Lord Ordinary, having heard the proof, gave judgment for the pursuer. At the hearing upon a reclaiming note against that judgment the defender insisted in his objection to the competency of the action, but admitted that his defences on the merits could not be entertained in the absence of a third party. The Court recalled the interlocutor of the Lord Ordinary, dismissed the action as incompetent, and found the defender entitled to expenses. The pursuer objected to the Auditor's report on the defender's account of expenses in respect that under the A. S., July 15, 1876, General Regulation 5, the Auditor ought to have taxed off the whole expenses of the proof. The Court *repelled* the objection, holding that the question raised was one which it was for the Court to decide when disposing of the motion for expenses, and not for the Auditor, and that the objection came too late, the Court having finally disposed of the motion for expenses.

1ST DIVISION. IN June 1890 James Russell, manufacturer in Selkirk, sold a house and back-garden in Selkirk to William Welsh, painter there, for £600, conform to disposition containing a clause of absolute warrandice, and bearing that the subjects were free from all burdens.

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On 27th December 1892 Welsh brought an action against Russell, concluding for decree that the defender was bound to free and relieve the subjects disposed of a servitude of passage through the back garden, possessed and enjoyed by Thomas Scott, as proprietor of the ground bounding the subjects on the east, and that by procuring from Scott, and duly recording a renunciation or conveyance of the said servitude right; and failing the defender procuring such recorded conveyance or renunciation, for decree ordaining him "to make payment to the pursuer of the sum of £750 sterling, being the present value of the subjects and others before described"; and further, and in either case, for payment of £20, 4s. 8d., "being the loss and damage incurred by the pursuer by and in consequence of a decree of interdict" obtained by Scott against him.

The conclusions of the summons made no provision for restitution of the subjects.

The pursuer founded on the warrandice clause in the disposition and averred that in June 1892 Scott claimed a servitude of way through the pursuer's back-garden, and that the pursuer on 3d June intimated this claim to the defender; that on 15th August Scott brought a petition for interdict against the pursuer, and that the pursuer on 17th August intimated this petition to the defender; that the pursuer, being advised by his agents that Scott's claim was valid in law, intimated this to the defender, and further intimated that the action would not be defended in so far as he (the pursuer) was concerned; that Scott obtained interdict on 7th October 1892; that the servitude right was a legal burden over the subjects, and had existed from time immemorial; that it was not disclosed to the pursuer at the time of the sale; that it was of a very burdensome nature and materially depreciated the value of the subjects. "By and through the existence and exercise of the servitude, . . . and the said decree of interdict, the pursuer has been evicted from the peaceable enjoyment and possession of the subjects. . . . The present value of the subjects (which have been greatly improved by the pursuer at an expenditure of £150 or thereby), free of the said servitude, the pursuer estimates at £750, and he is willing to reconvey them to the defender on payment of the sums now sued for."

The pursuer pleaded;—(1) The pursuer having purchased the subjects from the defender under a disposition containing absolute warrandice, and having been evicted therefrom, as condescended on, he is entitled to have the records purged of the said servitude rights as concluded for. (2) In the event of the defender failing to purge the records as concluded for,

the pursuer is entitled to decree in terms of the alternative conclusion of the summons, with expenses. (3) The pursuer having sustained loss and damage to the amount claimed, by and through the breach of warrandice condescended on, he is entitled to decree therefor against the defender, with expenses. No. 146.
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The defender denied the existence of the alleged servitude, and pleaded, *inter alia*;—(1) The action is incompetent as laid.

On 18th March 1893 the Lord Ordinary (Stormonth-Darling) repelled the first plea in law for the defender and allowed a proof.

The evidence led at the proof was mainly directed to the question whether the servitude existed.

On 10th November 1893 the Lord Ordinary pronounced an interlocutor by which he found that the subjects were burdened with the servitude described in the summons; that the defender was bound to free and relieve the subjects of the said servitude or else to make payment to the pursuer of the present value of the subjects on obtaining a reconveyance thereof from the pursuer; and further, that the defender was bound to make payment to the pursuer of the expenses incurred by him in connection with the action for interdict; continued the cause in order that the defender might have an opportunity of disburdening the subjects, if so advised, and granted leave to reclaim.*

* "OPINION.—(After examining the evidence and coming to the conclusion that the existence of the servitude in question had been established)—The question remains whether he [the pursuer] is entitled to the remedy which he asks.

"Warrandice indemnifies against loss from defective right. Although the existence of an undisclosed and unsuspected servitude does not mean want of title, it constitutes a material limitation on the full right of property which the purchaser had reason to think he was acquiring. Accordingly, in *Urquhart v. Halden*, 13 S. 844, the discovery of a negative servitude over the ground acquired was held to give the purchaser a right either to have the burden removed or to be relieved of his bargain. It is said by the defender that this rule applies to servitudes only where they are of a very burdensome description, or, to use the words of Erskine, are 'uncommonly heavy' (Ersk. ii. 3, 31). I cannot say that this seems to me a satisfactory distinction, for it lays upon the Court the duty of determining a question of degree, which must depend to some extent on the use which the purchaser intended to make of his property. I do not find that it has ever received effect except in three old cases, two of which were cases of thirlage, and the third a case of peat-casting—(*Sandilands* (1672), M. 16,599; *Symington* (1780), M. 16,637; *Gordonston* (1682), M. 16,606). In the first and last of these great stress seems to have been laid upon the fact of the servitudes being of a kind 'notourly known,' but here all argument to that effect is excluded by the circumstance that the defender repudiates all knowledge on his own part, and cannot therefore impute knowledge to the pursuer. It is impossible to describe the servitude in this case as a very serious one, and I cannot help thinking that a very moderate amount of neighbourly forbearance on the part of Scott and the pursuer would have reduced it to a minimum. But, as a question of law, I am not prepared to affirm that a right of passage at all times through a small urban subject is not a material burden on the full right of property, and therefore I think the defender was wrong in taking up the uncompromising attitude which he did. It follows that the pursuer is entitled to his remedy, and I shall adopt the course which was followed in *Urquhart's* case by allowing the defender time to endeavour to have the servitude removed. I may add that, if the case should result in decree having to be pronounced for rescission of the bargain and payment of the value of the subjects, I am by no means satisfied that the pursuer has proved the full value which he claims."

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At the hearing in the Inner-House the parties ultimately admitted that the question of the existence of the servitude could not competently be determined in the absence of the owner of the alleged dominant tenement.

Argued for the defender;—The action was incompetent in so far as it concluded that the defender, in the event of his failure to procure a renunciation of the alleged servitude, ought to be decerned to make payment to the pursuer of £750 as “being the present value of the subjects.” Assuming the pursuer’s tender of a reconveyance to be read into that conclusion, the conclusion amounted to a claim to have the bargain rescinded. But no relevant grounds were here stated for reduction of the contract. *Urquhart v. Halden*¹ was virtually an action for reduction of the contract, as it proceeded on the ground that the seller there was in bad faith in not disclosing the existence of the servitude. Here, on the other hand, the action was simply an action upon the warrandice clause, which assumed the contract to be effectual and entitled the purchaser to damages merely in the event of eviction. The pursuer’s proper remedy, therefore, was an action for damages in compensation of the loss which he had sustained through the eviction. But it was impossible to treat this action as an action of damages; there was neither averment nor proof of the injury which the existence of this servitude caused to the pursuer. The action ought, consequently, to be dismissed.

Argued for the pursuer;—The action was competent. The pursuer’s position was, that he had not got what he bargained for, and that consequently he was entitled to return the subjects, receiving in exchange their value. That was the proper course. Eviction from a part of the subjects was eviction from the whole. The defender’s contention came to this, that the remedy for a breach of warrandice was the *actio quanti minoris*. Such an action was contrary to the general principles of the law of sale in the case of moveables, and there was neither authority nor principle for holding that the sale of heritage was in this respect in a different position.

The parties were also heard upon the question, considered in the Lord Ordinary’s opinion, whether the existence of the servitude in question amounted to a breach of the warrandice.²

At advising, on 20th March 1894,—

LORD M^cLAREN.—This is an action founded on breach of warranty of a sale of heritable property in the town of Selkirk. The warranty is contained in a warrandice clause in the usual form, and the breach complained of consists in the successful assertion of a servitude of way or passage through the pursuer’s garden by the owner of an adjoining tenement. An action was brought in the Sheriff Court to constitute the servitude, and the present pursuer, after intimating the claim to the vendor, the present defender (who declined to interfere), allowed decree to pass in absence, and instituted this action with a view to indemnification. The Lord Ordinary allowed a proof, and on a consideration of the title-deeds, and explanatory parole evidence, found that the servitude was proved.

Before examining the case on the merits, it is desirable to consider what are

¹ *Urquhart v. Halden*, June 2, 1835, 13 S. 844.

² Authorities referred to by the Lord Ordinary, and *Stair*, ii. 3, 46; *More’s Notes to Stair*, pp. 92 and 93; *Bell’s Prin. sec.* 895; *Menzies’ Lectures on Conveyancing*, 3d ed. p. 555; *Bell’s Lectures on Conveyancing*, i. 218.

the rights of a creditor in the obligation called warrandice, because unless the relief claimed in this action be consistent with the pursuer's rights under the obligation, it is useless to proceed further.

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The obligation of warrandice differs from all other obligations in this respect, that it is not intended that it should be performed immediately, or within a definite time, or even within what the law describes as a reasonable time. It remains latent until the conditions come into existence that give it force and effect, and it continues to affect the granter and his heirs until the possibility of adverse claims has been extinguished by the long prescription.

The obligation has also this peculiarity in common with other obligations of indemnity, that its extent is measured by the extent of the injury which the creditor in the obligation may sustain, because such obligations are designed to indemnify the purchaser not only against the consequences of complete eviction, but against the loss of the most inconsiderable fraction of the estate, or its diminution in value by reason of the establishment of a burden of any kind.

If the question were now raised for the first time, how a warranty of title should be enforced, everyone would admit that the remedies of restitution, or repayment of the price, are singularly inappropriate to such a case. To put a case which is quite pertinent to the inquiry, we may suppose that thirty-nine years after the sale of an estate a cottage or an acre of moorland, which had been included in a description of subjects, was found to belong to another proprietor. In such a case, we do not immediately recognise that it is consistent with legal principle or with justice that the heirs of the seller should be required to repay the price, or should be obliged to take back the estate diminished by the evicted acre. If the seller or his heirs should be in a position to purchase the evicted subject and should offer reinstatement, this would seem to be a very satisfactory way of performing their obligation. But again, it is impossible to entertain the proposition that the seller is bound to purchase the evicted subject, because the law does not give him the power of compulsory purchase from the true owner, and the law will not require any man to perform specifically something that is not within his power. It is indeed evident from the nature of the obligation of warrandice that it must in the general case, and probably in all cases, resolve into a claim of pecuniary indemnification for the loss of the subject of sale, or its diminution in value through the existence of real securities, real burdens, servitudes, or other real rights affecting the estate.

Passing to the question of authority, there can be no better authority on such a subject than Erskine, who in Book ii. title 3, treats of warrandice at considerable length, and in section 30 makes it quite clear that in his opinion the remedy is not restitution, but indemnification. He says that "it is uncontested that absolute warrandice, after the subject is evicted, founds the grantee in an action of recourse against the granter, for making up to him the full damage he has suffered, either through the contravention of the warrandice or any defect in the right. An offer by him who warrants a right, therefore, to put the grantee in his own place by making him full payment of the price he paid for it, with the interest from the time of eviction, is not sufficient. For though this would indemnify the grantee, so that he would be no loser by the bargain, yet the obligation to warrant is not intended barely for indemnifying the purchaser, but for securing him against all the consequences of contravention, and, of course, for making payment to him, in case of eviction, of the full value of the subject at that period, together with the loss he has sustained through the

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want of it from that time." If, as Erskine points out, there are cases where an offer of repayment of the price with interest would not be a sufficient fulfilment of the warranty, it is perfectly clear that there are cases where repayment of the price would be very much in excess of the true measure of the obligation, and if illustration were needed, I could not desire a better one than the present claim. In the 31st section, Erskine considers the case of servitudes and says (speaking with obvious reference to considerable estates) that "warrandice is not incurred by every light servitude that the grantor or his authors may have imposed upon the lands conveyed, such as lands are usually charged with, e.g., aqueducts, passages, or even a moderate thirlage. But, if the servitude be uncommonly heavy, the grantor who makes over the estate *tanquam optimum maximum*, incurs the warrandice." The liability thus incurred is, of course, the liability to make pecuniary compensation, which is the only kind of liability recognised by the author. It may be that in some cases of total eviction, or cases treated as such, the decree obtained has been in form a decree for repayment of the price with or without interest, according as the purchaser had or had not got benefit by the possession of the lands for the period subsequent to the sale. But this would only be because, in the particular case, the value of the property was unchanged, and the price originally paid was considered to be a fair measure of the loss consequent on eviction. It is proper to point out that repayment in the case supposed is really indemnification, not restitution. Restitution supposes that the purchaser reconveys the estate in exchange for repayment of the price. But in the case supposed reconveyance is impossible, because the estate has been evicted, and such cases lend no support to the theory that on the discovery of a servitude or burden whose existence was unknown to the parties at the time of the sale, the purchaser is entitled to return the subjects to the seller and to demand repayment of the price. If he has such a right, it can only be made good by a reduction on the ground of fraud or error, and not by an action on the warranty.

If I have rightly stated the limits of the liability undertaken by the seller, the present action must fail, because it is neither in form nor in substance an action of damages. The first conclusion is that the defender should free and relieve the subjects described of a servitude of passage by procuring a renunciation of that right. I think that in fair construction this conclusion is only expressed in such terms as to give the defender the option of discharging the servitude, and when so interpreted the conclusion is unobjectionable. But the alternative conclusion is that failing the defender producing such renunciation he shall be decerned "to make payment of the sum of £750, being the present value of the subjects and others before described." If the condescendence had contained any specific statement of damage corresponding to the existence of a limited right in the proprietor of a dominant tenement, it might have been possible to treat the second conclusion as a conclusion for an arbitrary sum of damages. But the theory of the condescendence is that the pursuer is entitled to be indemnified as for a total eviction, and it is not made clear whether he is also to keep the subjects or to restore them. There is neither averment nor proof of partial damage, and my opinion is that the claim for repayment of price or value is inadmissible and contrary to law, and that the action ought to be dismissed.

LORD ADAM concurred.

LORD KINNEAR.—I am of the same opinion. The Lord Ordinary was invited by both parties to determine on the merits the question whether these subjects are or are not affected by a servitude, and he has decided it in favour of the pursuer. It is now admitted that that question of the existence of the servitude is not competently raised in this action, and cannot possibly be decided, for the party really interested in maintaining the existence of the servitude is not a party to the action. It is manifest that if there be any question whether the subjects are burdened by a servitude the true interest of the proprietor is not to maintain the claim but to defeat it; and it is equally clear that no judgment between him on the one hand and the defender on the other could be binding on the owner or alleged owner of the dominant tenement. It came to be conceded, however, I think, at the bar, that that question was not now before us.

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The contravention of warrandice, of which the pursuer is entitled to complain, is not the existence of the servitude but a decree in absence obtained by Mr Scott in the Sheriff Court, by which the pursuer's right of property is so burdened as to restrict his use and enjoyment of the subjects purchased. Now, that decree may or may not be well founded, but it cannot be reviewed on its merits in this process. The seller of the subjects—the granter of the warrandice—having had notice of the Sheriff Court proceedings declined to appear, and accordingly the purchaser brings this action on the warrandice clause; and I think he would be quite entitled to say, that whether that Sheriff Court decree is well founded or not, so long as it stands it is an encroachment on his right and a contravention of the warrandice, and therefore that if it is invalid it must be set aside, or if it is well founded he must be indemnified. But I agree with what has been said by Lord M'Laren, that that being the position of his right he has chosen a wrong and inapposite remedy, because the only operative conclusion of the summons which he has brought, after allowing the defender an opportunity of clearing the subjects of the burden, is that the defender should make payment to him of the present value of the subjects described in the summons. Now, that is the ordinary and perfectly appropriate conclusion of a summons upon a warrandice where there has been a total eviction of the subjects from the purchaser, for then the measure of the indemnity which he is asking, and to which he is entitled, is the present value of the whole subjects of which he has been deprived. In such an action the conclusion is not for repayment of the price, as Lord M'Laren has explained, but a conclusion for the present value of the subjects. In the ordinary case, of course, there is no corresponding conclusion for restitution of the subjects, for the assumption of such an action is that they have been carried away.

But such a conclusion is clearly inappropriate to a case where the purchaser remains in possession of the subjects, and complains merely that his use of them is diminished by reason of a servitude right of way. It is impossible that a purchaser of land should recover the entire value of the land from the seller, except on condition of his restoring the land, and in circumstances which will entitle him to do so. It is said that although there is no provision for restoration to be found in the conclusions of the summons, an offer to restore is contained in the condescendence. But however that may be, it is not appropriate to an action for breach of warrandice. That is an action on the contract, and the pursuer of an action founded upon the contract cannot in the same action claim to recover the price and give back the lands, and so to set aside the con-

No. 146. tract. The pursuer does not maintain that he is entitled to reduce the contract. But if he did he could not have decree of reduction in an action founded upon the warrandice clause. The remedy to which he is entitled under the clause of warrandice is not reduction but indemnification. In case of a total eviction he is entitled to demand the whole value of the subjects. In case of a partial eviction he cannot be entitled to the whole value, but only to the value of what he has lost. The action on the warrandice, therefore, where the pursuer is left in possession of the subject, and complains merely of a burden by which its value is diminished, is in effect an action of damages. But if the pursuer has a good claim for damages, there is no conclusion in the summons which will enable us to estimate or give effect to such a claim.

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I concur therefore in the opinion of Lord M'Laren.

The LORD PRESIDENT concurred.

THE COURT pronounced the following interlocutor:—"Having considered the reclaiming note for the defender against the interlocutor of Lord Stormonth-Darling, dated 10th November 1893, and heard counsel for the parties, recall said interlocutor, dismiss the action, and decern: Find defender entitled to expenses: Remit the account thereof to the Auditor to tax, and to report."

Upon the motion for the approval of the Auditor's report on the defender's account of expenses, the pursuer objected that, under the Act of Sederunt, July 15, 1876,* the Auditor ought to have taxed off the whole expenses of the proof.

Argued for the pursuer;—The proof had been made necessary in consequence of the defender's denial of the existence of the servitude, but he now admitted that the question of the existence of the servitude could not be entertained in the absence of the owner of the alleged dominant tenement. Either, therefore, the proof was a branch of the litigation in which the defender had been unsuccessful, or the expense of the proof had been occasioned by the defender's fault. The defender's account of expenses, *quoad* the proof, ought therefore to be disallowed.¹

Argued for the defender;—The defender did not desire a proof; he pleaded that the action was incompetent; but he was not bound to reclaim at once against the Lord Ordinary's interlocutor of 18th March 1893 repelling that plea and allowing a proof. It was the pursuer who was responsible for the proof in consequence of his having insisted in the action; and as the action had ultimately been found to be incompetent he must bear the expense of the proof. At all events it was too late to raise this question now. It was not a question of taxation, but was a question for the Court when considering the motion for expenses.

LORD ADAM.—The objection which is here taken to the Auditor's report does not appear to me to raise a question of taxation. I do not think that "fault," in the sense of the General Regulation, means that the party has stated a plea which he ought not to have stated, so as to entitle the Auditor to determine

* The A.S. July 15, 1876, General Regulation 5, provides,—“Notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.”

¹ Lord Clinton v. Brown, July 10, 1874, 1 R. 1137; Ralston v. Caledonian Railway Co., Feb. 9, 1878, 5 R. 671.

whether the particular plea ought or ought not to have been stated. Nor do I see how it can be said that there is any branch of the case in which the defender has been unsuccessful; on the contrary, he has been entirely successful.

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LORD M'LAREN.—I agree that the Act of Sederunt does not entitle the Auditor to disallow the whole expense of this proof. If the pursuer desired that the whole expense should be disallowed he ought to have argued the question to us when we were dealing with the defender's motion for expenses; but if he had raised that question at that stage I am not sure that he would have been successful. The defender's first plea in law gave the pursuer full notice, in the Outer-House, of the objection to the competency of the action, and he must be held to have known that although the Lord Ordinary repelled the plea it was open to the defender to renew his objection at a later stage. It was for the pursuer, therefore, to consider whether he should go on with his action and so take the risk of the defender's objection ultimately proving successful, or abandon the action and raise another which might not be open to the objection of incompetency. Unless we are prepared to hold that a defender, who pleads that an action is incompetent, is bound to reclaim at once against an interlocutor repelling that plea, I do not see how we can say that this proof has been occasioned by the fault of the defender.

LORD KINNEAR.—I agree that the question raised is not a question of taxation but is a question for the Court to decide, and I think that it cannot competently be brought before the Court after the question of expenses has been finally disposed of by interlocutor.

The LORD PRESIDENT concurred.

THE COURT approved of the Auditor's report.

DOVE & LOCKHART, S.S.C.—E. A. & F. HUNTER, W.S.—Agents.

GEORGE JOHNSTONE, Pursuer (Respondent).—*J. Wilson.*
MRS WILHELMINA M. H. HUGHAN AND ANOTHER, Defenders (Appellants).
—*Johnston—Macfarlane.*

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Lease—Repair of farm buildings—Disrepair from natural decay—Damages—Personal exception—Mora.—In an action of damages at the instance of a tenant against his landlord on the ground that from 1887 to 1892 he had not had the use of the granary and piggery on the farm, the pursuer averred that in the former year those buildings became "unfit to be repaired" "on account of decay occasioned by the lapse of time," that at the rent collection in the summer of that year, and at every succeeding rent collection, he had asked the factor to put them into tenantable order, and that the factor had frequently promised to have this done, but had never fulfilled his promise. He had not, however, made or claimed any deduction from his rent. *Held* (1) that the tenant had a relevant action of damages, in respect that the landlord was liable for extraordinary repairs necessitated by natural decay; and (2) that the tenant was not barred by delay from insisting on his claim.

Process—Appeal for jury trial—Remit to Sheriff—Special cause—Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 40.—In an action in a Sheriff Court at the instance of a tenant of a farm against his landlord for £100 damages, on the ground that he had not had the use of certain buildings on the farm, which had become useless through decay, the Sheriff allowed a proof. The defender having appealed for jury trial, the pursuer moved the Court to remit the cause to the Sheriff on the ground that the sum at stake was trifling, and that the Sheriff

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was already acquainted with the case, as, in another action, he had already settled the question of the landlord's liability to repair the buildings. *Held* that the defender was entitled to have the case tried by jury, no special cause to the contrary having been shewn.

GEORGE JOHNSTONE was tenant of the farm of Ringour, Kirkcudbrightshire, under a lease for nineteen years from Whitsunday 1881. The proprietor, Mrs Hughan of Airds, and her husband were bound under the lease to do certain specified work on the barn and stable, and to put the cart-shed in repair. The lease then contained the following clause:—"And with regard to the houses and fences on the premises hereby let, the said George Johnstone binds and obliges himself and his fore-saids to maintain them in good and sufficient repair during the currency of this lease."

In 1892 Johnstone raised an action in the Sheriff Court, Kirkcudbright, against Mr and Mrs Hughan, to have them ordained to execute such repairs on the granary and piggeries on his farm as might be found to be necessary to put them in a tenantable condition. The Sheriff-substitute remitted to a man of skill to report on the state of the buildings, and the report having been given in, Mr and Mrs Hughan agreed to execute the work specified therein, and this they afterwards did.

In February 1894 Johnstone raised a second action in the Sheriff Court against Mr and Mrs Hughan concluding for £100 damages in respect of the loss he had suffered from being deprived of the use of the piggery and granary for five years.

The pursuer averred;—(Cond. 3) "A few years after the beginning of said lease certain of the office-houses on said farm, and particularly the granary and pig-houses, began to shew signs of decay, and the pursuer had several times to repair the same, but by about the end of the year 1887, on account of decay occasioned by the lapse of time, and not through any undue negligence on the part of the pursuer, the said granary and pig-houses had become unfit to be repaired, and required to be renewed." (Cond. 4) "In consequence of said decay the said granary and pig-houses had by the end of 1887 become utterly unfit for the purposes of the farm. Owing to the rotten condition of the roof and floor of the said granary, and the dilapidated state of the said pig-houses, the pursuer has since 1887 been unable to store his grain in said granary or keep pigs in said pig-houses. . . ." (Cond. 5) "The pursuer frequently called upon the defenders to put said office-houses into tenantable condition. At the half-yearly rent collection in the summer of 1887, and again at every succeeding rent collection, as well as on other occasions, he intimated to the defender's factor, Mr William Milroy, solicitor, Kirkcudbright, the state of the said houses, and called upon him to have them put into tenantable order. The said factor frequently promised to have this done, but delayed or neglected to do so, and the pursuer accordingly wrote to the said factor on 9th January 1890, and to the defender, the said Major Henry Houghton Hughan, on 11th January 1890, calling upon them to have the necessary work done. . . ."

"On 8th January 1892 the pursuer's agent wrote to the defenders' agent regarding the granary, and added,—'I have further to inform you that Mr Johnstone will hold the landlord liable for whatever loss he has sustained or may hereafter sustain from the said granary being unfit for use.'"

He then averred that in consequence of the defenders' failure to put the granary and piggery into repair he had been deprived of the use of them for more than five years. "He has thereby suffered loss, inconvenience, and expense, which he estimates at £100 sterling."

The pursuer pleaded, *inter alia*;—(1) The parts of the subjects let above condescended on having fallen into decay through the lapse of time, and being past ordinary repair, the defenders, as landlords of the pursuer, were bound to execute the renewals and restorations necessary to put the said subjects into tenantable condition, and they having delayed and refused to do so, the pursuer is entitled to compensation for the loss and injury he has thereby sustained. No. 147.
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The defenders pleaded, *inter alia*;—(1) The statements of the pursuer are irrelevant and insufficient to support the prayer of his petition. There is no specification of damage.

On 27th February 1894 the Sheriff-substitute (Lyell) allowed parties a proof.

The defenders appealed under the 40th section of the Judicature Act.

Argued for the defenders;—There was no relevant ground for holding the defenders liable in damages for any loss incurred by the pursuer through his exclusion from these buildings. It was evident from the terms of the lease that the landlord was to repair certain of the farm buildings, and that, *quoad ultra*, the tenant was to take things as they were. Even if it was incumbent on the defenders to renew these buildings, when it was properly brought to their notice that they required renewal the tenant, while he averred that he had made such a request, did not say that he had intimated a claim for damages until the letter of 8th January 1892. If a claim of damages on the ground of exclusion from part of the subjects of the lease was to be made it should have been intimated from the first, and the tenant should in each year have refused to pay the rent, or made a reservation with regard to his claim; as he had not done that, he must be held to have departed from it,¹ at least up to the date of the letter. Further, the averments as to the damage suffered were not sufficiently specific.

Argued for the pursuer;—The landlord was liable to keep these houses in repair, as it was not averred that the disrepair was caused by any fault of the pursuer, or by anything but decay.² In a question of damages the tenant was entitled to date his claim from the time when he first made an effective complaint,³ and that he did in the present case, in 1887, when he complained to the factor. The averments of damage were sufficiently specific.

LORD PRESIDENT.—I think that the pursuer has a relevant case on record. I am unable to give effect to the appellants' argument that the lease as a whole absolves the landlord from the ordinary and inherent obligation on any person letting farm buildings to keep them extant. The case here is that the untenable condition of the granary and piggery was caused by decay,—that is to say, that it was not caused by the absence of timely repairs, such as fell to the tenant to make. In such circumstances there can be no doubt that the landlord is *prima facie* responsible, and it is going too far to say that, because the landlord has undertaken certain specified operations by way of renewals, that this completely exonerates him for the future from doing anything more to counteract the dilapidation of the premises by decay.

As regards the argument that the tenant has discharged his claim for damages,

¹ Broadwood v. Hunter, Feb. 2, 1855, 17 D. 340, 27 Scot. Jur. 587; Emslie v. Young's Trustees, March 16, 1894, *supra*, p. 710.

² Mossman v. Brocket, May 19, 1810, Hume's Dec. 850; Napier v. Ferrier, June 24, 1847, 9 D. 1354, 19 Scot. Jur. 586.

³ Macdonald v. Johnstone, June 12, 1883, 10 R. 959.

No. 147. the case does not, I think, fall within the principle of the cases of *Broadwood v. Hunter and Emslie*. The tenant here says that he did make specific claims for certain operations to be carried out, and that his claims were met by specific promises by the factor that what he required should be done. That averment supplies what was absent in the cases I have referred to, and I cannot think that here the tenant has so conducted himself as to make the landlord believe that he had departed from his claim. No doubt the averments as to the damage are rather general and colourless, but I am not prepared to say that they are so insufficient as to disentitle the pursuer from going to trial.

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LORD ADAM.—The lease between the pursuer and defender dealt with certain matters regarding the state of the offices, and it imposed certain obligations on the landlord with regard to them, and then provided that, these things being done, the tenant should take them over and keep them in repair. In so far as the lease deals with these matters it is, of course, conclusive, but beyond these obligations there are other legal obligations on both sides with which the lease did not deal. Now, it appears that about the seventh year of the lease the granary and piggery on the farm, by no neglect of the tenant, got into a condition of natural decay, and the question is, What is the legal obligation with regard to the repair of these buildings? I am of opinion that when there is a case of what may be called extraordinary repairs (as they are called by Lord President Boyle in the case of *Broadwood*), the obligation to restore is on the landlord. Now, that is the case here, and therefore, I think, there is a relevant ground of damage stated.

It is, however, further said that the tenant is not entitled to insist in the claim, in respect that when he paid his rent in 1887, and subsequent years, he did not intimate and insist on a claim for damages. That plea is rested on the cases of *Broadwood v. Hunter and Emslie*. That plea amounts to a plea of *mora*, and that plea always refers us to the particular circumstances in which it is pleaded. The case of *Broadwood* was a periodical claim for damage done to a farm by rabbits, and it must be observed that, from the nature of the claim, if it is not made at once, the defender is not in a position to prove his defence. The case of *Emslie* was a claim of damages for insufficient heather-burning, and there it was proposed to go back for a number of years before the claim was made. There again, if the case had been held to be relevant, there would have been a clear injustice against the landlord, as he could not have proved all the facts,—as to the burning, the state of the weather in each year, and so on, necessary for his defence. That, as I understand it, is the principle of those cases, but the case here is not of that kind. In 1887 notice was here given to the factor of the state in which the buildings were, and he was then and subsequently called on to put them in repair. The factor promised to do so but did not fulfil his promise. That being so, I do not think that the case is within the rule of the cases I have referred to.

LORD M'LAREN and LORD KINNEAR concurred.

The defenders then moved that the cause should be sent to trial before a jury, on the ground that there were no special circumstances in the case to deprive them of their right to a jury.¹

The pursuer moved that the cause should be remitted to the Sheriff to

¹ Willison v. Petherbridge, July 15, 1893, 20 R. 976.

proceed, looking to the trifling nature of the cause,¹ and to the fact that the Sheriff was acquainted with the cause, as he had already decided in a previous action the question of the landlord's liability to repair the buildings. No. 147.
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LORD PRESIDENT.—I think this case must go to a jury. The appellants and defenders desire that that course should be taken. The action is one of damages, and I concur in the view expressed by Lord Adam in the case of *Willison v. Petherbridge*, July 15, 1893, 20 R. 976, where he says,—“This is an action of damages, and the Legislature says that such actions, when they originate in this Court, are to go to a jury unless special cause be shewn why this should not be done, or the parties agree otherwise. These actions of damages, arising in the Sheriff Court, may be appealed to this Court for jury trial, and that being so we must take it that the Legislature intended such actions to be tried by jury, just as if they had originated in this Court, provided the sum claimed is of the requisite amount. That amount is fixed at £40.”

On that ground I think the case must go to a jury, there being no special cause which does not apply to all similar cases of damages.

LORD ADAM.—I concur.

LORD M'LAREN.—It is quite settled that it is only in exceptional circumstances that an appellant is refused his privilege of jury trial. There are no exceptional circumstances here. The smallness of the sum claimed is an element for consideration in these questions, but there is nothing of that kind to be considered here. It sometimes happens that a defender appeals merely to raise a question of relevancy, and it has been decided that if it appears advisable the Court may thereafter send the case either to a jury or to proof before a Lord Ordinary or may remit it to the Sheriff, but in this case the appellants maintain their right to jury trial, and I am of opinion that they are entitled to this.

LORD KINNEAR.—There is nothing to render this case unsuitable for jury trial, and the smallness of the sum claimed is not in itself sufficient to induce us to refuse the appellants' motion for a jury trial.

THE COURT approved the following issue, and remitted the case to Lord Wellwood for jury trial:—“Whether, during the period from the beginning of 1888 to June 1893, or any part thereof, the floor and roof of the granary, and the floor, roof, and doors of the pig-houses on said farm were in such a state of decay as to render the said granary and pig-houses unfit for the purposes of the farm, through the fault of the defenders, to the loss, injury, and damage of the pursuer?”

DAVID CRAWFORD, S.S.C.—MACKENZIE & KERMACK, W.S.—Agents.

ALEXANDER MIDDLETON, Pursuer (Reclaimer).—*Jameson—Kemp.*
TRUSTEES OF MISSES ISABELLA J. AND HELEN LESLIE, Defenders
(Respondents).—*Dickson—Abel.*

No. 148.

May 23, 1894.
Middleton v.
Leslie.

Property—Restrictions on building—Superior and Vassal—Feu-charter—Buildings similar in style and quality.—A feu-disposition contained a provision that the dwelling-houses to be erected on the feu by the feuar should be “similar in style and quality” to the tenements already erected by the superior in the same street in which the feu subjects were situated. The vassal erected a

¹ Nicol v. Picken, Jan. 24, 1893, 20 R. 288.

No. 148. tenement containing dwelling-houses consisting of three or two rooms each. The tenements erected by the superior consisted of houses containing four or three rooms each. Externally the tenements were similar. *Held* that the vassal's tenement was not in contravention of the stipulations of the feu-disposition.

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(SEQUEL of case reported 19 R. 801.)

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Ld. Kyllachy.

By feu-disposition dated in May 1839 Alexander Middleton disposed a piece of ground on the south side of Belmont Road, Aberdeen, to Roderick M'Kay, who in the same year disposed the subjects to Misses Lamond, Isabella Jane, and Helen Leslie.

The feu-disposition provided, *inter alia*,—"The said Roderick M'Kay and his foresaids shall be bound within two years from the date of entry, under these presents, to erect on the ground hereby disposed one or more dwelling-houses or shops and dwelling-houses combined, similar in style and quality to and not exceeding in height the houses already erected by me on the south side of Belmont Road foresaid, or cottages, or two-storey houses (which however shall have no attics therein for occupation as dwelling-places, other than personally by tenants or others occupying the first or second floors of such dwelling-houses, subletting of said attics being excluded), not inferior to those on the north side of said road; but having the north or front walls thereof built of dressed or hammer-blocked ashlar work of granite stone; and which building shall be of the value of at least £1000 sterling; and my disponent is hereby specially prohibited from placing in the roofs fronting to Belmont Road of the houses to be erected by him as aforesaid projecting windows of any kind whatever, but such windows as are placed in the said roofs shall be flush with the same; but declaring that this prohibition does not apply to any cottages to be erected by my said disponent as aforesaid, the roofs of which may have projecting windows."

No buildings having been erected on the feu, in November 1891 Middleton raised an action in the Court of Session against the Misses Leslie to have them ordained forthwith to erect houses as stipulated for in the feu-disposition, and for damages.

On 19th May 1892 (19 R. 801) the First Division ordained the defenders to erect the buildings within one year.

In January 1893 the defenders submitted to the pursuer the plans of the proposed buildings. The pursuer objected to the plans as not being in conformity with the stipulations in the feu-disposition, but the defenders proceeded to erect buildings according to the plans.

The pursuer thereupon raised an action in the Sheriff Court at Aberdeen to have them interdicted from proceeding with the building. This action was remitted to the Court of Session *ob contingentiam*, and was there conjoined with the original action.*

The pursuer then amended his summons by averring that the buildings then being erected were not conform to the stipulations in the feu-disposition, but were "inferior in style and quality to the houses erected by the pursuer on the south side of Belmont Road. The said buildings so erected by the pursuer consist of a tenement and a half, containing two shops, an office, and dwelling-houses, of which dwelling-houses five contain four rooms each, and five three rooms each. The buildings erected by the defenders consist of half houses, some of two rooms and others of two rooms and a closet each. In the houses containing three apartments the bedrooms are smaller than in the houses on the south side, and some of them contain no fireplaces, while the bedrooms of the houses on the south side all contain fireplaces. The houses on the south side of Belmont Road

* On 18th October 1893 Miss Isabella J. Leslie (the last surviving sister and representative of her predeceasing sisters) having died, the trustees of Misses Isabella J. and Helen Leslie were sisted in her room.

belonging to the pursuer let to tenants of the middle class at rents of from £14 to £17 annually. The houses erected by the defenders are much inferior to those, and will only let to an inferior class of tenants, and at rents of not more than from £8 to £12 a-year.”

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The defenders denied that the houses they were erecting were “in any respect in violation of the feu-disposition.”

Proof was allowed, but before it was led the defenders’ buildings were finished.

From the proof it appeared that the buildings erected by the pursuer and the defenders respectively were of the construction set forth in the amended condescendence above quoted. A large body of evidence was led by the pursuer to prove that the houses built by the defenders would attract a poorer class of tenant, and so reduce the value of the pursuer’s houses. The defenders on their side led evidence to disprove this.

On 10th November 1893 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—“Finds that the pursuer has failed to prove that the houses erected by the defenders are disconform to the conditions of the feu-charter: Therefore assoilzies the defenders from the conclusions of the action raised in this Court, and dismisses the Sheriff Court action, and decerns.” *

* “OPINION.—The question in this case is whether a certain dwelling-house or tenement of dwelling-houses built by the defender on ground feued by him from the pursuer in Belmont Road, Aberdeen, is dissimilar in style and quality to a certain other tenement of dwelling-houses erected by and belonging to the pursuer, and situated on the same side of Belmont Road.

“The pursuer contends that the defender’s buildings are thus dissimilar. He says they are inferior buildings, or rather inferior dwelling-houses, and that he is entitled to damages in respect that their erection constituted a breach of the conditions of the defender’s feu—one of these conditions being that the feuar shall erect within a specified time ‘one or more dwelling-houses, or shops and dwelling-houses combined, similar in style and quality and not exceeding in height the houses already erected by the superior on the south side of Belmont Road aforesaid.’

“Upon the proof I am not able to hold that the defender’s tenement is dissimilar in style and quality to the pursuer’s. Externally it is admitted that there is no difference between the two. The complaint is that the two tenements are differently subdivided, the pursuer’s tenement being divided into houses of three and four rooms and the defender’s into houses of two and three rooms. This it is said implies a distinct difference in the probable class of tenants, and therefore that viewed with respect to occupation—that is to say, to the class of tenants—the houses forming the defender’s tenement are inferior to the houses forming the pursuer’s.

“Now upon the proof I am disposed to think that the houses within the defender’s tenement will probably be occupied by a lower class of tenants. Nay more, I do not know that I should object to say that the houses forming the defender’s tenement are by reason of their smaller size inferior in style and quality to the houses within the pursuer’s tenement.

“But the question I think is not whether the houses within the two tenements, but whether the two tenements—are dissimilar in style and quality. The feu-charter no doubt speaks not of tenements, but of ‘dwelling-houses.’ But what is meant by a dwelling-house is plainly a building—not a set of rooms within a building. In other words the tenements constitute the dwelling-houses to be compared, and that being so, the question, as I have said, is whether the two tenements are dissimilar ‘in style and quality.’

“Now ‘style and quality’ have in my opinion reference not to the occupation of the subjects, or to their adaptation to this or that kind of occupation. The reference is to their style and quality as buildings, and compared as buildings it is, I think, impossible to say that the two are dissimilar. Externally they are

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The pursuer reclaimed, and argued;—The words “similar in style and quality” in the feu-disposition applied both to the external appearance and internal arrangement of the houses to be built, and in tenements of houses the words applied to each individual house. Thus in the present case houses containing three or two rooms could not be said to be similar in style and quality to houses containing three or four rooms. Smaller houses naturally attracted poorer tenants, and thus lowered the general character of the whole street. The evidence proved this, and, therefore, the pursuer had an interest to enforce the restriction.¹

The defenders argued;—The clause being a clause restricting the rights of the defenders should be construed liberally. The word “dwelling-houses” in the feu-charter meant the whole building, and only applied to the external appearance of the tenements, and to the workmanship and material of which they were built. Such words did not apply to the internal arrangement of the building, or to the use to which it was to be put.² The evidence failed to prove any damage to the pursuer.

LORD ADAM.—This action raises a question between a superior and a vassal. The superior founds upon a clause in the feu-contract which imposes on the vassal certain obligations with regard to the building of houses or tenements upon the feu. The state of matters at the present time is this: At a previous stage of the case we held that the defender was bound to implement the obligation laid upon him by building a certain house upon the ground feued to him. He sent a plan shewing the house which he proposed to build, to the superior. The superior intimated in reply that he did not approve of the plan, but the vassal nevertheless built the house, and the question we have now to decide is, whether the house so built is in conformity with the stipulations of the feu-contract. The superior does not seek to enforce an irritancy against the vassal, but brings an action of damages, alleging that the manner in which the house has been built is not in conformity with the feu-contract, and that he has sustained damage owing to the vassal's breach of contract.

The clause in the feu-contract binds the vassal “within two years from the date of entry . . . to erect on the ground hereby disposed, one or more dwelling-houses, or shops and dwelling-houses combined, similar in style and quality to and not exceeding in height the houses already erected by me on the south side of Belmont Road.” It is then provided alternatively that the vassal may build cottages, and various other provisions follow, it being stipulated, for example, that the building to be erected shall be of the value of at least £1000.

the same, and the difference between them is not in the style and quality of the structures, but in the extent to which they are internally subdivided. I put it to the pursuer's counsel whether if the defender had erected, not a tenement divided into two-roomed houses, but self-contained dwelling-houses, or dwelling-houses divided into houses say of six or eight rooms, the pursuer could still have objected; and he was obliged to admit that his argument went that length. But this, as it seems to me, reduces the pursuer's argument to an absurdity. The superior cannot be supposed to have prohibited larger houses than those in his own tenement, and if so, I do not see how he can be held to have prohibited smaller houses. The thing prohibited is, it will be observed, ‘dissimilarity.’

“On the whole I am of opinion that the pursuer's objection to the defender's building is not well founded, and I must therefore find for the defender in both actions, with expenses.”

¹ *Naismith v. Cairnduff*, June 21, 1876, 3 R. 863.

² *Fraser v. Downie*, June 22, 1877, 4 R. 942, see *Lord Shand*, at p. 945; *Moir's Trustees v. M'Ewan*, July 15, 1880, 7 R. 1141.

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The vassal is also prohibited from doing certain things. The part of the contract which has formed the subject of discussion is the provision that the vassal shall erect dwelling-houses, or shops and dwelling-houses combined, "similar in style and quality" to the houses built by the pursuer on the same side of the road. A material dissimilarity is said to exist between the houses built by the vassal and those built by the superior, and the dissimilarity is said to consist in this: The houses in the tenement built by the vassal consist of two or three rooms each, whereas those in the superior's tenement consist of four or five rooms each, and the objection taken is that the smaller houses attract tenants of an inferior class, and that the tenants are more numerous in number, with the result that there are more children about the street. That is in truth the leading objection, which is therefore one with reference to the internal construction, and not the external appearance of the building. The only objection stated to the external appearance is that the building erected by the vassal is one foot lower than that erected by the superior, but with reference to the observations which have been made on the use of the word "quality" in the feu-contract, I may say that in the matter of excellence of construction no objection is taken to the building either externally or internally. It is not said that the masonry or carpentry are of different quality or inferior workmanship.

The question is, whether houses which differ in the manner I have described are of the same style and quality. With reference to the whole clause, the first observation which I have to make is that it does not deal with use and occupation, and so far as I see, the house having once been erected, there is nothing to prevent the vassal from introducing any number of tenants into it. He might let it out in rooms, and I say again that, so far as use and occupation are concerned, there is no prohibition of any kind in the feu-contract. Mr Jameson founded upon the fact that there was a prohibition imposed as regards cottages in the event of their being built, that the attics should not be let out separately from the first or second floors, but that prohibition has reference only to cottages, and the fact that it is imposed in the case of the cottages goes in my humble opinion to support the observation that there is no prohibition as to the use and occupation of the houses.

In the next place, the words "style and quality" refer to the whole building, and not to any particular portion of it. It is provided, for example, that the houses are not to exceed in height the houses erected by the superior, which clearly refers to the height of the whole tenement, and shews that the words "style and quality" refer to the house as a whole, and not to the separate parts into which it may be divided.

If that is so, the question is whether the houses, so far as their external appearance and quality of construction and workmanship is concerned, are the same in style and quality. The Lord Ordinary is satisfied that they are, and I agree with the Lord Ordinary. I do not say that "style and quality" necessarily refer only to the external appearance. I think they may also refer to the internal construction so far as quality of material and workmanship is concerned. But these words do not in my opinion refer to the internal subdivision of the tenement, and the buildings being of similar quality and style in other respects, I cannot see that their difference in the matter of internal subdivision is such as to lead us to differ from the Lord Ordinary.

LORD M'LAREN concurred.

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LORD KINNEAR—I am of the same opinion. I think Mr Abel was quite right in saying that when stipulations of this kind imposing restrictions upon rights of property are expressed in ambiguous terms, they must be construed *contra proferentem*, that is, against the superior and in favour of the vassal who is to be limited in the use of his property. I think that that general rule is applicable in this case, because the language used in the feu-contract is exceedingly vague. The houses which the vassal is taken bound to erect are to be similar in quality and style to those already erected by the superior. The superior says that he has erected a tenement of shops, offices, and dwelling-houses consisting of three or four rooms each, and he complains that the vassal has erected a tenement containing dwelling-houses, some of three and some of two rooms. The vassal's buildings therefore resemble the superior's in so far as they are tenements subdivided into dwelling-houses containing a very small number of rooms.

I agree with Lord Adam that the restriction in the feu-contract does not strike against use and occupation. The question therefore to be considered is, whether the division into houses of two and three rooms, instead of into houses of three and four rooms each, creates a dissimilarity in style and quality between the two buildings, and I cannot say that it does. If the superior intended to limit the subdivision which should be permissible to his vassal, he should have done so in express terms. I agree with Lord Adam that in order to satisfy the obligation of the vassal his house should in material and workmanship be as good inside and outside as the superior's—but it is not said that the two houses are different in this respect.

The other differences seem to be immaterial. I should, however, have thought that the difference in height between the two tenements might have afforded the superior a ground of objection if the condition in the contract had stopped at the word “quality,” but the following sentence contains a specific provision that the vassal shall not build higher tenements than the superior's, which seems to me to imply that the new buildings need not be of the same height as the old, provided they do not infringe the specific restriction.

As to the general construction of the clause, it appears to me that some light is thrown upon the question what the superior meant by “style and quality,” by a comparison of the clauses as to the different kind of buildings which the vassal may erect. He is bound to erect houses “similar in style and quality to and not exceeding in height the houses already erected” by the superior. But he (the vassal) is allowed as an alternative to erect cottages or two-storey houses subject to certain restrictions. The distinction seems to be between the general style of the houses already built and that of the cottages or two-storey buildings.

The LORD PRESIDENT concurred.

THE COURT adhered.

HENRY & SCOTT, W.S.—DALGLEISH, GRAY, & DOBBIE, W.S.—Agents.

WILLIAM EDWARD HOWARD (Howard's Executor), First Party.—

Graham Stewart.

JOHN WALKER (Mrs Agnes E. Howard's Curator Bonis), Second Party.—

Craigie.

GEORGE FREDERICK HOWARD AND OTHERS, Third Parties.—

Graham Stewart.

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Aliment—Husband and Wife—Maintenance of lunatic widow.—A husband died intestate and childless, survived by his widow, who was of unsound mind, and was confined in a lunatic asylum. She had no means of subsistence other than her right to a half of her husband's estate, which amounted to £200. In a special case between her curator bonis and the deceased's next of kin, held that the maintenance of the widow was not a burden on the husband's estate, and that the next of kin were entitled to immediate payment of one-half thereof.

GEORGE FREDERICK HOWARD, Leith, died there intestate and childless, 1ST DIVISION. on 26th April 1892, survived by his widow, Mrs Agnes E. Howard, who was of unsound mind. John Walker, C.A., was, on 28th February 1893, appointed to be her curator bonis.

He was also survived by George F. Howard, his father, and by a brother and sister. The brother, William Edward Howard, was confirmed executor to the deceased.

A question having arisen as to the division of the deceased's estate, a special case was presented to the Court, to which the executor was the first party, the widow's curator bonis the second party, and the father, brother, and sister were the third parties.

In the case it was stated that the widow had no means other than her interest in her husband's estate, and a letter from the physician of the asylum in which Mrs Howard was an inmate was set forth in which he stated that,—“There are no symptoms at present in her case contra-indicating recovery. She may or may not recover.”

In these circumstances the second party contended that in respect of Mrs Howard's insanity and inability to earn her own livelihood, her maintenance—she being without means of her own—was a burden upon her husband's estate, and that, therefore, so long as she remained in such condition, the executor was bound to hold the estate and apply it, so far as it would go, for the maintenance of Mrs Howard. The third parties, on the other hand, contended that the second party was only entitled to one-half of the estate, as *jus relictæ*, and that they were entitled now to the other half thereof as father and next of kin of the deceased. It was stated at the bar that the value of the estate was £200.

The following questions were submitted to the Court:—“(1) Is the second party entitled in the circumstances to require the first party to retain the estate and apply it, so far as it will go, for the maintenance of the deceased's widow, or to require payment of one half of the estate now, and to insist that the first party should hold the other half thereof until it is ascertained whether it is required for Mrs Howard's maintenance? or, (2) Are the third parties entitled to payment at once of one half of the deceased's estate as the father and next of kin of the deceased, the second party being paid the other half in full of the widow's claim on the estate?”

Argued for the third parties, the next of kin;—They were entitled to immediate payment of one-half of the estate. The widow's right to *jus relictæ* was a debt on the estate, but a claim to maintenance was not.¹ The law had settled what the amount of a widow's claim on her husband's

¹ Mackintosh v. Taylor, Nov. 5, 1868, 7 Macph. 67, 41 Scot. Jur. 41; Steuart v. Court, June 10, 1848, 10 D. 1275, 20 Scot. Jur. 467; Stair, i. 5, 10.

No. 149. estate was, viz, her *jus relictæ*, and that was the full extent of any possible claim by her.

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Argued for the second party, the curator;—The first party was bound to retain the dead's part, and apply it as necessity arose to the maintenance of the widow—a claim for maintenance was a debt against the husband or his estate.¹ Wherever the legal provisions in favour of a widow were not sufficient to afford her reasonable maintenance, the Court had power to give her a maintenance out of the estate.² The cases cited were all cases of allowances out of income, but here the income was so small that no provision could be made out of it, and therefore the capital must contribute. The case of *Mackintosh v. Taylor*³ was distinguishable in this, that there the question arose between children, and if the claim had been given effect to the person against whom the claim was made would have been rendered a pauper himself.

At advising,—

LORD ADAM.—The way in which this case is put by the second party is that he is entitled to require payment of one half of the estate now, and to insist that the first party should hold the other half thereof until it is ascertained whether it is required for Mrs Howard's maintenance. I am of opinion that we should answer the first question in the negative. The widow, it is not disputed, is entitled to get £100. That is sufficient to maintain her for three or four years, but the proposition of the second party is that, because the widow may possibly remain of unsound mind and unable to support herself, the Court ought to say that that portion of the estate which would in the ordinary course of law go to the next of kin shall not go to them, but be retained for the maintenance of the widow. I know of no authority for that proposition. No doubt there were cited cases to the effect that where a husband has died possessed of considerable estate, leaving his widow unprovided for, she has been found entitled to aliment out of the income of the estate, but that is not what is asked here. What is said is that on the arrival of an event which may never occur, the capital of that part of the estate which belongs to the next of kin shall be utilised for the widow's maintenance, and that it shall be kept up by the first party, and not paid to the next of kin, until it shall be seen whether that conditional event will ever occur. I do not think that we can give effect to that proposition.

LORD M'LAREN.—I should be sorry to throw any doubt on the rule of law under which a child or a widow unprovided for or insufficiently provided for by the deeds of the head of the family has a claim for aliment against the father's or husband's representatives. That such a claim exists is stated by Lord Stair, with the limitation that it only arises if the father has left a competent estate. The case mentioned by Stair is that between son and son, but of course the principle applies equally to the case between a widow and her husband's representatives. Such a claim is recognised in the cases cited by Mr Craigie, cases which are not recent, but which are of undoubted authority. All those are cases where from the way in which the estate was invested the widow or child making the claim of aliment had not received a fair share of the intestate's succession.

¹ Oncken's Judicial Factor v. Reimers, Feb. 27, 1892, 19 R. 519; Hobbs v. Baird, Feb. 22, 1845, 7 D. 492, 17 Scot. Jur. 233.

² Thomson v. McCulloch, 1778, M. 434; Young v. Campbell, 1790, M. 400; Smith v. Smiths, 11th March 1812, Fac. Coll.; Fraser on Husband and Wife, 2, 968.

³ *Supra*, p. 787, note.

In the present case the estate is moveable, and by operation of law it falls to be divided between the widow and the next of kin. Now, it seems to me that when a widow has received her full legal share of the husband's succession this is complete fulfilment of the husband's obligation to provide for her. In the present case it is admitted that the widow is entitled to receive £100, the total amount of the estate being £200.

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No authority has been cited for the proposed extension of the doctrine of the liability of the deceased's estate for aliment, and such extension might lead to very inequitable results, for the claim, if it exists at all, must continue through life, and it would be in the power, for example, of a child who had spent his share of the succession to come down at any time upon his more provident brothers and sisters for aliment.

Some of the decisions relating to aliment are cases where the conventional provisions were insufficient. Such a state of matters may very easily happen. A father whose means are small may make what he thinks at the time a suitable provision for his wife and children, and yet that provision may be quite insufficient if the father dies in affluent circumstances. The reasonableness of a provision depends upon whether it is reasonable in all the circumstances of the estate. It must further be noticed that in some of the cases cited the provisions in favour of the claimant were of the nature of annual payments out of income. Now, here the curator is entitled to go on spending the £100 which the widow gets until it is exhausted. She is therefore not at present destitute, and the necessity for a further sum for aliment may never emerge; the widow may succeed to money, or she may die before the £100 is exhausted, and so the necessity for aliment may stop. I see no justice or equity in the money, which by law belongs to the next of kin, being held over to meet this event which may never occur.

LORD PRESIDENT.—I have examined the cases in Morison cited by Mr Craigie, and I find in them certain features widely distinguishing them from the present.

1. Where the Court has granted additional aliment there has been a great disproportion between the income of the heir's estate and the income from the widow's share. In the case of *Thomson* the husband died infert in only a small portion of the lands, with the result that the yield of the terce amounted to only one-sixth of the free income of the whole lands of which the husband had died possessed. There the Court held that the mere fact that there was a legal provision for the widow did not exclude her from claiming further aliment; and they acted on the view that the legal provision did not afford to the widow the sort of provision which the law holds to be just.

2. There, again, what the Court gave to the widow was a payment out of income and not out of the capital of the legal share of the heir or next of kin.

3. Further, the criterion of the amount of aliment to be given was not the amount of the widow's income, but the amount of the total income of the estate. That that is so is clearly brought out by what was said from the bench,—“Where there are no conventional provisions the widow is entitled to an aliment out of her husband's estate suitable to its free income. When her legal provisions of terce and *jus relictæ* are not adequate to this, she is entitled to an additional aliment out of it.”

Now, turning to the present case we find in the first place that there is no

No. 149. disproportion between the share taken by the widow and that taken by the next of kin. On the contrary, the two shares are equal moieties of the whole estate; 2d, what is asked for by the widow here is not a part of the income of the husband's estate, but the capital of the whole of it; and 3d, the claim is put forward solely on the ground of the widow's needs, and so far from equitably adjusting the rights of the next of kin and of the widow, it would operate the total extinction of the rights of the next in kin in the succession. I think, therefore, that we should answer the second question in the affirmative.

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LORD KINNEAR was absent.

THE COURT answered the second question in the affirmative.

IRONS, ROBERTS, & Co., S.S.C.—SNODY & ASHER, S.S.C.—Agents.

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MATTHEW PETTIGREW AND OTHERS (Fraser's Trustees), First Parties.—*Ure.*

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JAMES ARTHUR FRASER, Second Party.—*Dickson—Younger.*
JOHN AND HUGH FRASER, Third Parties.—*Dickson—Younger.*
DAVID B. FRASER AND ANOTHER, Fourth Parties.—*Johnston—*
W. C. Smith.

MRS JESSIE ROBERTSON AND OTHERS, Fifth Parties.—*W. Campbell—*
A. S. D. Thomson.

JANE FRASER ROBERTSON AND OTHERS, Sixth Parties.—*W. Campbell—*
A. S. D. Thomson.

Succession—Option to take over heritable subjects at specified price—Enhancement of value after date of settlement—Recompense—Mora.—By trust-disposition and settlement, dated in 1868, and codicil dated in 1871, a truster directed his trustees to carry on his business, assuming as a partner his eldest son, and to assume his second and third sons as partners with shares of profits when and as soon as the trustees should think proper, and to retain the balance of the profits for the general purposes of the settlement. The sons assumed as partners were to have the option of taking over the business premises, subject to a bond for £20,000, at the price of £8000. In 1872 the business premises, which had cost £29,500, were totally destroyed by fire. The testator recovered from insurance companies £11,550, giving security to the bondholder that he would rebuild the premises. The testator approved of plans for their reconstruction on a more expensive scale, and partially carried out the building prior to his death in 1873. The trustees expended £13,000 beyond the insurance money in completing the buildings. The new buildings were valued in 1884 at £51,000. The trustees with the eldest son carried on the business, and in 1884 the second son was assumed as a partner, and in 1891 the third was assumed. After the assumption of the latter the three brothers intimated to the trustees that they exercised the option of taking over the business premises.

In a special case *held* (1) that the three sons had not lost their right to exercise the option by delay, and (2) that they were entitled to have the subjects conveyed to them on the conditions set forth in the settlement, without compensating the general estate for the sums expended on them since the testator's death.

1ST DIVISION.

HUGH FRASER died on 12th February 1873. He left a trust-disposition and settlement and relative codicil, dated 24th November 1868 and 26th January 1871 respectively. He was survived by his widow and by five sons and three daughters.

Doubts having arisen as to the effect of the trust-disposition, a special case was presented to the Court, to which the trustees under the deed were the first parties; the testator's eldest son the second party; his second and third sons the third parties; his fourth and fifth sons the fourth parties; the testator's daughters and their husbands the fifth

parties; and the children of such of the fifth parties as were married No. 150. were the sixth parties.

By his trust-disposition and settlement the testator conveyed his whole estate to his trustees for certain purposes. By the fourth purpose he bequeathed to his children equally share and share alike in liferent, and to their respective issue in fee, the heritable subjects which formed his business premises, "declaring, however, that in the event of any of my sons entering into my business, and being desirous to hold said heritable subjects in their own name for the purpose of business, he or they shall have the option of having said subjects conveyed over to him or them upon payment of the sum of £8000 sterling as the value thereof beyond the heritable burden thereon [£20,000], and which sum of £8000 sterling shall be invested in separate sums in heritable securities in the names of my said children in liferent, and their respective issues in fee." May 25, 1894.
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By the 18th purpose he, *inter alia*, directed, authorised, and empowered his trustees to carry on, along with Mr M'Laren (his partner) and eldest son James, his business as a warehouseman until the expiry of the partnership then subsisting between him and Mr M'Laren, and for a longer period if the trustees should think it advisable, and to leave in the business the remainder of the testator's capital. By the codicil to his settlement, dated 26th January 1871, the testator directed his trustees in addition to assume his two sons John (born in 1864) and Hugh (born in 1866) as partners, with a share of profits, when and so soon as the trustees should think proper, and to retain the balance of the profits not appropriated to the sons for the general purposes of the settlement.

It appeared from the case that at the date of his death the testator carried on his business of warehouseman in property belonging to him in Buchanan and Argyle Streets, Glasgow. The property, which he acquired in 1867, had cost him £29,500, and he had granted a bond over it for £20,000. In 1872 the buildings were entirely destroyed by fire. He recovered, with consent of the bondholder, £11,550 from insurance companies, and gave security to the bondholder that he would rebuild the premises. Plans were prepared for reconstruction of the buildings on a more expensive scale, and contracts were made for the execution of the work at schedule rates, which left it open to the testator to restrict the work to any extent. At the testator's death work to the value of £5987 had been executed and £3987 had been paid, but the buildings were not then habitable. The trustees resolved to complete the work according to the plans, and spent £18,578 in completing them. The total cost of rebuilding was £24,565, involving an expenditure by the testator and his trustees of £13,015, in addition to £11,550 received from insurance. The premises were completed in 1874 and they were valued in 1884 at £51,000.

From the date of the testator's death the trustees carried on his business, and were still carrying it on at the date of this case.

The eldest son, James Arthur, was assumed as a partner as from the testator's death. John, the second son, was assumed in 1884, and Hugh, the third son, in 1891.

The case stated that when Hugh was assumed the three brothers informed the trustees that they wished to hold the business premises in their own names, and that they exercised the option given them by the settlement of having the premises conveyed to them on payment of £8000.

In these circumstances the following question was, *inter alia*, submitted to the Court:—“(2) Are the second and third parties entitled to demand that the said heritable property be conveyed to them in terms of the fourth purpose of the settlement and first codicil?”

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Argued for the second and third parties ;—The trustees were bound to carry out the plans for the re-erection of the business premises which had been sanctioned by the testator, and the amount necessary for that purpose was heritable *destination*.¹ The testator, who had sanctioned the plans, evidently had anticipated and intended that the business premises should be enhanced in value. Further, the sons had not lost their right to exercise their option by the lapse of time. The option must have remained open until the third son was assumed as a partner, and there had been no such delay since that time as to infer a forfeiture of the right.

Argued for the fourth, fifth, and sixth parties ;—The testator had contemplated that when his sons exercised the option the heritable subjects would be of the value of which they were when the settlement was executed. The second and third parties were, therefore, bound to recoup the general estate to the extent to which the business premises had been enhanced in value. Further, the second and third parties had lost their right to exercise their option by delay. It was inequitable that they should be allowed to put off exercising the option till they saw whether the estate was appreciated or depreciated in value.

At advising,—

LORD PRESIDENT.—This question is one of some complication. As regards the heritable subjects, which are the business premises, the primary bequest is, "to my children equally, share and share alike in liferent, and to their respective issues in fee"; and the option conferred upon the sons to buy those subjects is ancillary and subordinate to that bequest. But at the same time the option is one which so far is very clearly expressed. The testator wishes the business continued; he directs his trustees to carry on the business; he has already assumed one of his sons, and his contemplation is—I am taking the settlement now as a whole—that two of the others may yet come into the business, and then he wishes that if these sons like they shall take over the business premises. So far all is clear enough, but the matter is complicated by two considerations. In the first place, even if nothing had occurred to the premises by way of fire, the scheme of the settlement, taken in connection with the ages of the young men, is such that it was plain that intervals of time might elapse between the assumption of one son and the assumption of another. Now, taking the question apart from the occurrence of the fire, I am disposed to think that the sound view is that the first son assumed could not by declining to buy exclude the younger son, who might thereafter be assumed, from having the benefit of that option, and the only way of relieving the management of the estate of the difficulty which would arise from the disparity of ages would seem to be that which was adopted by the trustees, because in the conduct of the trust it appears to have been assumed that it was not until matters were matured—not until the trustees had made up their minds which of the sons were to come in—that this option could be effectively exercised. And, accordingly, had there been no fire, I think that one could not say the trustees were wrong in the view which they seem to have acted on—that they must wait until they had exercised their powers of assuming the sons as partners in order to see whether the option might or might not be exercised.

Then the other complication in the case is that after the settlement was exe-

¹ Bell's Prin. sec. 1492; Robson v. M'Nish, Feb. 2, 1861, 23 D. 429; 33 Scot. Jur. 217; Malloch v. M'Lean, Jan. 29, 1867, 5 Macph. 335, 39 Scot. Jur. 172.

cutted, and before the testator died, a fire had occurred, and the testator had proceeded to rebuild the premises, and had expended a certain amount of money in that work. At his death, however, the premises were far from being completed, and in the scheme of rebuilding which was adopted a sum of £18,000 was after his death expended by the trustees. No. 150.
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Now, the suggestion of the trustees is, that while they admit—or, at least, while for the sake of argument they may admit—that there is still an option in the sons, so far as the lapse of time is concerned, they can only exercise their option by paying a greater sum than the testator directed in his will. Now, I think it is impossible at one and the same time to hold that the option is exercisable now by the three sons who have come in, and at the same time that they are to pay more than the amount fixed in the deed. It is quite true that the course of events, to a considerable extent, dislocates the apportionment of this gentleman's goods among his family, and although we might do what was competent to us to redress that, at the same time I find myself unable to hold either that the sons are precluded from exercising the option, or that they are bound to give more for the property than is expressed by the testator in his definition of the option which he confers upon them. And I am reconciled to some extent to that view of the situation by seeing that the testator does not seem to have been diverted from his intention of giving them the option on these terms by the circumstance that the value of the property had considerably altered between the date of his settlement and the date of his death. What I mean is this, that when he said,—“You shall pay £28,000” (for that is the plain English of it) “for a conveyance of those lands,” he was speaking of subjects more valuable than those which he offered at his death by adhering to his will, inasmuch as the premises had been burnt down and only partially rebuilt. But then, in that state of circumstances, I cannot imagine very well how a son could have claimed more than what his father bade his trustees give him, and that was a conveyance to the lands. A further circumstance, as was pointed out to us, had taken place in the diminution of the value owing to the fire, yet these were the terms upon which alone the sons were to be entitled to buy the property. The other case, which is that which has occurred, is that there has been a change of value to the better in the premises, and that is owing to the action of the trustees in spending this money. Can I, who think that the price for the depreciated property would have been £28,000, say that the price for the appreciated property is to be more? Then again, if the trustees treat the question as one of implied intention, I must confess that I think the simple and plain-sailing theory of intention is to hold that the man read over his will before he died, and said,—“I am not going to cut or carve upon this; I may have my own opinion about the value of the property; but say anything you like, I adhere to the £28,000 as the price which my sons shall pay if they want to have the buildings.” In like manner I should suppose it eminently likely that he should be willing that they should have a fairly good bargain if the property should improve in value before the option came to be exercised. But I cannot find material out of his will for constructing a theory that in this state of matters we are to fix another price than that which he has expressed in his will.

But then it was said that the trustees have a claim of recompense for this expenditure of theirs. I suppose the way in which that would work out would be this: “If you say you are entitled to exercise the option to buy, you pay down your £28,000, but we have expended on the property £18,000, and you

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must make that good to us before we quit hold of the property." But then there is this to be considered. It is not the case that the trustees were holding for behoof of the partners as the ultimate owners of the property. On the contrary, the option might be exercised, or might not be exercised, and in the event of its not being exercised, the refusal to exercise it might—on the hypothesis of the case which I adopt, viz, the legality of the course of the trustees' administration—only be declared twenty years after the buildings were put up. Then we would have to consider whether this rebuilding by the trustees, if within their powers—which for the present I assume—was done for the general behoof of the estate, and in the view possibly that the buildings might belong not to the partners but to the eight children. But there is more than that; even in the event of the option being exercised it is to be observed that the trustees were largely interested for the other beneficiaries in the prosperity of this business; because after Mr Johnston's examination of the effect of the codicil it is quite plain that in any event a part of the profits would belong to the trustees for the purposes of the general settlement, because I think the fair reading of the words in the codicil about purposes "therein provided for" means the general purposes of the estate. Now, that shews that the trustees were interested in this business, not merely for the people who might eventually become partners, but were interested also for the general estate. And the law of recompense cannot apply to a case where a man is interested himself in the property, because it is presumed that the expenditure is made for his own interest primarily, and only incidentally for the interest of others. Accordingly, I think that the plea of recompense cannot be sustained.

My opinion upon the whole is (1) that the option is not excluded by the events which have happened; and (2) that if that be so it is impossible for us to prescribe other conditions than the payment of the £8000 above the bonds.

LORD ADAM.—Two questions are raised. The first question is whether it is too late for the three sons, who are partners, now to exercise the option given to them by the trust-deed to purchase the premises in which the business is carried on at the sum named by the testator. Now, if this option had been exercisable after the succession opened, and there had been unreasonable delay in exercising it, I should have said that there was great force in saying that it was too late now to exercise it, because a party is not entitled, if he has an option to take, to say when he is to exercise it. The subject of the option might increase or diminish in value as time went on, and if it turns out to be valuable, the party to whom the option is given is not entitled to say, "I will take it over"; or, if it turns out the reverse, to say, "I don't desire to take it." But I do not think that that is the case we have got to deal with here, because if my interpretation of the deed is the right one, then it is not too late to exercise the option. The deed says,—“In the event of any of my sons entering into my business and being desirous to hold said heritable subjects in their own name for the purpose of business” they are to have the option of taking them over; then follow provisions, the effect of which is that the sons may not be in a position to join the business except after a lapse of years. They were young when this will by the father was executed; one of them, I think, was assumed into the business as late as 1891, and the option of purchase necessarily remained open to him all that time. If we are to give effect to these words, “if any of my sons shall join the business,” I cannot

think it is too late now for the sons who have joined the business to exercise the option given them, because they allowed a couple of years or so to expire after the assumption of the third son before declaring that they would exercise it. People are not so very sure of their rights all at once, and I do not think that the other children are right in saying it is now too late to exercise the option.

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If, then, there is a right to exercise an option, what is the option they are to exercise? That option is of taking over these premises at a particular sum, viz., £28,000. There is no other option given to them. If that is so, and if the option is still open, I do not see that we have any alternative other than to give effect to it. We are not empowered to say, "Oh, but the value is very much increased." That might have been a reason for saying that the testator did not intend the option to continue all through this long time; but if the option is still exercisable, can you say anything else than that the option given by the deed is to take the premises at the sum named, and no other? Now, if that is so, I think that is all we have to answer upon the subject. It is said that they may take, but take under conditions, the terms and conditions being, as I understand, that they shall pay the value of the meliorations or improvements which are said to have been made by the trustees upon the premises. Now, I do not think myself that this is a case for the application of the doctrine of recompense at all. It is quite true that if a person builds on another man's property and the property is taken from him, he, of course, must be paid for what he has expended on the property. That is the sort of case where the doctrine of recompense comes in. Or if a person, thinking he has a good title to property himself, expends money upon it, it may be that if the true owner claims it he is bound to pay for the improvements made upon it. That is the class of case where the doctrine of recompense applies. But that is not the class of case we have to deal with here. The case we have to deal with here is this: The trustees were in the occupation of these premises; they knew, and were bound to know, that certain persons had a right to purchase them at a certain price; they possessed the property upon these terms all along, and knew exactly what position it was in; and before the time came for the exercise of the option they thought it right to build those premises at a certain expenditure. We must therefore hold that they knew that these sons could at any time come and say, "We require to have those buildings at a certain sum." It was, I presume, with their eyes open that they performed all this work. It may be—I say nothing about it, and it is not even suggested in this case—that the trustees, in the knowledge of these facts, should not have spent so much money in the erection of these buildings. It is not suggested by anyone that they were not right in doing so, and thence arises the difficulty I have. If they chose to expend this money with their eyes open, what right have they to come and say to the sons who have been assumed into the business,—“We know that the deed directs us to convey this property to you, but we shall not do as the testator directs us; we shall not give you this property for the sum of £28,000, because we have made it better”?

I therefore concur with your Lordship.

LORD M'LAREN.—When a testator dies leaving his building or undertaking which he has begun unfinished, and his trustees proceed to complete the building according to the testator's scheme, I think that their action should always be regarded with the greatest consideration and indulgence, and especially would

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that be the case where, in completing the work which the testator has begun, they are carrying out, or taking means to carry out, the scheme of administration prescribed by his settlement. Now, in the present case, the scheme of administration was certainly not one of realisation and division of realised value. On the contrary, we see in the anxious directions contained in this gentleman's will that he contemplated the continuance of this business for the benefit of his family, first through the administration of the trustees, and eventually, but only if his sons desired it, through the introduction into the partnership of certain members of his family. It was impossible that the trustees could carry out the directions given to them to continue to carry on the testator's business if they had allowed the premises to remain unfinished, or had sold them as unfinished buildings to other parties. On these considerations, I have not the smallest doubt that in completing the buildings, and providing for their completion out of the trust moneys, the trustees were strictly fulfilling their trust obligation, and that they had no option or discretion in the matter.

Now, in what they did it is not alleged that they wasted the money in any way, or that they paid more than what was necessary to the proper completion of the testator's design. Having done so, the effect of that was to increase the value of one part of the estate, because a new building is generally more valuable than the old one which it replaced. But that was done, not in virtue of any line of action or idea originating with the trustees themselves, but in fulfilment of the trust which was committed to them. When the time came for the two sons of the testator, to whom a right of entering the business was given, to declare their option and to take over the business premises if they thought proper, I think that in determining the conditions on which they were entitled to take over the premises no claim of recompense arises, and that their right was to receive a conveyance of the heritable subjects on payment of £8000. I read this settlement as prescribing that as the sum to be paid, irrespective of the value of the subjects for the time being, whether depreciated by change of fashion or otherwise or increased in value by improvements. It is quite intelligible that the father of a family should, in order to avoid disputes or ill-feeling, think it proper to name a sum, not as representing the actual value of the subjects, but that sum for which he thinks proper in the exercise of his will to declare that certain of his family shall take over the property. Or, it may be that the sum was fixed after considering the probable ability of the sons to furnish the money with the funds they might have at the time. But whatever the reason may be, I have no doubt that they are entitled to the property on payment of £8000. I agree with your Lordships in considering that the option certainly existed up to the time when the younger of the two next oldest sons was taken into partnership, and that that option has not been lost from the delay of somewhat less than three years which has occurred. I rather think that it was not intended that there should be an indefinite power of purchasing the property at any time during the sons' lives. I think it was to be exercised in connection with the scheme by which the three sons, or one of them, should enter the business. But as this case shews that there is a question between those three sons and the other members of the family as to the terms on which the property was to be taken over, and until that question was settled of course nothing could be done, I cannot say that a delay of about a couple of years is such as to lead to the forfeiture of this valuable right to acquire the heritable property.

LORD KINNEAR was absent.

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THE COURT found that the second and third parties were entitled to have the heritable property in question conveyed to them in terms of the fourth purpose of the settlement and of the codicil.

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WEBSTER, WILL, & RITCHIE, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—CAIRNS, M'INTOSH, & MORTON, W.S.—DAVIDSON & SYME, W.S.—Agents.

SIR JOHN WILLIAM RAMSDEN, BART., AND ANOTHER, Appellants.—
D. Dundas.

No. 151.

ASSESSOR FOR COUNTY OF INVERNESS, Respondent.—*P. J. Blair.*

May 25, 1894.*
Ramsden v. Assessor for Inverness.

Valuation Acts—Remit to obtain further information—Valuation of Lands (Scotland) Amendment Act, 1879 (42 and 43 Vict. c. 42), sec. 9.—Circumstances in which in a valuation appeal the Court, on the motion of the appellant, in terms of the 9th section of the Valuation Act, 1879,† remitted the case to the Valuation Committee to take further evidence, although the appellant had declined to avail himself of an opportunity of leading the evidence when the case was before the Commissioners.

AT a meeting of the Valuation Committee for the Badenoch district of the county of Inverness, held at Kingussie on 23d September 1893, to dispose of appeals against the valuation of lands and heritages by the County Assessor for the year ending Whitsunday 1894, Sir John Ramsden, Bart., and Alfred Frederick Style, Esquire, appealed against the Assessor's entry in the Valuation-roll of the shootings of Glenshiere, of which they were respectively proprietor and tenant, at a yearly rent of £920, and they craved that the valuation should be reduced to £236, 10s.

The shootings were originally let to Mr Style in 1889 at a fixed rent of £1000 for five years, but under a back-letter accompanying the lease the tenant was entitled on certain conditions to terminate his tenancy at the end of the first year. In 1891 the tenant exercised this power and entered into a new arrangement with Sir John Ramsden as to the rent to be paid for the shootings, the effect of which was that it was agreed between them that the rent was to be calculated at £1 for every brace of birds shot on the moor during the season, subject to the condition that the ground should be fully shot.

This arrangement was contained in three letters between the parties which were produced by the appellants' agent, Mr Kenneth Macdonald, before the Valuation Committee. Macdonald gave the undernoted evidence‡ before the Committee.

In answer to a question Mr Macdonald said that his evidence was founded solely on communications from the appellants, and that he had

* Decided Feb. 14, 1894.

† The Act 42 and 43 Vict. cap. 42, sec. 9, *inter alia*, provides,—“ . . . The said Judges . . . may, if they think fit to do so, remit the case to the commissioners or magistrates by whom it was stated, with such instructions as the said Judges may consider necessary for having the case more fully stated.”

‡ Macdonald deponed,—“ He (the Assessor) has entered Glenshiere at the full rent in the lease, a lease under which the parties practically ceased to act three years ago, the rent of the shooting now being really £1 per brace of birds killed. I produce a letter under the hand of Mr Style shewing that the number of grouse killed on Glenshiere this year is 633, being 316½ brace, and I produce a letter from Sir John Ramsden shewing that that statement has been accepted by him. Mr Style has left Glenshiere for the year, and I produce a letter of his stating that there has been a great scarcity of birds (as I know from other sources has been the case all through Badenoch this year) and saying that he would take Glenshiere for another year provided no more birds are shot this year.”

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no personal knowledge of the capabilities of the shootings or of the number of birds shot thereon. He stated that prior to the Valuation Court on 13th September, at which he attended, but at which a quorum of the Committee did not attend, the Assessor had informed him that he would not insist on formal evidence of the facts, but would accept his statement made at the bar, and that he had relied on that assurance.

The letter from Sir John Ramsden referred to by Macdonald in his evidence, and purporting to accept Mr Style's statement as to the number of grouse shot during the season, was for some unexplained reason omitted from the print of documents appended to the case, and was not produced at the hearing of the appeal.

The appellants contended that upon the facts deponed to by their agent, supported by the letters produced, the rent for the current year was proved to be £316, 10s., which, after certain admitted deductions had been made, left a balance of £236, 10s. to be entered as the value of the shooting for the year.

The Assessor on the other hand maintained that he was entitled to rely upon the lease in fixing the rent, subject, it might be, to a deduction under the back-letter, but that it was for the appellants to shew what the amount of that deduction, or rather repayment, really was.

The Assessor contended that as the grouse season did not end till 10th December, and no evidence had been adduced to shew that the moor was incapable of affording farther sport till that date, or even to shew the number of birds already killed, or whether the ground had been fully shot during the season preceding the date of the appeal, the Court had no option but to apply the lease, and enter the rent as therein given, under deduction of the usual allowances of wages, lodge, &c.

With reference to Mr Macdonald's statement to the effect that he had gone to the Court relying on a statement by the Assessor that he would not insist on formal evidence of the facts, the chairman put it to Mr Macdonald whether he had any further evidence to adduce, adding that if he had such, but had not the witnesses present, the Court should be adjourned to Inverness to give him an opportunity of bringing forward such evidence. Mr Macdonald replied that he did not propose to adduce further evidence.

The Committee dismissed the appeal on the ground "that there was no evidence to shew what abatement (if any) from the rent falls to be paid to Mr Style under the back-letter from Sir John Ramsden."

The appellants took a case, from which the above facts appeared.

Their counsel moved the Court to remit the case to the Valuation Committee to allow the parties to lead further evidence.

Counsel for the Assessor opposed the motion as incompetent, and relied on *Assessor for County of Argyle v. Marquis of Breadalbane*, Jan. 30, 1889, 16 R. 793.

At advising,—

LORD WELLWOOD.—I am very averse to sending back a case for further proof, especially where the appellant has had an opportunity of leading the proof he proposes before the Valuation Committee, and has declined to do so. But in the present case we might run the risk of not doing justice if we refused to grant the motion made by the appellant. His statement is that he attended the Valuation Committee under the impression that something short of exact legal evidence was required as to the number of grouse shot during the year, and as to the terms of the modification of the original lease. Apparently, however, when the appeal came before the Committee, either the Assessor or the

Committee were not satisfied that proof of these facts, falling short of full legal proof, was sufficient, and they held that the statement made by the appellant's agent and the letters produced did not constitute legally sufficient proof. In this view I am inclined to agree, and I think the appellant would have been well advised if he had accepted the offer which the Committee made to him of an adjournment in order that he might lead further proof. In ordinary circumstances I should not be inclined to give the appellant any further indulgence, but the case is a peculiar one, and I think the course which we ought to follow is to remit to the Committee to take further evidence on the points in dispute. Looking to the general complexion of the case, the proof should be short. The facts requiring to be established cannot admit of much doubt. The letters ought all to be available, especially the missing letter from Sir John Ramsden to the tenant of the shootings. From these it can be ascertained what rent was actually paid for the year in question; and it can also be easily ascertained whether any more grouse were shot after the tenant left the shootings for the season. If the letters furnish that information, there need be nothing more than a formal appearance before the Valuation Committee. I therefore propose that we should remit the case for further proof.

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LORD KYLLACHY.—I am of the same opinion. I should be sorry in any way to derogate from the authority of the judgment to which we have been referred. But I do not think that the course we here propose will have that effect. Upon the question of allowing or refusing further proof, every case must rest on its own circumstances, and in each case the course to be followed is a matter upon which the Court must exercise its discretion. I do not therefore think there is any obstacle to our here remitting for further inquiry, if in our view the justice of the case requires it. The fact that the letter of Sir John Ramsden has for some reason not been produced is itself a sufficient reason for some further inquiries, and if there is to be inquiry I think it ought to be extended to all the matters involved, including the original agreement, the number of birds shot, and the rent actually paid and accepted for the year's sporting.

THE COURT remitted the case to the Valuation Committee in terms of the appellants' motion.

DUNDAS & WILSON, C.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

TRUSTEES OF THE LATE EDEN COLVILLE, Appellants.—*D. Dundas*.
ASSESSOR FOR COUNTY OF FIFE, Respondent.—*M'Clure*.

No. 152.

Valuation Acts—Mansion-house and garden—Rent—Deductions—Services.
—In a lease of a mansion-house, garden, and grounds to a yearly tenant at a *cumulo* rent, it was provided that the tenant should have the use of the furniture in the house and the garden produce, but the wages of the gardeners and the expense of keeping up the garden were to be paid by the proprietor. The Assessor having entered the subjects at the value at which they had stood in the Valuation-roll for fifteen years, while unlet and in the occupation of the proprietor, the proprietor appealed and maintained that the house, garden, &c., having been actually let, the rent ought to be taken as the basis of valuation, under deduction of the annual cost of the services provided by him. The Valuation Committee sustained the Assessor's valuation. In an appeal held that

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No. 152. as it was admitted that the services of the gardeners supplied by the proprietor were required for other parts of the estate as well as for the garden and grounds let to the tenant, and as it was impossible to ascertain precisely to what extent they were given to the let and to the unlet parts of the estate, the Valuation Committee were justified in the circumstances in adhering to the former valuation, and the Assessor's valuation *affirmed*.

Lord Middleton v. Assessor for Ross-shire, March 1, 1882, 10 R. 28, *distinguished*.

Lands Valuation Appeal Court.
Ld. Wellwood.
Ld. Kyllachy.

AT a meeting of the Valuation Committee of the County Council of Fife on the 8th September 1893, the trustees of the late Eden Colville, Esquire, of Craighflower, appealed against the following entries in the Valuation-roll for the parish of Torryburn:—

Case 154.

No.	Description and Situation of Subject.	Proprietor.	Tenant.	Occupier.	Inhabitant Occupier not rated (48 Vict. c. 3, secs. 3 and 9).	Annual value of Dwelling-house of Inhabitant Occupier (Local Government (Scotland) Act, 1889), or Feudal duty or Ground-Annual of other subjects.	Yearly Rent or Value.
1	Craighflower House, Offices, and Garden.	Trustees of the late Eden Colville, Esq., per Messrs Mackenzie & Black, W.S., Edinburgh.	Fred. Pitman, Esq., W.S., per Mackenzie & Black, W.S., Edinburgh.	Same.	£140
9	Woodlands, Lawn, and Shrubberies.	Do.	Proprietor.	£55

The appellants craved that these valuations should respectively be reduced to £100 and £20.

The mansion-house, offices, garden, lawn, and shrubberies, together with the shootings (which were entered separately at a rent of £20) had been let, for one year, from Whitsunday 1893 to Mr Frederick Pitman, W.S., at a gross rent of £500. The terms of the lease were as follows:—

"1. The lease to be for one year, from Whitsunday 1893.

"2. The rent to be £500 per annum, payable Martinmas and Whitsunday.

"3. The whole wages of gardeners and cost of upkeep of gardens and grounds to be paid by proprietor. The tenant to have whole produce of garden.

"4. The proprietor need not supply a gamekeeper, it being understood that the head gardener continues to act as such, and to supply a man to carry game bags when required.

"5. The proprietor to make cottage in village into a laundry by introduction of water, a mangle, fixed washtubs, &c.

"6. Some furniture to be put into coachman's house.

"7. The furniture in mansion-house to be handed over to tenant, per inventory."

The appellants maintained that the mansion-house, offices, garden, lawn, and shrubberies having been actually let, the rent obtained ought to form the basis of valuation under deduction of the annual cost of the furnishings and services provided by the proprietor. In accordance with this principle they laid before the Commissioners a detailed statement* shewing that the valuation of the house, garden, and grounds, including the shootings, should be £93 only, but they expressed their willingness to consent to the entry for the mansion-house, &c., exclusive of the shootings, being at £100. With reference to this statement of deductions claimed, the appellants explained that only three-fourths of the wages of the eight gardeners, and of the hire (£60 per annum) of the horse for mowing, carting, &c. had been deducted, as the head-gardener acted as estate overseer, and the garden men and the horse were occasionally employed for estate purposes, one-fourth of the cost on wages, &c. being regarded by the appellants as sufficient to cover the services rendered for purely estate work.

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The appellants further, as a consequence of the principle of valuation contended for by them, maintained that the lawn and shrubberies being included in the lease should be entered along with the other subjects let, and that the woodlands which were not let should be separately valued, the value of the latter being placed at £20.

The Assessor explained that he neither admitted nor denied the accuracy of the statement of outlays made on behalf of the appellants; that he had no materials to enable him to form any opinion on the subject; that the appellants admitted that all the eight servants (the head-gardener included), and also the horse, were used for general estate work as well as in the gardens, so that the sum imputed to the latter must be quite arbitrary; without a diary of each man's work it was impossible to say whether the amount allocated to garden work was right or wrong.

It appeared that for more than fifteen years the mansion-house, offices, and garden of Craigflower, while in the personal occupation of the late proprietor, Mr Colville, had been valued at £140, the rate fixed by the Assessor for the year in question.

The Valuation Committee were of opinion "that £140 had not been proved to be an excessive rent for Craigflower house, offices, and garden," and confirmed the valuations as made by the Assessor.

The appellants took a case.

Argued for the appellants;—The Assessor's basis of valuation was erroneous. The lease was the proper basis of valuation. The question was, for what was the rent paid, and how much of it was to be taken as

* The statement submitted was as follows:—

"Rent payable by Mr Frederick Pitman for year,	£500	0	0
Deductions—			
Use of furniture,	£75	0	0
Rates and taxes, including house-duty,	20	0	0
Wages of head-gardener, £80 per annum, $\frac{3}{4}$ ths,	60	0	0
Wages of under-gardeners, attendance at bothy, and milk, £209, $\frac{3}{4}$ ths,	157	0	0
Coals, manure, seeds, and furnishings, say	50	0	0
Services of horse for mowing, and work in connection with garden and approaches, £60, $\frac{3}{4}$ ths,	45	0	0
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		<hr/>	<hr/>
		£93	0 0"

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paid for lands and heritages, and how much for conveniences and advantages not heritable.¹ The Assessor was bound to have given effect to the statement of deductions claimed by the appellants, which represented actual payments, with the exception of the deduction claimed in respect of furniture, and the allocation of three-fourths to the garden work, and one-fourth to the estate work.

Argued for the respondent;—The case of *Lord Middleton* did not apply. In it the Assessor did not dispute the accuracy of the statement of the deductions claimed. The lease here did not determine the rent of the heritable subjects. The appellants' allocation of three-fourths of the outlay as to garden work was purely arbitrary. There was no material for determining to what extent the gardeners' services were given to the let and to the unlet parts of the estate. The subjects were then rightly valued as they had stood for fifteen years.

At advising,—

LORD WELLWOOD.—I am of opinion that no sufficient grounds have been stated to us for interfering with the decision of the Valuation Committee.

The house, grounds, and shootings of Craigflower were let to Mr Pitman for one year from Whitsunday 1893 at a total rent of £500, and there were certain stipulations in regard to other matters which formed an ingredient in fixing the amount of that rent. One of the conditions was that the whole amount of the wages of the gardeners, and the cost of keeping up the gardens, were to be paid by the proprietor, and that the tenant was to have the whole produce of the gardens. There was a provision that the head-gardener should, when required, act as gamekeeper, and that other services of minor importance were to be provided by the landlord on behalf of the tenant. The tenant was also to have the use of the furniture in the mansion-house.

It is plain, therefore, from the terms of the lease that the *cumulo* rent of £500 was not paid exclusively for the use of the mansion-house and grounds, but was partly referable to the other valuable considerations which must have been taken into account by the tenant, and therefore when the Assessor proceeded to value the mansion-house, gardens, and shootings, he would have to consider what deductions ought to be made from the sum of £500. No doubt when the lease fixes the yearly rent of the subjects, then that yearly rent is taken as conclusive, but the difficulty in this case is that the lease does not fix the rent of the heritable subjects as distinguished from the other considerations in the lease. Had the mansion-house, gardens, and shootings represented the whole of the subjects upon which the services of the gardeners and other services mentioned in the lease were to be bestowed, I should have been prepared to have accepted, as forming the amount of the deductions, the actual wages paid for the services by the landlord, because the tenant was entitled to the whole benefit of them during the year. In that case the principle of valuation contended for by the appellants would probably have furnished the best test of the real value of the subjects. But the obstacle to the application of that method in this case lies in the admitted fact that the services were required for other parts of the estate as well as for that let to Mr Pitman, and by the fact that we do not know, and have no means in the case of ascertaining, to what

¹ *Lord Middleton v. Assessor for Ross-shire*, March 1, 1882, 10 R. 28, per Lord Lee, p. 30; *Forbes Irvine v. Assessor for Aberdeenshire*, March 16, 1893, 20 R. 626.

extent they were given to the let and to the unlet parts of the estate. It appears that for fifteen years previous to the present valuation during which the mansion-house was not let, it had been entered in the roll at £140. The Valuation Committee have determined that no sufficient reasons were shewn to them for departing from this valuation or for holding that it was excessive. The Committee had no more information than we have to enable them to say how much of the services of the gardeners was to be referred to the subjects let to Mr Pitman and how much to the rest of the estate—but they had the advantage of local knowledge, and I am not surprised that they should have reached the result stated in the case. I propose that we should find that the determination of the Committee is right.

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LORD KYLLACHY.—I am of the same opinion. There is no doubt as to the statutory rule that where a heritable subject is let the rent actually received is to be taken as the value for the purpose of assessment. That rule applies absolutely where a heritable subject is separately let, or is let at a separate rent, and it may often be capable of application even to furnished houses, and to other heritable subjects which are let at a *cumulo* rent along with subjects which are not heritable. We have an instance of that in the case of *Middleton*, 10 R. 28, where it appeared that the assessor and the owner had adjusted an admission of the annual value of the furnishings and services of which the tenant had the benefit in consideration of his rent. The question is whether we can apply the same rule in this case, or rather whether this is a case in which the Valuation Committee were bound to apply it. Now, I confess I think it was quite open to the Committee to hold that the best way in the circumstances of this case, of reaching the proportion of *cumulo* rent belonging to the heritable subjects, was to take the valuation as it stood for the fifteen years prior to 1893. I do not say that it might not have been ascertained by the method for which the appellants contend. But in their judgment that method was unsatisfactory, and I am not prepared to say that they were wrong. The lease itself did not fix the rent of the heritable subject or furnish materials for fixing it. It would therefore have been necessary to ascertain from outside the lease what was the proportion of *cumulo* rent applicable to the heritable subjects. Now, it seems to me that the outside materials before the Valuation Committee were not here such as to make it incumbent on the Committee to enter upon the calculation proposed by the appellants. On these grounds I agree with your Lordship.

THE COURT were of opinion that the determination of the Valuation Committee was right.

MACKENZIE & BLACK, W.S.—WILLIAM BLACK, S.S.C.—Agents.

WILLIAM HARVIE AND OTHERS, Appellants.—*J. A. Reid*.
ASSESSOR FOR THE UPPER WARD OF LANARKSHIRE, Respondent.—
D. Dundas.

No. 153.

May 25, 1894.
Harvie v.
Assessor for
Upper Ward of
Lanarkshire.

Valuation Acts—Value—Consideration other than rent—Minerals—Sum paid for right to bring down surface.—The proprietor of a colliery who had acquired from the proprietor of the surface the right to bring down the surface in consideration of an annual payment on the output, assigned this right to the tenant of the mine, who undertook in future to relieve him of the payment,

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Held that the annual payment thus made by the tenant constituted a consideration other than rent, and fell to be added to the lordships received by the proprietor from the tenant in estimating the annual value to be entered in the Valuation-roll, and there being nothing to shew how much of the payment represented surface damages, for which the tenant would have been liable, no deduction could be made on that account.

Lands Valua-
 tion Appeal
 Court.

Ld. Wellwood.
 Ld. Kyllachy.

Case 157.

(*VIDE Harvie v. Assessor for Upper Ward of Lanarkshire*, March 18, 1893, 20 R. 630.)

At a meeting of the County Valuation Committee for the Upper Ward of the county of Lanark, held on 11th September 1893, William Harvie, Esquire, of Brownlee, and Wilsons & Clyde Coal Company, Limited, appealed against being entered upon the Valuation-roll as proprietor and tenant respectively of a subject described as the "Colliery Shawfield," at a yearly rent of £6920, 8s., and they craved that the valuation should be reduced to £6406, 13s. 6d.

It had been decided in an appeal by these appellants (*Harvie v. Assessor for Upper Ward of Lanarkshire*, March 18, 1893, 20 R. 630) that Harvie, who was the proprietor of the minerals in the lands of Taponhill, forming part of the colliery in question, was not entitled, in the entry of the colliery in the Valuation-roll, to have deducted from the royalty received by him from his tenants, the other appellants, an annual payment which he had by an agreement in 1891 undertaken to make to Mr Ramsay, the proprietor of the surface, for liberty to bring down the surface, and the benefit of which agreement he had, by subsidiary agreement, communicated to his tenants, on their contributing one-half of the payment.

In the present case it appeared that in September 1893 a new lease of the coalfield had been entered into between Harvie and his tenants to take effect from Martinmas 1892. In this lease the lordships were fixed at 11d. per ton for great coal, 1d. per ton for dross, &c. The lease also provided in effect that Wilsons & Clyde Company (who, as stated, formerly were bound to make one-half of the payment to the surface-owner for liberty to bring down the surface) should in future undertake to pay the whole of it.

The Assessor arrived at his valuation by adding to the sum returned by the appellants as the rent the amounts paid by the mineral tenants to the surface-owner, being for the half year ending Martinmas 1892, at 1d. per ton, £171, 10s., and for the half year ending Whitsunday 1893, at 2d. per ton, £342, 4s. 6d.

The Valuation Committee sustained the Assessor's valuation, and at the request of the appellants stated a case, from which the above facts appeared, and in which it was further stated,—“The appellants contended, as regards the addition of £171, 10s. made by the Assessor for the half year ending Martinmas 1892, that he had, while there was no change of circumstances, departed from the principle of assessment adopted by himself last year and judicially confirmed (20 R. 630), and in terms of which the appellants' present return had been made, and that this sum being over and above the lordships in the lease, and being payable by the tenants in respect of surface damage and freedom from restoration, is not assessable.

“The appellants contended as regards the addition of £342, 4s. 6d. made by the Assessor for the half year ending Whitsunday 1893, that the sum payable by the tenants to Mr Hamilton Ramsay under the new lease likewise not being return received or receivable by the owner of the minerals from the subjects let is not rent or annual value, and is not assessable.

“The appellants further contended that the payments to the surface pro-

prietor being not for rent but for surface damage and restoration, and for the right to withdraw support from the surface, were not assessable, a landowner's right to keep his land uninjured not being a separate land and heritage in the sense of the Valuation Acts, and they founded upon the appeals of *Assessor for Fifeshire v. Curror*, March 16, 1888, 15 R. 632, and of the present appellants (20 R. 630).

"The Assessor contended that the appellants' lease had been altered since the previous year and that the payments to the surface proprietor now falling to be made by the tenants under the new lease were part of the consideration for it, and as such were of the nature of rent and were assessable."

The arguments appear in the opinion of Lord Kyllachy.

At advising,—

LORD KYLLACHY.—In this case we decided last year that where the proprietor of a coalfield, who is not proprietor of the surface,—and is consequently disabled from working his coal so as to bring down the surface,—has purchased from the surface-owner for an annual payment the right to bring down the surface, he cannot claim to have that annual payment deducted from his valuation, as being a payment which truly diminishes the rent of the coalfield. We considered that such a transaction simply enhanced the annual value of the coalfield, making it possible to work it to a greater extent and to greater advantage; and we thought it immaterial that in the case before us the payment was an annual payment, instead of, as it might have been, a capital sum down. We also considered that it was not possible to represent the payment in question as simply a commutation of surface damages—that is to say, of such surface damages as are usually paid by a mineral tenant. Such surface damages, if paid by a landlord out of his rent, instead of being paid in the usual course by the tenant, in addition to his rent, might, we thought, fall to be dealt with in the same manner as, for example, tenant's taxes similarly paid; but in our view, the transaction in question was a great deal more than the mere commutation of surface damages, and accordingly, last year we dismissed the appellants' appeal.

We have now in the present appeal to decide whether it makes any difference that during the last year (viz., in September 1893) a new lease of the appellant's coalfield, dating from Martinmas 1892, has been entered into; and that thereby the mineral tenant, who formerly undertook one-half of the payment to the surface-owner now undertakes the whole of it, and so relieves the appellant of his whole obligations under the agreement with the surface-owner. The Assessor contends, and the Valuation Committee have upheld his contention, that such a payment made by the tenant is simply an addition to his rent, and that it makes no difference in principle whether, as last year, the landlord pays directly what is due by him, or, as this year, gets his tenant to make the payment as part of the consideration for the tenancy. That is the Assessor's contention. The appellants, on the other hand, contend that the payment in question is truly a payment for surface damages, and further that, in any event, there should be no addition to the valuation in respect of the half year's payment made by the tenant under the old lease, which, as I have said, expired in the middle of the year of computation, viz., Martinmas 1892. They say that, by our last year's judgment, we in effect decided that the rent actually paid under the old lease should, while the lease lasted, be taken as the total rent received by the landlord.

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I am of opinion that the appellants have failed to make out either of these contentions. It may be that to some partial extent (which we have no means of estimating) the payment referred to does not represent what would in any case have been paid by the mineral tenant as surface damages, but, as I have already pointed out, the right which the agreement conferred is a right going far beyond the mere immunity from surface damages. It is a right to bring down the surface—a right which, even on payment of surface damages, the mineral owner did not previously possess. Whatever allowance therefore may be claimable in future years, in respect that the payment in question includes surface damages, which the tenant would in ordinary course, and apart from stipulation, have had to pay, we cannot under this appeal make such an allowance. Neither we nor the Court below have had materials for making an estimate of this kind.

As to the other point, all that need be said is, that we were not asked last year to deal with any question as to this tenant's contribution towards the annual payment. The Assessor took the rent or lordship actually paid as the basis of his valuation, and there was no appeal raising the question whether the tenant's contribution was to any extent truly an addition to the rent.

On the whole therefore I propose that we should decide that the Valuation Committee was right.

LORD WELLWOOD.—I agree with Lord Kyllachy. Taking this as an A B case, A, the mineral-owner, lets coal underlying lands of which B is the surface-owner, to C, the mineral tenant.

Although all the coal is let, it cannot all be worked out without B's permission, which must be purchased. But if B's permission is obtained, A's returns are increased by the amount of the royalties paid on the coal which was required for the support of the surface being worked out.

If A before letting settles with B, he will when he lets the minerals stipulate for and receive a larger return than if he were to let the coal without power to bring down the surface.

If, again, A lets the coal subject to the restriction, leaving C to settle with B, C will naturally pay A a smaller rent or royalty than if he had received the subject unrestricted; and as A will in that case receive the benefit of C's payment to B, that payment may at least to some extent be said to represent a consideration other than rent.

In the present case, when he let the coal to C, A was already under agreement with B, *inter alia*, to pay for bringing down the surface. Instead of stipulating for a return which would cover payment to B for bringing down the surface, A took his mineral tenant bound to relieve him of that, amongst other obligations, to B. Consequently he demanded and received from C a smaller return than he would otherwise have done, and therefore C's adoption of the agreement was a consideration other than rent.

THE COURT were of opinion that the determination of the Valuation Committee was right.

BUCHAN & BUCHAN, S.S.C.—BRUCE & KERR, W.S.—Agents.

AYR HARBOUR TRUSTEES, Appellants.—*Dickson—Salvesen.*
 PAROCHIAL BOARD OF PARISH OF NEWTON-ON-AYR, Complainers.—
Johnston—Clyde.

PAROCHIAL BOARD OF PARISH OF AYR, Complainers.—*Watt.*
 ASSESSOR FOR BURGH OF AYR.—*W. Campbell.*

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Valuation Acts—Valuation—Deductions—Harbour—Tenants' profits.—The trustees of Ayr Harbour were by statute empowered to administer the harbour, and to levy rates upon vessels and cargoes using the harbour, and were bound to apply the revenue derived from the rates, 1st, in payment of costs of management and maintenance, 2d, in payment of interest on borrowed money, 3d, in prescribed payments to a sinking fund, 4th, the surplus, if any, in paying off borrowed money, or in improving or otherwise for the benefit of the undertaking.

The Assessor, in estimating the annual value of the harbour for the Valuation-roll, deducted from the gross revenue derived from the harbour-rates the charges and expenses necessary to earn that revenue, including interest on moveable plant and floating capital, together with the expenses of collection and management.

The trustees maintained that they were entitled to a further deduction in name of tenants' profits.

Held that as the whole surplus revenue was devoted by statute to other purposes, there could be no tenants' profits.

Valuation Acts—Harbour—Apportionment of value between two parishes—Quayage.—In apportioning the *cumulo* valuation of a harbour between two parishes within which it was situated, the Assessor did so according to the lengths of quayage in the two parishes respectively. One of the parishes maintained that it should be first credited with revenue derived from certain fixed machinery locally situated within its bounds, and that only the remaining revenue should be apportioned according to quayage.

Held that the harbour fell to be regarded as a *unum quid*, and that the allocation by quayage was right.

By the Ayr Harbour Acts, 1855 and 1893 (18 and 19 Vict. cap. cxix. and 56 Vict. cap. li.), the Ayr Harbour Trustees were empowered to administer and manage the Ayr Harbour, and to levy rates upon vessels and cargoes entering the harbour.

By section 7 of the later Act it was enacted,—“All moneys coming to the trustees by way of revenue shall, after the passing of this Act, be applied in the manner and order following, and not otherwise:—

“1. In payment of the costs, charges, and expenses of and incident to the management and maintenance of the undertaking.”

2, 3, and 4. In payment of interest to holders of A, B, and C debenture stock.

“5. In payment to the sinking fund as hereinafter provided.

“6. The surplus (if any) shall be expended as the trustees think fit in paying off principal moneys due by the trustees, or in improving, or otherwise for the benefit of the undertaking.”

The trustees had also power to let the rates to a lessee, subject to the restrictions imposed by the Acts.

The Assessor for the burgh of Ayr fixed the valuation of the harbour for the year 1893-94 at £14,400, which he thus distributed:—

For the parish of Ayr, . . .	£4,790	0	0
For the parish of Newton-on-Ayr, . . .	9,580	0	0
For the parish of St Quivox, . . .	30	0	0
	<hr/>		
	£14,400	0	0

In arriving at his valuation, the Assessor took the gross revenue de-

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rived from the harbour proper, and from this he deducted the charges and expenses necessary to earn that revenue, including interest on moveable plant and floating capital, together with the expenses of collection and management. The amount thus brought out he assumed to be the rent which the harbour would fetch if let as a heritable subject.

I. At a meeting of the Magistrates and Town-council, sitting as the Valuation Appeal Court for the burgh of Ayr, held in September 1893, the Harbour Trustees appealed against the Assessor's valuation, and maintained that it ought to be reduced to £11,520. They claimed that 20 per cent on the sum of £14,400 should be deducted as representing tenants' profits, and they based their claim on the ground that they were empowered under sections 56, 57, and 58 of the Ayr Harbour Act, 1855, to lease the rates, and that they were not therefore precluded from making profit.

The Magistrates dismissed the appeal, and the appellants obtained a case, in which the above facts were stated.

Argued for the appellants;—The statutes contemplated the letting of the undertaking to a tenant, and consequently that tenant's profits should be earned. Under the 1855 Act the trustees had power to lease the rates, and under the Ayr Harbour Amendment Act of 1879* they were empowered not only to lease the slip-dock constructed under the authority of that Act and the rates levied therefrom, but also "the whole other works and conveniences at the harbour." That clearly referred to the whole harbour works, and not merely the slip-dock. *The Mersey Docks*¹ case did not apply, because in it the trustees could not let either the rates or the undertaking, and under the statutes which created the trust no profit could be earned by the trustees themselves. In the *Dundee Gas Company* case² also there was no statutory power to lease. It might be that any profits earned by the trustees themselves would under section 7 of the 1893 Act have to be expended in clearing off debt and improving the harbour, but that did not amount to a prohibition against a tenant of either the rates or the harbour-earning profits. In the recent case of the *Irvine Harbour*³ tenants' profits had been allowed.

Argued for the Assessor;—The trustees had no power under the statutes to lease that with which alone the Assessor was concerned, viz., the heritable subject. Their power was limited to the letting of the rates. The Act of 1879 dealt only with the slip-dock and the works connected with it. There was no reference to tenants' profits in the judgment in the *Irvine Harbour* case. The question was settled by authority.⁴

II. There was also lodged before the Magistrates a complaint at the instance of the Parochial Board of the parish of Newton-on-Ayr. These complainers complained, *inter alia*, of the Assessor's valuation, maintaining that he had erroneously allocated the *cumulo* valuation

* (42 and 43 Vict. cap. cxl.)—The Ayr Harbour Amendment Act of 1879, section 26, enacted,—“The trustees may let on lease the slip-dock by this Act authorised, and the works and lands connected therewith, or any portion of the same, and the rates leviable in respect thereof, and any of the sheds, warehouses, offices, workshops, ground, and other works and conveniences at the harbour, and may demand and recover such rents for the same as they think fit.”

¹ *Mersey Docks v. Liverpool*, 1873, L. R., 9 Q. B. 84.

² *Dundee Gas Commissioners*, Jan. 12, 1881, 9 R. 1240.

³ *Black v. Irvine Harbour Trustees*, May 19, 1893, 20 S. L. R. 660.

⁴ *Kirkwall Harbour Trustees*, Feb. 25, 1881, 9 R. 1243; *Dundee Gas Commissioners*, Jan. 12, 1881, 9 R. 1240; *Mersey Docks v. Liverpool*, 1873, L. R., 9 Q. B. 84.

(under deduction of the sum of £30 assigned by him to the parish of St No. 154.
Quivox) between the parishes of Ayr and Newton-on-Ayr, in the pro-
portion of one-third to Ayr parish and two-thirds to the parish of May 25, 1894.
Newton-on-Ayr, this proportion being based upon the extent of quayage Ayr Harbour
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They maintained that "the Assessor ought to have included in 'the valuation of Newton parish exclusively (without sharing with Ayr parish) the whole amount of his valuation in respect of revenue from the entire dock and its appurtenances, and from all fixed machinery, cranes, hydraulic hoists and lifts thereof, locally situated in Newton parish,' and that Ayr parish was not entitled to any share of such valuation."

The Committee dismissed the complaint, and upon the request of the complainers they also stated a case for them, in which the following facts were held to be proved:—"(1) That on the south or Ayr side of the harbour the fixed machinery, plant, or equipment consists of two wooden sheds and two hand-cranes; (2) that all the rest of the fixed cranes, machinery, quay equipment, and hydraulics, &c., of the harbour and dock are on the north or Newton side of the river, but a considerable portion of them can be moved without injury to the south side of it when necessary." (9) That the apportionment of the *cumulo* annual value of the harbour, dock, &c., by quayage had been arrived at with the consent of the Parochial Boards of the parishes of Ayr and Newton after conference with the Assessor, and that the arrangement had been acquiesced in and acted upon unchallenged till after the Assessor had completed his roll.

Argued for the Parish of Ayr, who appeared as parties in the case upon a point not now reported;—The appeal at the instance of the complainers was incompetent. The question was one for the Court of Session, where the parties would be properly called, and where the question of boundaries, &c., would be inquired into if necessary. The appeal would, if successful, involve a corresponding reduction in the amount allocated to Ayr. It was a mere accident that Ayr parish was here as a contradictor. The method of apportionment proposed was erroneous. The harbour fell to be regarded as a *unum quid*, and the method of allocation by quayage was the only practicable one, and had been acted upon for thirteen years.

Argued for Newton-on-Ayr Parish;—The complaint was competent under section 13 of the Lands Valuation Act, 1854. The whole revenue of the harbour, with the exception of that earned by two hand-cranes, was earned by Newton parish, which had no concern with the effect which the appeal if successful would have upon other parishes.

At advising,—

LORD KYLLACHY.—We have here to dispose of various appeals against the valuation of the Ayr Harbour, and the first appeal is that of the Ayr Harbour Trustees, which is confined to the question of tenants' profits. The Assessor has valued the harbour (which I need hardly explain is in the trustees' own hands, and is managed by their officials) in the usual way. He takes the gross revenue of the year so far as drawn from the harbour proper. He then deducts the charges and expenses necessary to earn that revenue, including interest on moveable plant and floating capital, together with the expenses of collection and management; and the amount thus brought out he assumes to be the rent which the harbour would fetch if let as a heritable subject to a hypothetical tenant. This valuation has been upheld by the magistrates, but the Harbour Trustees challenge it in respect that the Assessor ought, as they say, to have deducted from the net revenue 20 per cent in name of tenants' profits.

I am of opinion that in this matter the Assessor is right. I do not think the

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question turns on the possibility under the Harbour Acts of letting the harbour. There is, it appears, an express power to let the rates, but it is disputed whether the trustees have power to let the undertaking. I do not think it is material whether they have that power or not. For the purposes of the Valuation Acts the letting of the harbour must, I think, be assumed, whether—under the Harbour Acts—it would or would not be a lawful transaction.

Neither do I think that the question is solved by the circumstance that the Ayr Harbour is a public as opposed to a private undertaking. There may conceivably be harbours privately owned, the conditions applying to which are such that no allowance for tenants' profits could be permitted. There may, for example, be harbours free from all statutory restrictions, where nevertheless, by the owners' choice, the rates are fixed not on commercial principles, but so as merely to meet the interest on outlay and expenses of upkeep. In such cases, if the harbour were let, the tenants' profits requiring to be provided could of course only be so by increasing the rates, and so augmenting the revenue. On the other hand, there may conceivably be public harbours where the existing rates leave a margin beyond the prescribed expenditure; and in such cases, if there be any, I am not prepared to say that it may not be possible to have an allowance greater or less for tenants' profits. Each case which presents itself must, I apprehend, be considered on its own merits,—the special principle as regards statutory undertakings being, I think, only this—that the undertaking must be valued with regard to the whole statutory conditions affecting the revenue of the undertaking, or affecting the application of that revenue.

Now this being so, what are the facts with respect to this statutory undertaking of the Ayr Harbour? The main points to be noted are, I think, these—

1. The valuation in controversy is, it will be observed, made as usual on the basis of the existing revenue—that is to say, the Assessor takes the existing rates as the basis on which he calculates his assumed rental. Any increase, therefore, of the rates would as a matter of course increase the valuation.

2. The existing rates are, as appears from the accounts, no more than sufficient to meet the prescribed annual expenditure. That is to say, they are more than exhausted by charges prescribed by the Harbour Statutes, viz., expenses of management, interest on debt, and prescribed contribution to sinking fund. It may be (I do not enter upon that at present) that the statutes make an exhaustive application of the whole rates which may be levied whatever their amount, but there is at least no doubt that they make what is *de facto* an exhaustive application of the existing rates.

3. Amongst the charges which thus exhaust the existing rates, there is no provision for tenants' profits. There is a charge, amounting to about £800 a-year, for expenses of collection, but nothing more. If, therefore, the harbour were let, and the tenant, in fixing the rent, claimed and got an allowance for tenants' profits, the result must be either (1) that the existing rates must be raised; or (2) that there must be a shortcoming in the prescribed expenditure—that is to say, a non-compliance with the Harbour Statutes.

4. In this particular case there does not appear to be any statutory obstacle to the raising of the rates, if such rise is required for the purposes of the harbour. Accordingly, the result of making the supposed allowance for tenants' profits would, I take it, simply be this, that the Assessor in making the allowance would at the same time require to assume a corresponding addition to the existing rates. He would be entitled and indeed bound to do so, and the result

would of course be that his valuation, or assumed rent, would remain just as before. No. 154.

5. Supposing, however, that the rates could not be raised, or could not be raised for such a purpose, the ultimate result would be still the same. The Assessor would in that case have to deal with a subject where, on the one hand, the revenue was statutorily restricted, and where, on the other hand, it was statutorily protected from any charge in respect of tenants' profits. Now, how is the Assessor to deal with such a subject? He must, as I have said, assume a tenancy, but in making up his assumed rent he must, I apprehend, take the statutory conditions affecting the subject as a whole. That is to say, he may be bound to accept as his basis the statutorily restricted revenue, but, on the other hand he cannot be at the same time required to submit to a charge on that revenue which is inconsistent with the statute. *Per contra* the appellants cannot, in disregard of the statutes, claim an allowance for tenants' profits, and at the same time, in virtue of the statutes, claim the benefit of the statutorily restricted revenue. If they appeal to the statutes they must appeal to them as a whole. Apart from the statutes their position (I mean as regards the valuation of their undertaking as a heritable subject) would probably be not better, but worse.

On the whole, therefore, it is, I think, sufficiently manifest that in this matter the Assessor is right, and that the present case cannot really be distinguished from the *Mersey Docks* case (L. R., 9 Q. B. 84), *Dundee Gas Company* case (9 R. 1240), and *Kirkwall Harbour* case (9 R. 1243), all of which cases were referred to at the discussion. It is said that a different decision was pronounced by us last year in the case of the *Irvine Harbour*, and it certainly appears that in that case there had been an allowance for tenants' profits made in the Court below, and that on appeal the valuation was not disturbed. The matter of tenants' profits is not, however, referred to in our judgment, and we have no note of any argument on the subject. If, therefore, the position of Irvine harbour is similar to that of the harbour of Ayr, the question of tenants' profits must not have been pressed in argument, or must in some way have been overlooked.—(His Lordship here referred to an appeal by the Parochial Board of Ayr upon a minor point not reported.)

The other appeals are by the Parochial Board of Newton-on-Ayr, and are three in number.—(His Lordship here referred to the first and second appeals not reported.)

The third appeal, by the Parochial Board of Newton-on-Ayr, relates to the appointment of the *cumulo* valuation between the parishes of Ayr and Newton-on-Ayr. The Assessor, following a practice which has been in force without objection for thirteen years, has apportioned the *cumulo* valuation according to the lengths of quayage in the two parishes respectively. The parish of Newton-on-Ayr now contends that it should, in the first instance, be credited with the revenue derived from hydraulic hoists, cranes, and other fixed machinery locally situated within its bounds, and that only the remaining revenue should be apportioned according to quayage. The reply is that the harbour is a *unum quid*:—that the proposed method of valuation is impracticable, and that the apportionment by quayage, although rough, is on the whole fair, and has been shewn to be so by the acquiescence of all parties up to the present time.

I have considered the argument addressed to us on this subject, and I have come to the conclusion that there is no call to disturb the existing practice or to alter the decision of the Magistrates.

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On the whole, therefore, I propose that we should find that the sum of £100 falls to be added to the valuation of the parish of Newton-on-Ayr, in respect of the rental of railways leased to the Glasgow and South-Western Railway Company, and that for the rest the decisions of the Magistrates are throughout right.

LORD WELLWOOD.—I agree generally in Lord Kyllachy's opinion. The principle question, viz. that of tenants' profits, is one of great difficulty. The circumstance that an undertaking is carried on for the public benefit and not for private gain certainly affords no reason for valuing and taxing it more heavily than a private concern. Again, even if letting of such an undertaking is prohibited by its constitution, that of itself is not, in my opinion, an obstacle to valuing it on the assumption that it can be let.

But then such undertakings are invariably fenced with restrictions as to the power of levying rates and the application of revenue; and these restrictions must be taken into account in valuing the subjects, just as the existence of a servitude affects the valuation of a farm. It will accordingly be found in cases such as the present that if the restrictions are considered and given effect to there is practically no room for an allowance for tenants' profits. As Lord Kyllachy has pointed out, the revenue derived from rates (and consequently the valuation of the subjects) is lower than it might have been if the undertaking had been in the hands of a private trader, just because the purposes to which the revenue must be applied are restricted and higher rates are not required, and of this the trustees get the benefit. In short, it is difficult to argue from the one kind of undertaking to the other; and although there may be some features in this case which are not to be found in the cases to which we were referred, I think the safer course is to follow the principle on which the *Mersey Docks* case, the *Dundee Gas Company* case, and the *Kirkwall Harbour* case (which is scarcely distinguishable) were decided.

My recollection as to our decision in the case of *Irvine Harbour*, decided last year, coincides with that of Lord Kyllachy. Although I find nothing on my papers to shew that the point was given up, I find no note of an argument; and although the question may have been noticed in opening by the appellants' counsel, I fancy that it must have been lost sight of owing to the prominence given to the question of water-way, which bulked largely in the discussion, and to which our opinion was confined.

On the other point in the present case I agree with Lord Kyllachy, and have nothing to add.

THE COURT were of opinion that £100 fell to be added to the valuation of the harbour and to be apportioned to the part of the valuation pertaining to the parish of Newton-on-Ayr, and that *quoad ultra* the determination of the Magistrates was right.

T. J. GORDON & FALCONER, W.S.—JAMES AYTON, S.S.C.—JOHN MACMILLAN, S.S.C.—Agents.

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ALEXANDER COWAN AND SONS, LIMITED, Appellants.—*R. V. Campbell—W. C. Smith.*

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ASSESSOR FOR MIDLOTHIAN, Respondent.—*Dickson—Cullen.*

Valuation Acts—Subjects of valuation—Paper mill—Steam-engines—Fictures—Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), sec. 42.—Section 42 of the Valuation of Lands Act, 1854, provides that all machinery

fixed or attached to any lands or heritages shall be considered as lands and heritages and be valued accordingly.

The steam-power of a paper mill in the hands of the proprietor was supplied by a number of engines of different sizes, which were fixed by bolts and nuts to solid foundations of masonry, specially designed for their reception. Although they could be removed without injury to themselves or to the buildings, the foundations would have required alteration to adapt them to engines of any other shape or size.

Held that the engines were heritable fixtures in the sense of the Act of 1854, and fell to be valued as part of the lands and heritages.

Observed that the rules which regulate the rights of landlord and tenant in regard to machinery erected by the tenant during the currency of his lease had no application; and that the principles to be applied were practically those which regulate the rights of heir and executor.

Valuation Acts—Principle of valuation—Paper mill—Valuation by floor area.—An assessor valued the buildings of a paper mill at a uniform rate per square yard of floor space.

Held in an appeal by the proprietor, that, as he did not propose to give information as to the profits of his business, but merely stated the alternative of valuation by cost of construction, the Assessor's valuation was *right*.

At a meeting of the Valuation Committee of the Midlothian County Council at Edinburgh on 13th and 19th September 1893, Messrs Alexander Cowan & Sons, Limited, papermakers, Penicuik, appealed against an entry of them as proprietors and occupiers of the Valleyfield Paper Mill (including the Valleyfield Mill and the Low Mill) at a yearly rent of £3212.

The appellants sought to have the valuation reduced to £641, 10s., appealing against the proposed assessment under these heads—(1) assessment for steam-power; (2) assessment for water-power in so far as exceeding £3 per horse-power; (3) assessment of the buildings at a rate per yard of floor space; and (4) the assessment generally as being greatly in excess of the rent for which the subjects could be let.

I. The Assessor had entered the steam-engines used in the mill under the head of "steam-power," including driving-gear, engine-houses, boilers, boiler-houses, and chimney, at £569 for Valleyfield Mill, and £92 for Low Mill, making in all £661. The appellants maintained that only one compound condensing steam-engine (No. 3) fell within the description of "machinery fixed or attached" to the heritage in the sense of section 42 of the Lands Valuation Act, 1854, and that all other engines were not assessable. They admitted that engine No. 3 was assessable at £30.

From a list appended to the case it appeared that the steam-power of the mill was supplied by eighteen engines for Valleyfield Mill and six engines for Low Mill. Nos. 1 and 2 were of 65 and 56 horse-power respectively, No. 3 of 20 horse-power, and the horse-power of the remainder was from 17 to 2. With the exception of No. 3, which was built into the heritable structure, the engines, as appeared from the evidence of Mr Reid, Mr Belfrage, and Mr Ormiston, quoted *infra* by Lord Wellwood in his opinion, were fixed by nuts and bolts, in some cases of 10 or 11 feet long, into solid structures of great depth made specially for their reception. They could be removed without injury to themselves or to the foundation structures, but the latter would require alteration to adapt them to engines of any other size or shape.

The appellants contended that on the evidence it was clear that the engines (with the exception of No. 3) were moveable, and therefore not assessable, and they relied on *North British Railway Company v. Assessor of Railways, &c.*, decided by Lord Fraser, Sept. 26, 1887, 25 S. L. R. 4.

The Assessor maintained that the same principle of valuation had been adopted in Midlothian for the last thirty-seven years, and that all the engines were fixed or attached to the building.

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II. As to the assessment of water-power, the evidence shewed that the Assessor had not valued the water-power proper above £3 per horsepower.

III. The Assessor's entry for the buildings and land was for Valleyfield £1659, and for Low Mill £590. He had fixed the value of the buildings according to floor space at Valleyfield at 1s. 8d. per yard, and at Low Mill at 1s. 6½d. per yard.

The appellants maintained that in assessing at a uniform rate per yard of the space he had adopted an improper method of valuation. The buildings were of a widely different value; some had been erected recently in a substantial manner, while others were of wood, erected early in the century, of very small value, and intended for purposes entirely different from that for which they were now used. They contended that a more correct method was to take the value of the buildings as they now stood, and to take a percentage upon such value, and if this method were adopted, and a certain amount allowed for depreciation year by year, they believed a much lower value would be brought out. Upon this basis their valuation for the two mills, including buildings, land, and assessable steam-engine, amounted to £2001.

IV. The appellants contended that the valuation was excessive, as the works could only be carried on subject to the conditions of an agreement with the Duke of Buccleuch and other riparian proprietors on the North Esk, to prevent pollution. As the Court held that there was no evidence to enable them to decide whether the agreement was prejudicial to the appellants, this objection need not be further referred to.

The Valuation Committee having sustained the Assessor's valuation, the appellants asked for and obtained a case for appeal to the Lands Valuation Appeal Court, from which the above facts appeared.

Argued for the appellants;—The question whether these engines were to be valued for the purposes of assessment as being “fixed and attached” to the heritage, in the sense of section 42 of the Act of 1854, must be decided not as if the question arose as between heir and executor, as in such cases as *Fisher v. Dixon*¹ and *Brand's Trustees*² but as if it arose as between landlord and tenant. The practical rule in the latter case was that articles were not to be regarded as heritable which, although fixed, could be removed without injury to the building or to the article itself.³ The only alternative would be to hold that all tools of trade in a workshop or manufactory which were fixed merely to secure stability were liable to assessment.

Argued for the Assessor;—The sole test under the 42d section of the Act was whether the machinery was “fixed and attached.” These engines were so fixed and attached as to be *partes soli*.⁴ The cases between landlord and tenant had no application. A tenant was permitted to remove fixtures not because they were not physically fixed or attached, but from favour of trade. In any question as to what was fixed or attached to the heritage, and so *partes soli*, not arising between landlord and tenant, it was immaterial that the things fixed could be removed without injury to themselves or the building, or that the object of the annexation

¹ *Fisher v. Dixon*, June 26, 1845, 4 Bell's App. 286.

² *Brand's Trustees v. Brand's Trustees*, Feb. 2, 1878, 5 R. 607.

³ *Nisbet, &c. v. Mitchell Innes*, Feb. 20, 1880, 7 R. 575; *Ferguson, &c. v. Paul*, July 4, 1885, 12 R. 1222; *North British Railway Co. v. Assessor of Railways and Canals*, Sept. 26, 1887, 25 S. L. R. 4.

⁴ *Chalmers*, Jan. 28, 1871, *Lands Valuation Appeal Cases*, No. 75, 11 Macph. 983; *Wilson*, Dec. 15, 1859, *Lands Valuation Appeal Cases*, No. 17.

was merely for the convenience of the things fixed, and not to improve the heritable subject.¹ No. 155.

The arguments on the third ground of appeal appear from the opinion of Lord Wellwood.

At advising,—

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LORD WELLWOOD.—The principal question raised in this appeal is whether the steam-engines—a list of which is given on pages 6 to 18 of the case—are to be valued for purposes of assessment as part of the lands and heritages belonging to the appellants, Messrs Alexander Cowan & Sons, Limited, at their paper mills at Valleyfield. The question depends upon whether they are heritable fixtures in the sense of the Lands Valuation Act of 1854. That Act contains the following express provisions in regard to the valuation of machinery (section 42):—"The following words and expressions when used in this Act shall in the construction thereof be interpreted as follows, except when the nature of the provision or the context of the Act shall exclude or be repugnant to such construction, (that is to say), the expression 'lands and heritages' shall extend to and include all lands, houses, shootings, and deer forests, . . . fishings, woods, copse, and underwood, from which revenue is actually derived, ferries, piers, harbours, quays, wharfs, docks, canals, railways, mines, minerals, quarries, coalworks, waterworks, limeworks, brickworks, ironworks, gasworks, factories, and all buildings and pertinents thereof, and all machinery fixed or attached to any lands or heritages." I shall afterwards advert to the mode in which these steam-engines are fixed to the buildings, but in the first place I shall consider the principles upon which machinery should be dealt with in the valuation of lands and heritages.

The appellants maintain that the question whether this machinery is to be dealt with as heritable for the purposes of valuation must be considered as if a question had arisen between landlord and tenant as to the property of the machinery. I have no hesitation in rejecting this contention. A tenant's right to remove machinery which, for the purposes of his trade, he has himself fixed or attached to the heritable subject leased, is an exception introduced from favour to trade; and it proceeds on the assumption that otherwise such machinery would be treated as heritable fixtures. Indeed, strictly speaking, the machinery, if sufficiently fixed or attached, is the property of the landlord; but the tenant has right to make it his own by removing it, a right which can be transferred or renounced by assignment—*Miller v. Muirhead*, March 10, 1894, 21 R. 658.

The Valuation Act, section 42, provides, without qualification, that all machinery fixed or attached to any lands or heritages shall be considered as lands and heritages, and valued accordingly. If the appellants' contention were well founded this provision would be practically inoperative; but I think that a little consideration shews that the rules which regulate the rights of landlord and tenant in regard to machinery erected by the tenant during the currency of his lease have no application in the question of valuation for rating purposes. If, in a lease of ordinary duration, the tenant hires fixed machinery from the landlord, as well as the buildings, the rent paid to the landlord for the whole

¹ *Longbottom v. Berry and Another*, 1869, L. R., 5 Q. B. 123, per J. Hannen, 137; *Holland v. Hodgson and Another*, 1872, L. R., 7 C. P. 328.

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concern will, under section 6 of the Act of 1854, be taken as the yearly value of the subjects, as regards both the proprietor and the occupant. But if he hires the buildings alone, and uses his own machinery, which he erects and fixes in order to be used, the value of the machinery thus erected and fixed will not enter the valuation, because the tenant will be entitled to remove it at the expiry of his lease (provided always that this can be done without serious injury to the fabric of the building), and the landlord derives no benefit or return from it.

We are familiar in this Court with analogous cases where, under his lease, a tenant is empowered to erect temporary buildings, which he is entitled or bound to remove at the end of the lease. Such buildings are fixed or attached to the heritage; but it has been repeatedly decided that, for the reasons stated, they must not be valued. Thus in a question of valuation, the tenant's interests, as distinguished from the landlord's, are not affected; their interests are identical. The question must, therefore, be considered as if the subjects to be valued were in the occupation of the proprietor, as indeed is here the case, and the principles to be applied are practically those which regulate questions between executor and heir.

In the case of the *North British Railway Company v. Assessor of Railways, &c.*, Sept. 26, 1887, 25 S. L. R. 4, cited at the discussion, Lord Fraser (Lord Ordinary on the Bills) said:—"The reason for this special enactment as regards machinery is not far to seek. According to the Scottish mode of assessment for public burdens the landlord pays a certain proportion, and the tenant pays the rest. The assessments are laid on according to the annual value as contained in the Valuation-roll. The 6th section of the Valuation Act enacts that where heritages are *bona fide* let under a lease of twenty-one years or less the rent shall be taken as the annual value; but if the lease shall be more than twenty-one years, then the rent shall not necessarily be assessed as the yearly value, but such value shall be ascertained irrespective of the rent. Now, suppose the shipbuilding yard or joiners' premises, or any other premises wherein engineering works are carried on under a lease for more than twenty-one years, and the tenant brings all the plant (the rent received by the landlord being payable merely for the shell of the building), it would be a very hard case in such circumstances to enter in the Valuation-roll not merely the annual value of the building but also the value of the tenant's plant, and upon such value to lay an assessment upon the landlord, who derives no sort of return from the plant, which is not his. It would be different if the machinery which is valued were fixed and annexed to the realty, because such machinery becomes a part of the realty, and will go to the landlord at the termination of the lease. It must have been upon some such ground that the special enactment in reference to machinery was made by the Valuation Act." It will be time to consider this question when it arises; but as Lord Fraser's observations have a bearing on the question before us, I feel bound to make the following observations,—First, The statute provides that in the case of such leases the tenant shall be taken to be the proprietor of the lands and heritages; and it may therefore be maintained that machinery should in such a case be valued on precisely the same footing as here; secondly, the true proprietor of the land is only bound to relieve the tenant of such proportion of the assessments laid upon the valuation as shall "correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation"; and thirdly, the special mention in the statute of machinery fixed or attached seems to me to tell against rather than for exemption from valuation of machinery

which would be held to be "tenant's plant" in a question between landlord and tenant. No. 155.

An examination of the authorities, both Scotch and English, shews that it is difficult, if not impossible, to lay down general rules which shall be of universal application. The words "fixed or attached" require construction; the question is necessarily one of degree. On the one hand it is not necessary that the machinery should be so attached to the soil or to the building as to become *pars soli* in the sense in which a house or building is *pars soli*. On the other hand, it is not every mode or degree of attachment which will make machinery heritable *quoad* valuation. For instance, a sewing machine which is fastened with screws or bolts to the floor simply in order to keep it steady would be held to be moveable notwithstanding attachment to a heritable subject, there being in no proper sense any dedication of the heritable subject to the machine, or *vice versa*. These are extreme cases; the intermediate cases are more difficult of solution.

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The fact that machinery can be removed without injury to itself and without material injury to the building is, no doubt, an element in favour of exemption from valuation, pointing, as it does, to the machinery being moveable; but it is by no means conclusive. It is necessary also to consider the degree of attachment: whether the building has been specially adapted to the machinery, whether the annexation is of a permanent or quasi-permanent character, and how the use and enjoyment of the building would be affected by the removal of the machinery.

If it appears that the machinery has been attached to the building by the proprietor in order that it may be permanently or quasi-permanently used in that position, and that the building has been altered and specially adapted to the use of the machinery, and would require to be reconstructed or altered if the machinery were removed, unless it was replaced by machinery of precisely the same size and shape, then, in my opinion, the words of the statute are sufficiently satisfied, and such machinery must be regarded as fixed or attached to the buildings, and accordingly valued as lands or heritages, although it can be separated and removed without destruction to itself and without actual injury to the buildings.

Now, with regard to the mode in which the engines in question are fixed or attached there is no dispute. The appellants admit that the compound condensing steam-engine (No. 3 of the list) is assessable, being built into the heritage; but they maintain that all the others are moveable because they are held in their seats merely by bolts and nuts, and can be removed without injury to themselves or to the buildings. A model of a horizontal engine is in process, which shews the way in which all the steam-engines are fixed to their seats. They are not all of the same size, but they are all fastened in the same way. They are thus described by the witness William Ormiston (page 72 of case):—" (Q.) You examined these engines and boilers. Were they attached or fixed to the property in any way? (A.) They were fixed to the seat in the way shewn—a foundation at the bottom, and then a huge structure of brickwork. In the one case of the largest engine, I went down the hatch by a ladder about eight or nine feet deep, and examined the brickwork, and saw that the attachment was done in the way shewn in the model. The engine-house had a very large roof, 40 feet by 20 feet, and as high as this room. Below that was a 10 feet deep bed, into which the seat was built. (Q.) And was the whole building, both

No. 155. above and below, specially adapted and fitted for the reception of such an engine as you saw? (A.) In that case it specially was. In some other cases an old building had been taken down and the engine-seat formed and the engine put into it. But in some cases the whole building was new and specially made for an engine-house. (Q.) Was it the case that the house was rather made for the engine than the engine for the house? (A.) It was a new engine-house, and the engine put into it. (Q.) You say you regard these as fixtures; why? (A.) Because they are fulfilling the words of the Act, 'fixed and attached' to the building. (Q.) As matter of course, that is part of the building? (A.) It is inside the building, standing on the same earth that the walls of the building are standing on. It is there specially for that and no other purpose." It will thus be seen that although it is true that they are kept in their seats simply by bolts and nuts, the seats are solid structures of great depth made specially for the engines and undoubtedly *partes soli*; and the bolts are, in some cases at least, 10 or 11 feet in length. The view which I take of those engines coincides with that expressed in the evidence of A. W. Belfrage, C.E. (pp. 68-69 of case). He says that he regards the engines as fixtures, because the under-structure is so very substantial that it cannot be taken apart from the super-structure, and the two must be valued as one subject; that the under-structure is of no other use than merely fixing the engine; "that the structure in stone and lime is made in relation to the under-structure. The upper-structure is made with relation to the whole, and the building is made in relation to both. No doubt the iron-work can be removed, but no other engine unless it were a fac-simile could be reinstated there without this immense under-structure being remodelled." His view, in short, is that the building has been dedicated to the machinery, and can only be used for these machines or others of precisely the same model and size.

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Judging from the nature of the questions put to the witnesses, the appellants' case is rested upon what I hold to be an erroneous view, that the rule of tenant's fixtures applies in this matter. Once that view is rejected, I think it is clear upon the authorities that machinery so fixed or attached is heritable *quoad* valuation. A heavy burden lies upon the appellants, because, not only has such machinery been invariably valued as heritable in Midlothian, but if I am not mistaken, it has been so valued by common consent throughout Scotland from the time of the passing of the Valuation Act, 1854. But the question having been now seriously raised and argued, it is right that we should give our judgment upon it, and not proceed solely upon a practice, however long and settled.

I shall now make a few remarks upon the cases to which our attention was drawn in the course of the arguments.

The English decisions which deal expressly with the valuation of machinery for purposes of rating, such as *Laing v. Bishop Wearmouth*, 1878, L. R., 3 Q. B. D. 299, and *Tyne Boilermakers Company v. The Overseers of Long Benton*, 1886, 18 Q. B. D. 81, must be received with caution; because some of them seem to proceed upon the footing that although machinery is not attached to the realty and remains personal property, yet its value may be taken into consideration as enhancing the value of the realty if it is placed on rateable premises with the intention that it shall be permanently used for the purposes for which the premises are adapted.

I profess to express no opinion whether these decisions are justified by the terms of the English statutes. I do not proceed upon them to any extent

There is no doubt that under the 42d section of the Scottish Statute of 1854 No. 155. machinery must be fixed or attached to the land before it can enter the valuation.

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But the English decisions in questions between executor and heir, and mortgager and mortgagee, are directly in point, because the law of England is the same as the law of Scotland in such questions. Now, it has repeatedly been decided in England that machinery fitted in the way in which the engines in question are fixed is heritable. For instance, in the case of *Walmsley v. Milne*, 1859, Scott's Rep. 7 C. B., New Series, 115, the articles were attached by bolts or nuts, and could be removed without injury to the building or to themselves; but they were held to be heritable, the Court being of opinion that they were attached for the purpose of improving the inheritance, not for any temporary purpose. The same judgment was pronounced in the case of *Mather v. Fraser*, 1856, 2 Kay & Johnson, 536, and *Climie v. Wood*, 1869, L. R., 4 Exchequer, 328.

There are, no doubt, cases which seem to conflict with those I have mentioned; but I think that the true explanation of the conflict is that in those cases the Court lost sight of the distinction between the right of a tenant to remove articles which were fixtures, and the character of the machinery as between executor and heir.

Coming to the Scots cases, I need only refer to the second case of *Brand's Trustees v. Brand's Trustees*, Feb. 2, 1878, 5 R. 607, which is the sequel to the case decided in the House of Lords in March 16, 1867, 3 R. (H. L.) 16, as an authority directly in point. I may add that the older decisions in the Valuation Court are in accordance with the views which I have expressed. I refer in particular to the case of *Wilson*, December 15, 1859, Lands Valuation Appeal Cases, No. 17; *Home*, October 9, 1858, 24 D. 1451; *Drumgray Coal Company*, April 8, 1867, 11 Macph. 977; and *Chalmers*, Jan. 28, 1871, 11 Macph. 983; and the practice of assessors has, I believe, been in accordance with those decisions.

The decision of Lord Fraser in *The North British Railway Company v. Assessor of Railways and Canals*, September 26, 1887, 25 S. L. R. 4, is relied on by the appellants as a decision to the contrary. Although I am not prepared to agree with all that his Lordship says in the course of his opinion, I do not think that that case is necessarily in conflict with the judgment which we are about to pronounce. Some of the articles, such as grindstones and troughs, were not attached to the ground in any way whatever. Again, there was a drilling-machine which rested on the ground without any bolts. Other small articles, such as sewing-machines, axle-turning lathes, and a small punching-machine, were fastened to the ground by bolts, though not riveted. Now, as I have said, the question is always one of degree. The articles first mentioned were clearly moveable, not being attached at all; and those which were attached by bolts were articles of comparatively small size which could be equally well used at other parts of the works, and for which no elaborate preparation had been made by preparing a solid foundation or seat.

Lord Fraser says, with reference to the 42d section of the Valuation Act, 1854,—“The enactment is not that all machinery that shall be found to be adapted to the particular mill or gaswork or shipbuilding yard shall be deemed heritage to be valued; it must be machinery fixed or attached,—fixed, that is to say, in such a manner that it cannot be detached from the building without destruction to the building.” If by this his Lordship meant that before

No. 155. machinery can be held to be rateable it must be so fixed that it cannot be removed without actual injury to, that is, dilapidation of, the building, I do not agree in his opinion. But having regard to the articles under consideration, I do not read that passage as covering a case like the present, where, although not a stone of the buildings would necessarily be injured by the removal of the engines, the solid and specially adapted foundations would be rendered useless except for machinery of precisely the same shape and size.

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2. The next question raised by the appellants is with regard to the Assessor's valuation of water-power. The Assessor has valued the water-power at £7 per horse-power. The appellants maintain that this is too much; but it appears from the evidence that of the £7 only £3 represents water-power proper, and that the remainder represents the water-wheel, mill-lade, and damhead; and that if the value of these adjuncts were not included under the head "water-power," it would go to swell the valuation of the building and works.

3. The next objection is to the Assessor's valuation of the building according to flooring. Valuation according to flooring is a somewhat old-fashioned and, when taken by itself, not a conclusive mode of valuation; but before discarding it, it is necessary to consider what is the alternative proposed by the appellants, especially as it seems to have been adopted and acted upon without objection for about thirty years in the county of Midlothian. Now the only alternative suggested by the appellants is valuation according to the cost of construction. But that is a mode of valuation which is open to objections quite as serious as those applying to valuation according to flooring, and has been discountenanced by this Court in more cases than one. The appellants do not propose that the value shall be fixed according to profits, for obvious reasons. That mode of valuation is not a favourite with traders, involving, as it does, disclosures of the contents of their books. Now, it has latterly been decided by this Court that the most satisfactory way in which to ascertain the valuation of trading premises with the view to seeing what rent could be obtained for them is to value them according to the profits of the undertaking. But that course is not here proposed, and the only alternative course being valuation by cost of construction, I am not prepared to condemn the method adopted by the Assessor. At the same time I reserve my opinion for future years in the event of the appellants proposing that the valuation shall be according to profits in preference to valuation by flooring, and leading evidence, and placing before the Committee materials to support that mode of valuation.

LORD KYLLACHY concurred.

THE COURT were of opinion that the determination of the Valuation Committee was right.

MENZIES, BLACK, & MELVILLE, W.S.—J. H. BALFOUR MELVILLE, W.S.—Agents.

No. 156.

R. S. FORBES (Surveyor of Taxes), Appellant.—*Sol.-Gen. Shaw—Young.*
STANDARD LIFE ASSURANCE SOCIETY, Respondents.—*Johnston—*
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Revenue—Inhabited house duty—Exemption—Business premises—Messengers—Customs and Inland Revenue Act, 1878 (41 Vict. cap. 15), sec. 13, subsec. 2—Customs and Inland Revenue Act, 1881 (44 Vict. cap. 12), sec. 24.—The Customs and Inland Revenue Act, 1878, sec. 13, subsec. 2, exempts from inhabited house duty "every house or tenement which is occupied solely for the

purposes of any trade or business," and enacts further that "this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof." No. 156.
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The Customs and Inland Revenue Act, 1881, sec. 24, enacts, "with reference to" the foregoing exemption "the term 'servant' shall be deemed to mean and include only a menial or domestic servant employed by the occupier, and the expression 'other person' shall be deemed to mean any person of a similar grade or description not otherwise employed by the occupier, who shall be engaged by him to dwell in the house or tenement solely for the protection thereof." Inland Revenue v. Standard Life Assurance Co.

An insurance company who had been assessed to inhabited house duty in respect of their offices appealed on the ground that they were within the foregoing exemption. The case upon appeal set forth that the only persons who occupied the premises at night were two messengers whose duties were to lock up the premises at night and open them in the morning, and in the day-time to go errands, attend in the lobby, and perform various miscellaneous duties of a similar nature. The case further bore that the company "rested their appeal on the fact that the messengers were servants absolutely necessary for their business, not merely for the protection of their premises."

Held (1) that the words "for the protection thereof" in sec. 13, subsec. 2, of the Act of 1878 applied to "servant" as well as to "other person"; (2) that this construction was not modified by sec. 24 of the Act of 1881; and (3) that the company were not within the exemption, in respect that the messengers did not reside in the premises solely for the protection thereof.

Question, whether the exemption would apply to the case of premises in which more than one person resided, such persons being necessary for the protection of the premises, and residing in the premises solely for the protection thereof.

At a meeting of the Commissioners for the General Purposes of the Income-tax and Inhabited House Duties for the county of Edinburgh, the Standard Life Assurance Company, Edinburgh, appealed against an assessment to inhabited house duty for the year 1893-94 on the annual value of the premises Nos. 3 and 5 George Street, Edinburgh, belonging to and used by the company as business offices, on the ground that the premises in question fell within the exemption provided by the Customs and Inland Revenue Act, 1878, sec. 13, subsec. 2, and the Customs and Inland Revenue Act, 1881, sec. 24.* Exchequer Cause.
1st Division.

The Commissioners held that the premises fell within the exemption provided by these statutes.

The Surveyor of Taxes obtained a case, which the Lord Ordinary in

* The Customs and Inland Revenue Act, 1878 (41 Vict. c. 15), sec. 13, enacts,—“With respect to the duties on inhabited houses . . . the following provisions shall have effect. . . .”

“(2) Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof. . . .”

The Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), enacts,—Sec. 24.—“With reference to the exemption from the duties on inhabited houses given by subsection 2 of section 13 of the Customs and Inland Revenue Act, 1878, the term ‘servant’ shall be deemed to mean and include only a menial or domestic servant employed by the occupier, and the expression ‘other person’ shall be deemed to mean any person of a similar grade or description not otherwise employed by the occupier, who shall be engaged by him to dwell in the house or tenement solely for the protection thereof.”

No. 156. Exchequer (Wellwood), on the motion of the parties, appointed to be heard by the First Division.

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The decision of the case ultimately came to turn upon whether two persons, described in the case as "messengers," who lived in the premises at night, and were, as appeared from the case, the only persons who did so, belonged to the class of persons contemplated by the statutes referred to. With reference to these messengers, the case stated that "the duties of the two messengers were . . . to lock up the premises at night and open them in the morning, and in the day-time to go errands, deliver letters, attend in the lobby, and perform various miscellaneous duties of a similar nature." The case further stated that the company "rested their appeal on the fact that the messengers were servants absolutely necessary for their business (not merely for the protection of their premises)."

On the assumption that each of the messengers belonged to the class of persons described in the statutes founded on, the further question arose, whether the company was, under the statutes, and looking to the character of the premises, entitled to have more than one such person on the premises at the same time, and facts were stated in the case bearing on this question. For the purposes of the present report, the nature of these facts is sufficiently set forth in the opinion of the Lord President.

The arguments sufficiently appear from the opinions of the Court.*

LORD PRESIDENT.—I must say that I think the case a very clear one for the Crown. To begin with, Nos. 3 and 5, although they bear a name which sounds in the plural, are neither more nor less than one house,—that is to say, if you go back to the beginning of things, you will find that No. 3 was one house and No. 5 was another house, but at the present time they have this strong element of solidarity, that there is but one door to the building, and the owner of the building and the occupants of the building are just one company. It is true that for their convenience, and apparently following out tradition, they have kept the two branches of their business more or less apart, and that the partition of the staff corresponds with the former differences between the two houses, but that cannot found any distinction in favour of the Standard Insurance Company on the present question of inhabited house duty.

Well, then, this being one house, we find that there are living in it as inhabitants two servants of the company. Now, on looking at the existing statutes, and perhaps still more on looking at the *catena* of the statutes upon the subject to which Mr Young has very properly referred, this stands out quite clear, that while the Legislature were minded to exempt from the duty houses which were occupied solely as business premises, there occurred the slight complication that sometimes a man had to sleep in the house for its protection, and it was plain enough that that circumstance did not, in the view of the Legislature, and should not, detract from the exemption—the fact of the man living in the house being more or less incidental to the proper exercise of the trade or calling on which the exemption is to be conferred. Therefore when we come to the existing statutes, this is the expression used by the Legislature,—“Every house or tenement” is to be exempt “which is occupied solely for

* At the hearing counsel for the Crown founded on the following earlier statutes:—48 Geo. III. cap. 55, rule 5, sched. (B); 57 Geo. III. cap. 25, sec. 4; 6 Geo. IV. cap. 7, sec. 7; 14 and 15 Vict. cap. 36; 32 and 33 Vict. cap. 14, sec. 11.

the purposes of any trade or business, and this exemption shall take effect No. 156. although a servant or other person may dwell in such house or tenement for the protection thereof." Now, I think it is hopeless to maintain that these last words "for the protection thereof" do not apply to the word "servant" as well as to the words "other person." The permission or licence given to the trader is merely to keep his house protected. If he likes to have one of his own servants, let him do so. If he wants to have caretakers let him have caretakers, but the words "other person" are clearly put there in order to cover the case of someone who employs, not one of his staff, but an outsider, to protect his house; but in the case of the "servant," as in the case of an outsider, the legitimacy of his residence there, in the question of exemption, is determined by the question—Is he there for the purpose of protecting the house or not? When we look at the reason of the thing, it is manifest that, if the Legislature intended to exempt persons who let their servants live in the house, although not required for the protection of the house, any number of people might be furnished with dwelling-houses within a building of this kind, and that would entirely defeat the purposes of the Revenue Statutes.

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Now, when we turn to the statement on the face of this case, it becomes as clear as anything can be, that these two messengers who live in this one house which bears the plural name are not there for the protection of the premises but for the general purposes of the business. That is said in so many words. The Standard Company rested their appeal on the fact that the messengers were servants absolutely necessary, for what?—for their business, and not merely for the protection of their premises. Now, it seems to me that that puts the Standard Company entirely out of Court.

I am therefore clearly of opinion that these premises are assessable, and that we must reverse the decision of the Commissioners.

LORD ADAM.—I am of the same opinion. The appellant referred to the words of subsection 2 of section 13 of the Act 41 Vict. cap. 15. That subsection gives exemption from premises being assessed as inhabited houses where such premises are solely occupied for the purposes of trade or business; and then it goes on to say that this exemption shall take effect although a servant or other person may dwell in such premises for their protection. As a matter of construction I think it is impossible to apply the last words of that section—"for the protection thereof"—to the words "other person" by themselves. I do not think the meaning of that clause is modified by section 24 of 44 and 45 Vict., because that is an interpretation clause, and merely reads into the clause the words "menial or domestic servant." It does not at all affect the application of the condition that the servant who is a menial or domestic servant shall reside there solely for the protection of the house.

In the next place, I do not think it necessarily must be one servant or other person. There may be facts which would shew that more than one was *de facto* residing in the premises for the purpose of protecting them. There is the case of Buckingham Palace, which was taken as an illustration. There might be dozens of people put there necessarily for the protection of the premises. But then I think this case entirely fails upon the facts. As your Lordship has pointed out, it is perfectly obvious that the two messengers do not live in the house for the protection of the premises, and are not there solely for that purpose. No doubt, as Mr Dundas says, the greater the number the greater

No. 156. the protection, but there can be no doubt at all that these two messengers are kept there for the convenience of the company.

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LORD M'LAREN.—I concur, but I would wish to say that I reserve my opinion on the question of whether the provision, or rather the exemption, applicable to the case of a servant or other person dwelling in the premises for their protection can ever be extended so as to include a plurality of persons in that position. I think the case contemplated is a case of usual occurrence, that there may be some person living in business premises during the night who can be there to open the door in case of fire or emergencies of any kind. I do not think that the case contemplated is that of complete protection of the premises against external risks, but merely that there may be someone there for protection in the sense I have mentioned, and as a means of communication between persons outside who may have cause to come to the building. However, that point is not raised here, because it is not stated that the messengers in the present case were there solely for the protection of the premises.

LORD KINNEAR.—I agree with your Lordship. It is probably unnecessary to decide whether the residence of two or more persons in a building devoted solely to the purposes of trade or business would deprive that building of the exemption accorded to buildings of this class, provided it appeared that two or more persons were living in the building solely for protecting it, because I agree with your Lordship that it is clear enough on the face of this statement that the two messengers are not occupying premises solely for the protection of those premises. I think that is a sufficient ground of judgment.

THE COURT reversed the determination of the Commissioners, and sustained the assessment.

SOLICITOR FOR SCOTLAND FOR BOARD OF INLAND REVENUE—DUNDAS & WILSON, C.S.—Agents.

No. 157. MRS MARY M'CALLUM, Pursuer (Respondent).—*Comrie Thomson—Hunter.*

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M'Callum v.
Graham.

MRS MARY GRAHAM, Defender (Reclaimer).—*Watt—Macaulay Smith.*

Issue—Facility—Fraud—Undue influence—Nurse and patient—Reduction.—In an action for reduction of a will the pursuer averred that the testatrix had, through excessive drinking, become deteriorated in her mental and physical condition, and facile and yielding in her disposition; that the defender, three months before the death of the testatrix, had been engaged to attend her as nurse; that taking advantage of her position of nurse, and of the patient's craving for alcohol, she had plied her with drink, and that by this means, by excluding her relations, and by various false stories, she had induced the patient to make a will in her favour. *Held* (rev. judgment of Lord Wellwood) that the pursuer was not entitled to an issue of undue influence, but only to an issue of facility and fraud or circumvention.

1ST DIVISION.
Ld. Wellwood. IN December 1893 Mrs Mary M'Callum raised an action in the Court of Session against Mrs Mary Graham concluding for reduction of a settlement, dated 15th June 1892, made by the deceased Margaret Anderson Middleton, niece of the pursuer, by which she left the residue of her estate to the defender.

The pursuer averred;—(Cond. 4) "Shortly after her father's death Miss Middleton became very intemperate in her habits and very much addicted to excessive drinking, and these habits of intemperance gradually increased,

she being at times in a state of intoxication for days together. From the time of her contracting said habits until her death Miss Middleton's physical and mental condition deteriorated, and she never recovered the full possession of her normal faculties. She lost much mental firmness, and became of facile and yielding disposition, and easily influenced by any one with whom she was in personal contact."

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She then averred that owing to Miss Middleton's state it became necessary about three months before her death that a strong nurse should be engaged, and that the defender was engaged. She then averred ;—(Cond. 6) "The defender perceiving the weak and facile condition of Miss Middleton, and her liability to be easily imposed upon and unduly influenced, immediately set herself to induce Miss Middleton to execute a will in her favour. In pursuance of said scheme the said Mrs Graham succeeded in acquiring a powerful influence over Miss Middleton, and in controlling her every action. She endeavoured as far as possible to prevent any other person having access to Miss Middleton; persuaded Miss Middleton to dismiss the servant girl who had been in her employment for about three years; and refused admittance to Miss Middleton's minister and her friends when they called to see her. Further, the defender, Mrs Graham, in direct violation of the medical instructions, encouraged Miss Middleton in her habits of drinking. She on several occasions drove and walked out with Miss Middleton, and brought her home in a state of intoxication. She falsely pretended to Miss Middleton that she was a trained nurse, and the widow of a doctor of medicine. . . . The consequence of the actings and representations of the said Mrs Graham was that Miss Middleton was induced to execute the deed presently under reduction a few weeks after she obtained access to the house."

The pursuer pleaded, *inter alia*;—(2) The said Margaret Anderson Middleton having been in a weak and facile state of mind, and the said Mrs Mary Elizabeth Duncan or Mack or Graham having taken advantage thereof, and fraudulently or by circumvention induced the said Margaret Anderson Middleton to execute the said deed, it ought to be reduced. (3) The defender, Mrs Mary Elizabeth Duncan or Mack or Graham, being in a position in which she exercised a dominant or ascendant influence over the said Margaret Anderson Middleton, and having unduly influenced the latter to grant the said deed, it ought to be reduced.

On 6th March 1894 the Lord Ordinary (Wellwood) approved the following issues as the issues for the trial of the cause:—" (1) Whether on or about the 28th day of March 1893 the deceased Miss Margaret Anderson Middleton was weak and facile in mind and easily imposed upon, and whether the defender, Mrs Mary Elizabeth Duncan or Mack or Graham, taking advantage of her said weakness and facility, did, by fraud or circumvention, obtain or procure from the said Miss Margaret Anderson Middleton the general disposition and settlement dated on or about 28th March 1893, No. 9 of process, to the lesion of the said Miss Margaret Anderson Middleton? (2) Whether the defender, the said Mrs Mary Elizabeth Duncan or Mack or Graham, being the nurse of, and having in that position acquired a dominant and ascendant influence over the deceased Miss Margaret Anderson Middleton, did, by undue influence, procure and obtain from the latter the said general disposition and settlement dated as aforesaid, No. 9 of process, to the lesion of the said Miss Margaret Anderson Middleton?"*

* "OPINION.—The line which separates the first and second of the issues proposed is very narrow, because, to support an issue of undue influence, there must be proof of weakened will, which borders on facility, and of undue influence, which is not easily distinguished from circumvention. But under the latter

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The defender reclaimed, and argued;—There was no objection to the first issue, but the second ought not to be allowed. The first issue covered the pursuer's whole case. There was no definite standard for testing what "undue influence" meant, and a separate issue of undue influence had never been allowed¹ except in cases between agent and client, where there was a well-recognised relation of trust, of which the law took a very strict view.²

Argued for the pursuer;—She was entitled to the two issues approved by the Lord Ordinary. She had averred a special relationship, that of nurse and patient, a relationship which opened the door very wide to undue influence, and here the averment was fortified by a statement that the nurse excluded the patient's relations. Where a relationship affording special opportunities for influence was averred, an issue of undue influence would be granted.³ That was recognised in *Gray v. Binnie* and *Munro v. Strain*, though the Court in the latter case held that the circumstances of the case did not disclose a relevant case of undue influence, and therefore the issue was refused.

At advising,—

LORD PRESIDENT.—In my opinion the pursuer's case on record is a case of facility and fraud or circumvention, pure and simple. The story is that this testatrix had got into a debilitated condition of body and mind, and was not in the full possession of her normal faculties; that a nurse was got to attend her; that this nurse, taking advantage of the patient's craving for alcohol plied her with drink, and by this means, and by false stories, got the patient to make a will in her own favour. This is, on the face of it, a very plain sailing case of facility and circumvention.

The general issue of weakness and facility and fraud or circumvention is in its terms, and according to our practice, applicable to a great variety of circumstances and relations, and to the manifold forms in which facility and circumvention appear and meet. In a large proportion of cases, the success of the circumvention implies the establishment of influence; and this influence often arises from some more or less specific relation between the testator and the person

issue full proof of facility and circumvention is not required. It is sufficient to establish that ascendancy was acquired by the defender in a position of trust over the will of another, and the abuse of that position by unduly influencing the person over whom ascendancy was so acquired to execute a deed in favour of the defender.

"It only remains to consider whether there are sufficient statements on record to warrant an issue of undue influence. I am of opinion that there are. The pursuer avers that the defender, having been employed as a nurse to prevent Miss Middleton from drinking, instead of doing so, gave her facilities for drinking, and by this means, and by excluding her relations and friends, obtained such ascendancy over her that, in the course of a few months, she obtained a will leaving everything to herself, with the exception of a legacy to the Infirmary.

"A nurse has as great, if not greater, opportunities of acquiring an ascendancy over her patient than a medical man has, who probably visits his patient only once a day, if so often; and I therefore see no reason why an issue of undue influence should not be granted in the present case."

¹ *Munro v. Strain*, Feb. 14, 1874, 1 R. 522, Lord Ordinary Ormidale's opinion; *Anstruther v. Wilkie*, Jan. 31, 1856, 18 D. 405, 28 Scot. Jur. 136; *Clunie v. Stirling*, Nov. 14, 1854, 17 D. 15; *Gray v. Binnie*, Dec. 5, 1879, 7 R. 332.

² *Harris v. Robertson*, Feb. 16, 1864, 2 Macph. 664, 36 Scot. Jur. 333.

³ *Morley* [1893], 1 Chan. 736, see p. 752.

impetrating the will. But the element of undue exercise of legitimate influence does not make it necessary to take a separate issue. No. 157.

The pursuer claimed the second issue on the ground that, even if she failed to prove weakness and facility, she was entitled to prevail. This is not the view of the Lord Ordinary, who thought that the pursuer, even under the second issue, would have to prove "weakened will bordering on facility," but the answer to the pursuer's demand is that the case which she has on record is one of which facility is the basis. May 30, 1894.
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I am for recalling the interlocutor, and I think we should refuse the second issue, and approve of the first issue as the issue for the trial of the cause.

LORD ADAM.—I concur.

LORD KINNEAR.—I am of the same opinion.

LORD M'LAREN was absent.

THE COURT recalled the Lord Ordinary's interlocutor, disallowed the second issue, and approved the first issue as the issue for the trial of the cause.

DALGLEISH, GRAY, & DOBBIE, W.S.—WILLIAM ALSTON, Solicitor—Agents.

MRS CATHERINE M. MACNAB, Nominal Raiser, Pursuer and Defender (Reclaimer).—*Johnston—Chree*. No. 158.

PETER WADDELL, Real Raiser (Respondent).—*Dickson—Abel*.

May 30, 1894.
Macnab v. Waddell.

Process—Multiplepinding—Double distress—Fund in medio.—Where there were competing claimants to one half of a trust-estate, the right to the other half not being in dispute, one of the claimants raised an action of multiplepinding in name of the trustee, bringing the whole estate into Court as the fund *in medio*. Held that the action was incompetent.

By antenuptial contract of marriage, dated in 1865, Peter Macnab, Oban, conveyed his whole estate to trustees, of whom his future wife, Catherine M. Ferguson, was one. One of the purposes was that in the event of the husband predeceasing his wife the trustees should make over one half of the estate to the widow for her absolute use, and the other half to any person whom the husband might appoint by writing, and failing such appointment to his own next of kin. 1ST DIVISION.
Lord Low.

Peter Macnab died on 9th May 1892, leaving a holograph settlement, by which he bequeathed to his nephew, Peter Waddell, the half of the estate over which he had a power of appointment.

Waddell thereafter called upon Mrs Macnab, who was the last survivor of the trustees, to convey one half of the trust property to him in terms of Macnab's settlement. She, however, refused to do so, alleging that she had claims against her late husband for which she was entitled to retain that half of the estate, and that Mr John Macnab, the brother of Peter Macnab, had also claims on it, in virtue of an *inter vivos* assignation.

In August 1893 Peter Waddell raised a multiplepinding in the name of Mrs Macnab as pursuer and nominal raiser. Mrs Macnab, Peter Waddell, and the next of kin of Peter Macnab, were called as defenders.

The whole of the estate was set forth as forming the fund *in medio*.

The nominal raiser pleaded, *inter alia*;—2. The action is incompetent in respect (1) that *ex facie* of the summons there is no double distress; (2) that there is and can be no competition between the real raiser as a beneficiary under the marriage-contract and the pursuer and others as

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creditors on the deceased's estate; and (3) that any claim which the real raiser may consider he has should have formed the ground of an action of accounting.

On 8th March 1894 the Lord Ordinary (Low) pronounced an interlocutor repelling the defences and sustaining the competency of the action.*

The nominal raiser reclaimed, and maintained that the action was incompetent in respect there was no double distress.

At advising,—

LORD PRESIDENT.—Lord Adam has pointed out what seems to me to be an unanswerable objection to the competency of this multiplepinding, and this appears on the face of the Lord Ordinary's opinion. The only double distress alleged to exist consists of competing claims, not to the fund *in medio*, but to one half of the fund *in medio*. As regards the other half there is no dispute whatever. The real raiser seems to have assumed that if he could shew the existence of a competition for any part of the estate this was enough to support the competency of a multiplepinding, throwing the whole estate into Court as the fund *in medio*. This view cannot be supported, and its adoption would be highly inconvenient. If we were to sustain this multiplepinding, the necessary and probably the intended result would be that the administration of the whole marriage-contract estate would be taken out of the hands of the marriage-contract trustee. For this there is no valid reason. It is the duty of the trustee to divide the estate. A dispute, such as we have here, as to who is entitled to this particular share of the estate might be settled by a multiplepinding for the distribution of the one half which is the subject of the dispute. The present action is in my opinion incompetent.

LORD ADAM.—Peter Macnab and the defender and nominal raiser Mrs Catherine Macnab entered into an antenuptial marriage-contract by which Mr Macnab conveyed his whole estate to trustees, of whom the nominal raiser is the sole survivor. In the event of the husband being the predeceaser of the spouses (which has happened) one half of the estate goes to the widow for her absolute use. There is no question as to that portion of the estate. The other half of the estate was destined to any person whom Peter Macnab might appoint, whom failing to his next of kin. As regards this half of the estate there is double distress. A claim to it is lodged by Peter Waddell, who is the heir under a will left by Macnab. There is also a claim made to this half by John Macnab, a brother of Peter Macnab. If the fund *in medio* had been limited to the latter half of the estate, I should have agreed with the Lord

* "OPINION.—The nominal raiser pleads that there is no double distress in this case, and that therefore the action is incompetent.

"The real raiser claims the one half of the marriage-contract estate, which was contributed by the late Peter Macnab, under the holograph settlement left by the latter. He avers (and it is not denied) that the same part of the marriage-contract estate is claimed by John Macnab, a brother of Peter Macnab, by virtue of an *inter vivos* assignation granted by the latter in his favour.

"These circumstances appear to me to satisfy the definition of double distress given by Lord Kinloch in the case of *Russell v. Johnston*, 21 D. 886 (which was quoted with approval in a recent case, *Fraser v. Wallace*, 20 R. p. 374), as being 'a double claim to one fund or property on separate and hostile grounds.'

"I shall therefore repel the defences."

Ordinary in thinking that there was double distress, but the fund is not limited to that half, but comprises the whole estate. It is, however, the duty of the marriage-contract trustee to administer the estate, and having done so, to pay over the estate to the person in right of it. No. 158.
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It appears to me, that though two persons may have a claim to one half of the estate, that affords no ground for throwing the whole estate into Court, the effect of such a course being to oust the trustee from her right to administer the estate. I do not think that that course is competent, and I therefore concur with your Lordship.

LORD M'LAREN and LORD KINNENAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, found the action to be incompetent, and dismissed the same.

MORTON, SMART, & MACDONALD, W.S.—GILL & PRINGLE, W.S.—Agents.

LORD DONINGTON, Pursuer (Appellant).—*Johnston—Maconochie.* No. 159.
GEORGE MAIR AND OTHERS, Defenders (Respondents).—*Comrie Thomson*
—*James Reid.* May 31, 1894.
Lord Donington v. Mair.

Road—Public right of way for foot-passengers over road suited for carriage traffic—Right of proprietor to erect gates to prevent carriage traffic.—Held (diss. Lord Rutherford Clark) that the proprietor of a road, which was suited for carriage traffic, and of the whole of which the public had been found entitled to "the free use," for foot-passengers only, was entitled to erect, and to keep locked, gates at each end of the road, across the carriage-way, for the purpose of preventing any public traffic along the road other than that of foot-passengers, swing-gates being left unlocked at each end sufficient to permit the entrance and egress of foot-passengers.

ON 4th December 1891 Hugh Smith, weaver, Newmilns, Ayrshire, raised an action against Lord Donington, Loudon Castle, Galston, concluding for declarator that the road or way leading off at or near Hag Bridge from the turnpike road between Newmilns and Galston to the public road near Woodhead farm-steading, was a public road or right of way, and for decree ordaining the defender to remove the locked gates, fences, and other obstructions which he had put upon said road, in order that the public might have free and uncontrolled access and admission thereto, and for interdict against the defender troubling or obstructing the public in the peaceable use, enjoyment, and possession of the foresaid public right of way. 2D DIVISION.
Sheriff of Ayrshire.

Lord Donington lodged defences, and the cause was tried before Lord Low and a jury.

The following was the interlocutor, dated 23d June 1893, of the Lord Ordinary applying the verdict:—"Applies the verdict of the jury: And in respect thereof, finds that there is a public road for foot-passengers along the road in question, and that the pursuer and all others are entitled to the free use of said road for foot-passengers: To that extent and effect decerns and declares in terms of the conclusions of the summons: . . . *Quoad ultra* assolzies the defender from the conclusions of the summons, and decerns."

Lord Donington subsequently moved the Lord Ordinary to restrict the right of way along the road to a width of 4 feet 6 inches. The Lord Ordinary refused the motion.

Lord Donington took no steps to have the procedure in the action just narrated set aside, but in November 1893 he brought an action in the

No. 159. Sheriff Court at Kilmarnock against George Mair, factory-worker, New-milns, and certain other persons residing there, in which he prayed to have the defenders ordained to re-erect a gate-post and two gates, and to restore the said gate-posts and gates belonging to the pursuer to the condition in which they were between the 22d and 23d days of September 1893, before the defenders' interference therewith; and failing the defenders re-erecting and restoring as aforesaid within such period as the Court should appoint, for warrant to the pursuer to re-erect and restore said gate-posts and gates at the defenders' expense; and for interdict against the defenders taking down, removing, or otherwise interfering with said gate-posts and gates, and any other gate-posts and gates that might be erected on the said road by the pursuer, "so long as the public road for foot-passengers along same is not affected."

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The pursuer stated that he had, on 21st and 22d September 1893, erected at each end of the Hag or Lime Road a gate 9 feet wide across the carriage-way of the road; that these gates were kept locked with a view to preventing all traffic other than that of foot-passengers along the road; that he had also erected at each end of the road a swing-gate 2 feet 9 inches wide; and that these swing-gates were kept unfastened and presented no obstacle to foot-passengers using the road.

The pursuer pleaded;—(2) The pursuer being proprietor of said Hag or Lime Road, subject only to a public road for foot-passengers, along the same, is entitled to protection against the acts complained of, and to have the gate-posts and gates restored to their former condition as craved in the conclusions of the petition. (3) The defenders having interfered with the property of the pursuer as libelled, the pursuer is entitled to be protected against such interference being repeated, and interdict should be granted as craved.

The defenders pleaded;—(2) The road in question having already been judicially declared to be a public right of way, and the pursuer ordained to remove all gates or obstructions put by him on the same or any part thereof, the matter is *res judicata*, and the erection by the pursuer of said gates was illegal, and the petition should be dismissed. (3) It having been found in a case to which the pursuer was a party that the said road for its entire breadth had been a public roadway for time immemorial, and had never had gates or any obstructions thereon or any part thereof, the present action is incompetent, and should be dismissed. (5) In any view, the pursuer is not entitled to decree as craved, or to make any erections that will in any way interfere with the public use or character of said road, and the defenders should be assoilzied, with expenses. (6) *Separatim*, The pursuer having failed to obtain authority to put up gates or other erections in the course of the declaratory action in the Court of Session the present application is incompetent, and should be dismissed.

On 14th February 1894 the Sheriff-substitute (Hall) pronounced this interlocutor:—"Finds that by judgment of the Court of Session, dated 23d June 1893, it is *res judicata* that there is a public road for foot-passengers along the Hag or Lime Road in question: Finds that on 21st and 22d September 1893 the pursuer erected at each end of the said road two gates, one 9 feet wide and locked, the other a swing-gate, 2 feet 9 inches wide and unfastened: Finds that on 23d September 1893 the defenders, or some of them, took down and removed the said gates: Finds in law that the said gates having been an obstruction to the free use of the said road by foot-passengers, the pursuer was not entitled to erect them, and is not now entitled to have them restored; therefore sustains the defences, and assoilzies the defenders from the conclusions of the action: Finds the pursuer liable in expenses. . . ."

The pursuer appealed, and argued;—The question was, whether where the existence of a public right of way for foot-passengers, but not for other traffic, had been established, the proprietor was entitled to put up gates so as to prevent other traffic, sufficient space being left for the entrance and egress of foot-passengers. The defenders' objection was that the gates across the carriage-way were there at all, not that the space for foot-passengers was too narrow. The property of the *solum* over which this right of way had been found to exist remained in the pursuer,¹ and he was entitled to the exclusive use of the *solum*, subject only to the exercise of the public right, and to take such measures as were necessary to protect the public from using the *solum* otherwise than in accordance with the right which they had vindicated.² The gates here in question were necessary to prevent the public from using the road for carriage, horse, and cattle traffic; on the other hand they to no appreciable extent obstructed the public right of footpath. Interdict ought therefore to be granted.

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Argued for the defenders;—The verdict of the jury gave the public a right of footpath over the whole length and breadth of this road. It was not the case of a right of footpath over unenclosed ground. It was to the latter class of cases that the authorities cited on the other side applied. There was no case in which the proprietor had been held entitled to put gates across a defined road over the whole of which a public right of way for foot-passengers had been found to exist. [LORD RUTHERFURD-CLARK referred to the interlocutor applying the verdict, and asked, Does that give you a right over the whole road, or merely along it?] A right over the whole road was intended. The conclusions of the original action shewed that. Further, the Lord Ordinary had refused the motion to limit the breadth of the road. As, therefore, the pursuer had to an appreciable extent—that was, to an extent which the law would recognise—diminished the right to which the public had been found entitled, interdict ought to be refused.³

At advising,—

LORD JUSTICE-CLERK.—The facts of this case are:—(1) That there is an old road wide enough for carts and carriages, between two public places, upon the estate of the pursuer; (2) that it has been judicially found that there is a public right of way over this road, but that such right is one of passage on foot only; (3) that the right is not one of footpath merely, but extends over the whole breadth of the old road.

In this state of facts the present dispute has arisen in consequence of the proprietor of the *solum* having erected gates at both ends of the road, consisting of a swing-gate 2 feet 9 inches wide, which is unfastened, and a gate closing the rest of the width of the road, which gate is locked. The public have resented this as an unwarrantable interference with their right of use of the road for walking, and have broken or pulled down the gates, and the pursuer has appealed to the jurisdiction of a Court of law for a remedy.

¹ Galbreath v. Armour, July 11, 1845, 4 Bell's App. 374.

² Wood v. Robertson, March 9, 1809, F. C.; Rogers v. Harvie, Jan. 17, 1829, 7 S. 287; Kirkpatrick v. Murray, Nov. 26, 1856, 19 D. 91, 29 Scot. Jur. 43; Hay v. Earl of Morton's Trustees, Dec. 5, 1861, 24 D. 116, 34 Scot. Jur. 61; Home Drummond, June 3, 1868, 6 Macph. 896, 40 Scot. Jur. 503; Sutherland v. Thomson, Feb. 29, 1876, 3 R. 485.

³ Queen v. United Kingdom Electric Telegraph Co., Limited, 1862, 31 L. J. Mags. Cases, 166; Turner v. Ringwood Highway Board, 1870, L. R., 9 Eq. 418; Pullin v. Deffel, 1891, 64 Law Times Rep. 134.

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The pursuer says that he cannot, without the gates, prevent the use of the road by horse and carriage or by cattle, and that he does not interfere with its use by persons on foot. The defenders maintain that their use of the road on foot is illegally obstructed, and that the pursuer has no right to erect gates.

It can hardly be questioned that if this were a case of right of footpath only, the presence of swing-gates, giving an opening of 3 feet when swung back, could not be held to be an illegal obstruction. The peculiarity of this case is, that as the whole breadth of ground which formed a private road for vehicles has been held to be subject to a public right of passage on foot, the space covered by the locked gate is technically part of the ground over which the right to walk exists. Upon this ground the Sheriff-substitute has held that the locked gates are not legal, and that the pursuer cannot demand that they be restored by those who have removed them. It is, I conceive, a well-established principle that at any place over which the public have a right to go, the owner of the *solum*, who is subject to this public right, cannot diminish it in however small a degree, and defend his action only by maintaining that what he has done does not practically interfere with the enjoyment of the public right. He is, as regards mere occupation, by an obstruction of any part of the *solum* over which there is a right to go, in the same position as if it were a public highway. If anything is put up that prevents free movement over the ground, it must be defended on other grounds than that there is plenty of space left for the traffic. This rule is well illustrated by the case of *The Queen v. The Telegraph Company*, 31 L. J. Mags. Cas. 166, referred to at the debate, in which those interested in maintaining a right of open road on a highway were held entitled to have the erection of telegraph posts stopped, although it could not be said that ample room was not left for use of the road after their erection. It is therefore, in my opinion, no answer to the defenders' contention to say that the wickets left by the pursuer are amply sufficient for the use of the road by foot-passengers. I think they are so, but in my opinion that is not a sufficient answer to the defenders' contention, and if that were the only answer I should reject it.

It is quite true that a servitude road or a mere public right of way over the property of a citizen is not in the same position as a highway. In the case of a highway, the right to prevent any erection on the highway is absolute; whereas in the case of a servitude or public right of way it is a question of circumstances whether the right of those who possess the servitude or of the public is to have it removed. But still anything which covers up and prevents the unobstructed use of the ground, subject to the right for its exercise, must be justified by the owner. He may do so by shewing that what he is doing is required for the proper working of his estate, as by dividing fields or the like, and that it is an immaterial interference with the rights of the dominant tenement in the one case or of the public in the other. The case of stiles on a footway is an illustration of this. They are obstructions, but may be put up as not interfering materially with the right, and as being requisite for the reasonable working of the owner's estate. This is well settled by decision.

The pursuer's contention in this case is that what he has done has been done to protect his property against illegal encroachments beyond the existing public right, which the leaving of the ends of the road open to free use by any traffic would give rise to, and that in doing so he has in no material way interfered with the enjoyment of the right existing over his property. If that be so, I think it is a good answer to the defenders' objection to what he has done. The

questions are, is this a true statement of the matter?—and if it is, is it a competent answer to the defenders' objection? It appears to me that the statement is true. The pursuer is compelled to keep a road, wide enough for carriage traffic, free for the use of foot-passengers, while having the right to exclude animals, horsemen, and vehicles. If he is to fence himself against the latter, he can only do so by stopping their ingress to this road, which must be accessible to the foot-passengers.

The only remaining question is, has he the right to do so by the mode which he has adopted, and which is the ordinary and reasonable mode where it does not interfere with the rights of others? This question is not by any means an easy one. The Sheriff-substitute has expressed himself as of the opinion that it is "clearly illegal." I do not feel able to express myself with such absolute confidence, but I have on consideration come to be of a different opinion. It appears to me that the rights of a proprietor whose private estate is burdened with a servitude road or a public right of way are to have that right exercised in the way least burdensome to him, consistently with its free exercise, and that any reasonable protection to his estate from other causes tending to restrict or injure his enjoyment must be conceded to him, even although in a technical sense it may, at a particular point, cause those enjoying the right acquired over his property to do in some minute and immaterial particular what they would otherwise not require to do. This is well illustrated in the case already referred to, viz., the placing of stiles across a footway which is subject to a servitude or a right of way, which it has always been recognised is the right of a proprietor, if in utilising his property he requires to erect a fence to divide his ground. No more distinct obstruction could be placed on a way than a stile to be clambered over, yet so distinctly was the right of placing stiles across footpaths recognised in early times, that in the case of *Wood*, March 9, 1809, F. C., the party who was objecting to a swing-gate tried to get over the argument deducible from stiles having been sanctioned by the Court, by maintaining that they improved the footpath. This extraordinary contention was disregarded by the Court, and declared to be "palpably insufficient and contrary to common sense," since, as it was expressed, "all the world knew that styles (*sic*) were not an improvement of the footpath, but to a certain degree an obstruction of it."

It thus, as I hold, is established law, that a right to pass from one place to another over private property is one which does not imply the power to prevent the proprietor from beneficial use and protection of his own property, because his mode of obtaining these things may require the right to be exercised at some particular point under some immaterial restriction, which in no true sense injures the enjoyment of the right. Applying this plainly equitable view to the present case, can it be said that there is any practical distinction between the placing of a stile for crossing an obstructing fence and the arrangement in this case. In the case of the stile, the person using the right is entitled to walk along the ground of the proprietor from one place to another. Nevertheless, he may be required at one or more places on the road to leave the ground and climb over a fence by steps provided. In this case, at points where fences are provided, he has for a distance of two or three inches to pass along one side of the road. The cases seem to me to be quite parallel—to be, in the words of the judgment in *Wood's* case, "an interference not material." Lastly, I do not think that a different rule is to be applied in the case of a right of public foot-

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way over private property to that which is applied in a case of servitude road. In both cases I hold that the proprietor is entitled to all enjoyment of his property consistent with his not obstructing the exercise of the right granted, and that in this case the proprietor is not to be held to obstruct the right by the course he has taken, which practically leaves the whole road available to the foot-passenger, and only requires him at the moment of entering or leaving the private property of the pursuer to do so in such a manner as does not injure him, but enables the pursuer to protect his property from illegal trespass by other classes of road traffic.

LORD RUTHERFURD CLARK.—There is a road which runs through the property of the appellant called the Hag or Lime Road. By a judgment of this Court pronounced on 23d June 1893 it was declared “that there is a public road for foot-passengers along the road in question, and that the pursuers and all others are entitled to the free use of said road for foot-passengers.”

At a subsequent period the appellant moved the Judge before whom the case depended to restrict the width of the road to 4 feet 6 inches. The motion was refused.

In these circumstances the appellant maintains that he is entitled to erect a locked gate at either end of the road with a swing-gate at the side of the width of 2 feet 9 inches. He had erected such gates at his own hand, but they were removed by the respondents or some of them. He asks the authority of the Court to their being re-erected. He explains that the road is not fenced, and he says that while the gates will be an advantage to him both in preventing the use of the road for wheeled traffic and the trespass of animals, they will not in any way interfere with the use of it as a footroad.

The appellant relies on the case of *Sutherland*, 3 R. 485, in which it was held that the proprietor of lands through which a public footpath ran was entitled to put swing-gates across the footpath, provided that they were not of an obstructive character. I accept that decision as an accurate statement of the law. But the question remains whether it will justify the action of the appellant.

I do not understand the judgment to determine more than that an easily opened swing-gate is not an obstruction to a public footpath. It applied to public footpaths the rule which had been established in the case of *Wood*, March 9, 1809, F. C., in regard to a servitude road. Swing-gates do not prevent the full use of the footpath. They interpose, no doubt, a certain obstacle to its use, but one which the passenger can easily and at once remove. They are a great benefit to the proprietor, and of no disadvantage to the public, and in view of the benefit the Court thought that the trouble of opening might be thrown out of account.

The appellant cannot bring himself within the rule of this case unless he can shew that the locked gates are not an obstruction. I do not think that he can. They cannot be opened by those who are using the road. They are intended to form, and do in fact form, a permanent obstruction at two places of the road. At these two places they reduce its width to 2 feet 9 inches, and absolutely prevent the rest of it from being used. They are, in my opinion, an obstruction, and cannot be justified on the principle of the case on which the appellant relies.

But he urges that the footpath is not obstructed, inasmuch as he leaves at each gate a sufficient space for the exercise of that right. If he had only to submit to a right of public footway through his property, it might be true that

the Court would cause to be laid off a footpath of sufficient breadth and no more. No. 159. But we have no such case before us. It is, I think, the just meaning of the judgment which I quoted that the right of footway exists over every part of the Hag or Lime Road. The public are "entitled to the free use of said road for foot-passengers." It seems to me that the appellant is not entitled to withdraw any part of the road from the use to which it is subject, or to narrow it at any part of its course. I do not mean to say that the appellant may not erect swing-gates. I give no opinion on that point. I am dealing with the locked gates only, which I hold to be an illegal interference with the rights of the public.

I confess that I have come to this opinion with reluctance. The gates would probably be of much advantage to the appellant, and I doubt if the public would suffer by their erection. But I am bound to give my decision in accordance with what I believe to be the legal rights of the parties before us.

LORD TRAYNER.—The road in question in this case is situated on the property of the complainer—the *solum* of the road is his. But along that road the respondents and other members of the public have a right of way as foot-passengers, but no other or higher right. The respondents' right, however, is one of passage over every part of the road—not merely over a defined footpath or part of it. In September last the complainer, in order, as he alleges, to prevent carting, riding, and driving over said road, erected at each end of the road (I quote from the finding of the Sheriff-substitute) "two gates, one 9 feet wide and locked, the other a swing-gate 2 feet 9 inches wide and unfastened." It was admitted at the bar that if the complainer was entitled to erect gates at the ends of the road at all, the swing-gate of 2 feet 9 inches wide was sufficient for the access or egress of anyone who desired to use the road. But the respondents dispute the complainer's right to erect gates at the ends of the road in question, and maintain that he is bound to leave it open and unfenced to its full breadth. The Sheriff-substitute has sustained this contention on the part of the respondents, and in doing so has taken a view of the rights of parties in which I cannot concur.

Considered apart from strict law, in the meantime, the position taken up by the respondents is not one which can be regarded with favour. The gates complained of are, I suppose, an inch or 2 inches wide, and therefore it is only for that space at each end of the road that any obstruction is presented. Access to and egress from the road is duly provided, and after access has been obtained there is nothing to hinder the use of the road over its whole breadth. The purpose of the complainer's action is to prevent the road being used in a manner in which no one but himself has right to use it. The right of the respondents is practically left intact, and they are not subjected to any inconvenience in the exercise of their right. I cannot regard the respondents as acting otherwise than in *emulationem*.

But I think the complainer is within his legal right in putting up the gates in question. Such a right seems to me to have been recognised in the case of *Wood*, March 9, 1809, F. C. (which was the case of a servitude road), and in the cases of *Rogers*, 7 S. 287; *Kirkpatrick*, 19 D. 91; and *Sutherland*, 3 R. 485, which were cases of public footpaths, the right to use which had been acquired by the public, as in the present case, by prescription. The differences in detail between the three cases last cited and the present do not appear to me

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No. 159. to affect the principle on which the cases were decided. I am therefore for recalling the judgment appealed against.

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LORD YOUNG was absent.

The pursuer intimated that he did not ask that the defenders should be found liable in the expense of re-erecting the gates.

THE COURT recalled the interlocutor of the Sheriff-substitute, granted warrant to the pursuer to re-erect the gates, and interdicted the defenders from interfering with them.

J. & F. ANDERSON, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 160. MRS GEORGINA PLAYFAIR AND OTHERS (Patrick Playfair's Trustees),
First Parties.—*Jameson—J. E. Graham.*
WALTER PLAYFAIR, Second Party.—*Rankine—Napier.*
MISS JANE ISABELLA PLAYFAIR AND OTHERS, Third Parties.—*Jameson—J. E. Graham.*

June 1, 1894.
Playfair's Trustees v. Playfair.

Succession—Heritable and Moveable—Conversion.—A testator by trust-disposition and settlement conveyed his whole estate, heritable and moveable, to trustees, and after making provision for his widow, and for payment of certain legacies, directed his trustees to hold and apply the residue for behoof of the whole children whom he might leave, equally among them, share and share alike; to pay or expend for behoof of the children respectively the interest of their shares, or so much thereof as the trustees should think necessary, until the children respectively attained the age of twenty-five, or, if daughters, were married; "and on my children respectively attaining said age of twenty-five years if sons, or attaining that age or being married if daughters, I direct my said trustees to make payment to them of their respective shares," it being declared that the shares should not become vested in the children until the respective periods of payment arrived, and there being a conditional institution of issue and a clause of survivorship for the case of children dying without having taken a vested right. The deed gave the trustees a full and unlimited power to sell the whole estates, heritable and moveable, but contained no direction to sell.

The testator died possessed of heritage to the value of about £56,000, and of moveable property valued at about £50,000. He was survived by nine children, two of whom died unmarried, and without having taken a vested interest in the fee of the residue. Thereafter M, a daughter, died unmarried and intestate, but, having attained the age of twenty-five, with a vested right to a one-seventh share of the fee of the residue. At the date of M's death no part of her share had been made over to her, and the trustees had not exercised the power to sell the heritage.

In a competition between M's heir-at-law and her heirs *in mobilibus*, held (1) that the exercise of the power to sell the heritage was indispensable to the due execution of the trust, and therefore (2) that the whole of M's share was moveable *quoad* her succession, and fell to her heirs *in mobilibus*.

Advocate-General v. Blackburn's Trustees, Nov. 27, 1847, 10 D. 166, *followed*.

2D DIVISION. PATRICK PLAYFAIR, merchant in Glasgow, died on 21st November 1879, leaving a trust-disposition and settlement by which he conveyed his whole estates, heritable and moveable, to trustees, and after making provision for his widow and appointing payment of certain small legacies, in the fifth place directed his trustees "to hold and apply the whole residue and remainder of my whole means and estate for behoof of my whole children whom I may leave, equally among them, share and share alike, and to pay or expend for behoof of such children respectively the interest or annual proceeds of their shares, or such part thereof as my trustees shall think necessary, for their board, education, and maintenance respectively, accumulating the remainder until they shall respectively attain

the age of twenty-five years complete if sons, and until they shall respectively attain that age or be married, whichever of these events shall first happen, if daughters; and on my children respectively attaining said age of twenty-five years if sons, or attaining that age or being married if daughters, I direct my said trustees to make payment to them of their respective shares, . . . declaring that the shares of such of my children as are sons shall not become vested in them until they shall respectively attain the said age of twenty-five years, and the shares of such of my children as are daughters shall not become vested in them till they attain that age or are married, whichever of these events shall first happen; and I provide that in the event of any child or children predeceasing me, or surviving me and dying before the term of payment and vesting of their shares without leaving lawful issue, then the shares of such deceasing child or children shall accrue to and be divided equally between and among my surviving children and the lawful issue of such as may have died leaving issue equally among them *per stirpes*; but in the event of the deceasing child or children leaving lawful issue, such issue shall in every such case receive (if more than one equally among them share and share alike) the share or shares which would have fallen to their deceased parent or parents had he, she, or they survived."

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The trust-disposition further gave full powers to the trustees to enter into possession of the trust-estate, and to lend or invest the same in certain securities and investments, and to change and vary the said securities and investments from time to time, and to take other securities and investments of the same description as they should think necessary, and then proceeded as follows: "And I grant full and unlimited power to my trustees from time to time as they shall think proper, to sell and dispose of all or any part or parts of my estate and effects, heritable and moveable, real and personal, hereby conveyed, and all other estate and effects, heritable and moveable, which may at any time form part of my trust-estate, by public roup or private bargain, at such price or prices, and with or without advertisement, as they shall think proper, and with full power to my trustees to grant all dispositions, assignations, conveyances, discharges and renunciations, and every other deed or writing necessary or proper for any of the above purposes, containing all usual and necessary clauses, and particularly a clause binding my heirs in absolute warrandice of the same, and generally with full power to my trustees to do every other deed, matter, or thing for implementing and fulfilling the directions herein contained, and carrying into effect the whole purposes of the trust hereby created in the most full and ample manner." The deed did not contain a direction to sell.

Mr Playfair was survived by nine children, two of whom died unmarried without having taken a vested interest in the capital of their father's estate.

A third child, Anna Mary Playfair, died on 15th February 1892, intestate and unmarried, but having attained the age of twenty-five on 26th June 1883, she was entitled to one-seventh share of the residue of her father's estate. No part of her share however having been paid or conveyed to her, the question arose whether her interest in the heritable property left by her father was heritable or had become moveable *quoad* her succession; and a special case was accordingly presented. Mr Playfair's trustees were the first parties, Walter Playfair, Anna Mary Playfair's immediate younger brother as her heir-at-law, was the second party, and her heirs *in mobilibus*, being her six surviving brothers and sisters, were the third parties.

The case set forth the foregoing facts, and further stated, that the value

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of Mr Playfair's moveable property at the time of his death was about £50,000, and of his heritage about £56,000, the latter consisting of the estate of Ardmillan in Ayrshire, and a house in Glasgow; that the trustees had made various payments out of the capital of the estate to certain of the beneficiaries other than Anna Mary Playfair; that the trustees had never exercised the power of selling the heritable property; and that at the date of Miss Playfair's death they still had in their hands moveable property to the value of about £30,000.

The second party, as Miss Playfair's heir-at-law, claimed the whole of her share in so far as it consisted of heritage; while the third parties maintained that the heritage had been converted and so fell to them, along with the moveable portion of their sister's share, as her heirs *in mobilibus*.

The questions of law were,—“(1) Are the first parties, as Mr Playfair's trustees, bound to convey or pay over the share of the trust-estate falling to the late Miss Anna Mary Playfair so far as it consists of heritable property to the second party as the heir-at-law of the said Miss Playfair? Or (2) Are the said trustees bound to pay over the whole share of the said Miss Anna Mary Playfair in the said trust-estate to the third parties, who are her heirs *in mobilibus*?”¹

At advising,—

LORD RUTHERFURD CLARK.—The question which is before us is whether the share of Miss Anna Mary Playfair in so far as it consists of the heritable property passes to her heir-at-law, or whether the whole share belongs to her heirs *in mobilibus*—in other words, whether there has been conversion.

The general law is settled by the case of *Buchanan v. Angus*, 4 Macq. 374. The rule is that a direction to sell operates conversion; but that a power to sell does not, unless it is exercised or unless the exercise of it is “indispensably necessary to the due execution of the trust.” In the latter case, the power is equivalent to a direction to sell. But however clear the law may be, the cases shew that the just application of it is not an easy matter.

We have seen that the whole residue is held for the children in equal shares, and that the share of each child is to be paid at a different time.

Of course I do not attach importance to the fact that the trustees are directed to pay and not to convey. The phrase in itself is not material, as the case of *Buchanan* shews. But we must be satisfied that the trustees may lawfully convey a share of the heritable estate to a child in part payment of his share, and that the child is bound to receive it. These are convertible propositions. For beneficiaries are bound to submit to what the trustees may do in execution of the powers committed to them.

The second party says that the trustees might execute the trust without a sale, and in this way: When the period arrived for the payment of the first share, they could dispoise the heritage *pro indiviso* to themselves and the child in the proportion of six-sevenths and one-seventh. They could convey to the

¹ *Authorities cited*.—Advocate-General v. Blackburn's Trustees, Nov. 27, 1847, 10 D. 166; *Buchanan v. Angus*, May 15, 1862, 4 Macq. 374; *Weir v. Lord Advocate*, June 22, 1865, 3 Macph. 1006, 37 Scot. Jur. 522; *Fotheringham's Trustees v. Paterson*, July 2, 1873, 11 Macph. 848, 45 Scot. Jur. 519; *Baird v. Watson*, Dec. 8, 1880, 8 R. 233; *Duncan's Trustees v. Thomas*, March 16, 1882, 9 R. 731; *Aitken v. Munro*, July 6, 1883, 10 R. 1097; *Sheppard's Trustees v. Sheppard*, July 2, 1885, 12 R. 1193; *Brown's Trustees v. Brown*, Dec. 4, 1890, 18 R. 185.

next child one-sixth of their own share, one-fifth of the remainder to the third child, and so on as the several periods of payment arrived, till the whole was exhausted. There is no warrant in the trust-deed for giving to each child successively a separate part of the heritable estate on a separate title, and it is plain that equality could not be obtained in that way. The only possible mode of equal division is by the creation of successive *pro indiviso* estates. No. 160.
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It is not likely that the trustees would act in this manner, which I think could hardly fail to be very detrimental to the beneficiaries. It is sufficient for the second party to shew that it would be lawful for them to do so. For in that case they would be acting in conformity with the powers conferred on them by the truster, and a sale would not be necessary for the execution of the trust.

We must consider the effect of the creation of the several *pro indiviso* estates. The child in whose favour the first conveyance is granted becomes the joint proprietor along with the trustees of the whole heritable property, and being joint owners only, the trustees would cease to have the exclusive management of the largest portion of the trust-estate. They could neither sell nor let without the consent of the other joint owner, while he on his part could when he pleased force a division or a sale. The trust management would cease and be superseded by the management of the joint owners. The evil would obviously become greater as each child received his *pro indiviso* share, and indeed when a second conveyance was granted the trustees would be in a minority in a council of co-owners.

I do not think that the truster contemplated the possibility of such a state of things. He could not have meant that a stranger should be introduced into the management of a large portion of his trust-estate, and I do not think that he gave any power to that effect. It may be said that the joint owner would be one of his own children; but that would be true only so long as the *pro indiviso* share was not sold. But whether a child or a stranger be owner the creation of the joint estate is so entirely subversive of the trust management which the truster has set up that I cannot hold it to be within the power of the trustees. No doubt there are cases in which the trustees may convey to all the beneficiaries *pro indiviso*. But in doing so they are denuded of the trust and their management ceases.

Again, it appears to me that a child could not be compelled to take his share as joint owner with the trustees. When he reaches the specified age he is entitled to require the trustees to pay him his share. In my opinion he is entitled to demand that his share shall be separated from the trust-estate, and put under his own absolute control. It may well be that a conveyance to all the beneficiaries satisfies a direction to pay in equal shares. The trust is brought to an end—and they are joint proprietors—not with the trustees, but with one another. Here the direction is to pay one child an equal share, leaving the rest of the estate to be held for the others. I can put no other construction on such a direction than that the share is to be separated from the trust-estate. The word “share” has here, I think, its natural meaning, and denotes something that is shorn off.

The share of each child is to be paid when he attains twenty-five, or in the case of daughters when they marry. If all the children had lived there might have been nine “payments” to make, and it is certain that there must be several—each at a different time. I do not see in what manner this direction could

No. 160. be accomplished otherwise than by paying the shares in money, or in other words, the exercise of the power of sale is indispensable to the execution of the trust.

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The present case seems to be substantially the same as that of the *Advocate-General v. Blackburn's Trustees*, 10 D. 166, in which Lord Fullerton held that the trust could not be executed without a sale, and therefore that there was conversion. I have not observed, nor have I been informed, that in any subsequent case his decision has been questioned. It was fully under the notice of the House of Lords in *Buchanan v. Angus*, when the decision of the Court of Session was reversed. Lord Fullerton's judgment was quoted with approval as correctly expressing the law, and it was not said that he had applied it erroneously. I think that we must follow it.

LORD KYLLACHY and the LORD JUSTICE-CLERK concurred.

LORD YOUNG and LORD TRAYNER were absent.

THE COURT answered the first question in the negative and the second in the affirmative.

FRASER, STODART, & BALLINGALL, W.S.—W. & F. C. MACIVOR, S.S.C.—Agents.

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DAVID GIBSON, Pursuer (Reclaimer).—*Comrie Thomson*—*J. J. Cook*.
CHARLES JOHN MUNRO, Defender (Respondent).—*M'Kechnie*—*Kennedy*.

June 5, 1894.
Gibson v.
Munro.

Bankruptcy—Sequestration—Reduction—Foreign—Jurisdiction.—A, the trustee in a sequestration granted in 1885, under the Bankruptcy Act, 1856, having realised the bankrupt's estate and distributed it among the creditors, was discharged in 1889. In 1893 B, alleging that he was trustee in a liquidation by arrangement of the debtor's estates instituted in 1881 in the English Courts, brought an action against A for reduction of the sequestration and of the act and warrant appointing the trustee thereunder, on the ground that the Court in Scotland had no jurisdiction to award sequestration in respect of the dependence of the bankruptcy proceedings in England.

The Court *dismissed* the action on the ground that all parties interested had not been called.

Opinion (per Lord Young and Lord Kincairney, Ordinary) that an action for reduction of a sequestration on the ground that the Court had no jurisdiction to award sequestration by reason of the existence of a liquidation in England of the debtor's estates was incompetent.

2D DIVISION.
Lord Kin-
cairney.

ON 14th May 1885 Andrew Ross Robertson, designed as residing at No. 1 Marchmont Street, Edinburgh, with concurrence of J. A. Trevelyan Sturrock, "a creditor of the said Andrew Ross Robertson to the extent required by the statute," presented a petition in the Bill-Chamber, setting forth that he was subject to the jurisdiction of the Supreme Courts of Scotland, and praying for sequestration of his estates under the Bankruptcy (Scotland) Act, 1856.* On 2d June the Lord Ordinary on the Bills (Trayner) sequestered Robertson's estates, and remitted to the Sheriff of the Lothians. Thereafter D. H. Wilson, S.S.C., was elected

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79, sec. 13, enacts,—Sec. 13.—"Sequestration may be awarded of the estate of any person in the following cases:—

"1st. In the case of a living debtor subject to the jurisdiction of the Supreme Courts of Scotland:

"(A) On his own petition, with the concurrence of a creditor or creditors, qualified as hereinafter mentioned."

trustee on the sequestrated estates, and his election was confirmed by act and warrant of the Sheriff of the Lothians, dated 23d June 1885. Wilson having died, C. J. Munro, C.A., was elected trustee, and his election was confirmed by act and warrant, dated 2d October 1885. Munro, as trustee, then proceeded to realise the estate and to distribute it among the creditors. On 24th September 1889 he was discharged.

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On 14th July 1893 David Gibson, C.A., Liverpool, designed as "trustee in the liquidation by arrangement or composition with creditors taken out in the London Bankruptcy Court on 9th July 1881 of the affairs of Andrew Ross Robertson, of No. 12 Calthorpe Street, Gray's Inn Road, Middlesex," brought an action against Munro "as an individual, and as claiming to be trustee in the pretended sequestration hereafter referred to," concluding for reduction of the above-mentioned interlocutor sequestrating Robertson's estates, and acts and warrants appointing Wilson and Munro respectively to be trustees.*

The pursuer averred;—(Cond. 1) "On the 9th day of July 1881 a petition for liquidation of the affairs of the said Andrew Ross Robertson, by arrangement or composition with his creditors, under and in terms of the Bankruptcy Act, 1869 . . . was presented in the London Bankruptcy Court by the said Andrew Ross Robertson, and on said date notice of a general meeting of the creditors of the said Andrew Ross Robertson was duly summoned and published on 15th July 1881 in the *London Gazette*. Office copies of the London Bankruptcy Court of the said petition and publication in the *London Gazette* are herewith produced." (Cond. 2) "At a meeting, held in answer to the above *Gazette* notice, on 25th July 1881, Mr Alexander Hosie, commission-agent, of 19 Cloudesley Square, London, was elected trustee, conform to certificate in his favour, dated 27th July 1881. Notice and order of said appointment of trustee was duly published in the *London Gazette* of 2d August 1881. Office copies of the London Bankruptcy Court of said certificate, and notice and order of appointment of trustee, are herewith produced." (Cond. 3) "On 15th April 1889 Mr Hosie was removed from office by resolution of creditors, and in his place and stead Mr Thomas Steven Lindsay, chartered accountant, of 31 Poultry, in the city of London, and 55 Castle Street, Edinburgh, was appointed trustee." (Cond. 4) "On 17th April 1891 Mr Lindsay was removed from office by resolution of creditors, and in his place and stead Mr Walter Hercules Short, incorporated accountant, of No. 31 Wool Exchange, Coleman Street, in the city of London, was appointed trustee." (Cond. 5) "On 31st October 1892 Mr Short was removed from office by resolution of creditors, and in his place and stead the pursuer, Mr David Gibson, chartered accountant, of No. 1 South John Street, Liverpool, in the county of Lancashire, was appointed trustee. An office copy of the London Bankruptcy Court of the certificate of Mr Gibson's appointment is herewith produced, dated 4th November 1892. Notice thereof and order was duly published in the *London Gazette* of 15th November 1892, copy of which is herewith produced."

The pursuer, after setting forth a number of the provisions of the English Bankruptcy Act, 1869 (32 and 33 Vict. cap. 71), and the deeds under reduction, then averred further,—(Cond. 15) "The . . . award of sequestration, and acts and warrants before mentioned, were and are illegal, incompetent, and inept *ab initio*, . . . by reason of the

* The representatives of Wilson, the first trustee, were also called as defenders, but as the pursuer, in the Inner-House, consented to decree of absolvitor being pronounced in their favour, the case as regards them need not be farther noticed.

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said liquidation by arrangement of the affairs of the said Andrew Ross Robertson in the London Bankruptcy Court on 9th July 1881 under and in terms of the Bankruptcy Act, 1869, 32 and 33 Victoria, cap. 71, section 125, subsections 1 and 5, and rules made in pursuance of said Act. Said liquidation by arrangement still continues and is unclosed, and was continuing and pending on . . . 2d and 23d June and 2d October, all in the year 1885, the dates of the said pretended . . . interlocutor or decree awarding sequestration of the estates of the said Andrew Ross Robertson, and the said pretended acts and warrants. The pursuer, as trustee therein, has found it necessary to raise the present action."

The pursuer pleaded;—(1) In respect of the proceedings in the London Bankruptcy Court, the pursuer, as trustee aforesaid, is entitled to decree as concluded for. (2) The said Andrew Ross Robertson having been made bankrupt in the London Bankruptcy Court in 1881, and which bankruptcy is still subsisting and pending, the said pretended . . . interlocutor or decree of sequestration, and acts and warrants, were and are incompetent and illegal, and in violation of the Bankruptcy Statute 32 and 33 Vict. cap. 71, and general rules made in pursuance of said Act, and ought to be reduced.

The defender set forth the proceedings in the sequestration, and also certain proceedings in which the validity of the sequestration had been assumed, and pleaded;—(2) The action is incompetent. (4) No relevant nor sufficient grounds averred to sustain the conclusions of the summons. (8) *Mora*. (9) The whole proceedings complained of having been legally initiated and carried through, and this defender discharged as trustee, he ought to be assoilized, with expenses.

On 27th February 1894 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Sustains the second, fourth, eighth, and ninth pleas in law for the defender Charles John Munro: Assoilizes the whole defenders from the conclusions of the summons, and decerns."*

* "NOTE.— . . . On examining the record I can find no distinct averment that a liquidation of Robertson's affairs was ever constituted by order of Court or resolution of creditors. No such order or resolution is produced, or indeed said to exist, although copies of certificates of appointment of the successive trustees are produced. It may be that, if I were to proceed perfectly strictly, I might throw out this action for want of any relevant averments of title. But this apparent defect in the record (which was not adverted to at the debate) may perhaps arise from mere inadvertence, or it may be that I may be under some misunderstanding on the point; and therefore for the purposes of the present judgment, I assume that there existed a real process of liquidation of Robertson's estate by arrangement or compromise in the London Bankruptcy Court, and that that Court had jurisdiction to deal with that liquidation. I also assume that the liquidation had the same effect—so far as relates to the present question—as an adjudication in bankruptcy.

"Making these assumptions in the pursuer's favour, the case which he presents is that the award of sequestration pronounced in the Bill-Chamber on 2d June 1885 must be reduced, because there was at its date a bankruptcy of Robertson's estate depending in the London Bankruptcy Court. That is the sole ground of reduction. It is not averred that the award of sequestration was obtained by any fraud practised on the Court, or on account of any misstatement made, or error under which the Court laboured. The pursuer does not state who the creditors are for whose behoof he appears, or that there are any creditors now claiming in the English bankruptcy. It is not said that the Scotch trustee holds or is accountable for any part of the bankrupt's estate, or that there exists elsewhere any part of the bankrupt's estate which the pursuer cannot recover by reason of the Scotch sequestration. There is no statement

The pursuer reclaimed.

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At the hearing in the Inner-House counsel for the pursuer stated that

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that the reduction has been brought with any practical purpose at all. Further, it is not said that the pursuer or those who preceded him in his office were not aware of the proceedings in the Scotch sequestration. Presumably they knew of them, because a Scotch sequestration is a public proceeding, and, under section 48 of the Act of 1856, must be advertised in the *London Gazette*. In the absence of any averment of ignorance, I hold that the trustee under the English liquidation was aware of the proceedings in Scotland; and the pursuer now offers no explanation of his delay in making his challenge. The plea of the pursuer is therefore of the most general and unqualified character.

"I think the pursuer's contention cannot be supported, and that for various reasons.

"1. There is no authority or precedent for a reduction of an award of sequestration. None of the counsel have found in the books any trace of such a decree, and that appears to me a very cogent argument against the pursuer.

"2. The Bankruptcy Statutes do not authorise reduction of an award of sequestration. They provide various remedies for mistakes in sequestrations, and methods of bringing a sequestration to a close. X

"The sequestration of Robertson's estate was granted on the petition of the bankrupt, presented under section 21 of the Act of 1856. It is not now denied that the statutory formalities were complied with, and in that case, under section 29 the Lord Ordinary was bound to award sequestration if he had jurisdiction. He had no discretion. The estates were sequestrated *vi statuti*.

"Perhaps the most important provision for the correction of errors in awarding a sequestration is that in section 31, which authorises recall of a sequestration within forty days after it has been granted, and directs the registration of the recall in the Register of Sequestrations and on the margin of the Register of Inhibitions. Otherwise, according to the plan of the Bankruptcy Statutes, the bankruptcy must proceed after the forty days whatever the errors or misapprehensions may have been under which it was granted. There is no doubt that a petition for recall presented after the forty days would be thrown out as incompetent; and it seems strange to affirm that it is competent to bring an action of reduction when it is not competent to present a petition for recall. § 31

"The statute in sections 32, 35, 36, 38, and 40, makes careful provision for a sequestration being sisted or brought to a close after the lapse of the forty days, when a certain majority of the creditors are agreed that it should be sisted or closed; and section 40 provides that a judgment declaring a sequestration at an end shall be registered in the same manner as a judgment of recall. X

"By the second section of the Bankruptcy Amendment Act, 23 and 24 Vict. cap. 33, provision is made for the special case in which it is shown that the bankrupt estate ought to be distributed under the Bankruptcy Laws of England or Ireland. In such cases the time allowed for presenting a petition for recall is extended to three months.

"Seeing that these remedies have been provided, and that the remedy of reduction has not been provided, I think that the remedy of reduction in the ordinary Courts is not competent. It appears to me that the whole procedure in a sequestration is regulated by statute, that the scheme of the statute is that its provisions shall be carried out in disregard of mistakes or informalities not discovered within the time allowed. I am inclined to think that I have no power and no jurisdiction to pronounce any judgment in a sequestration which the Bankruptcy Statutes do not expressly authorise.

"It is true that it has been found that the Bankruptcy Statutes have failed to provide for every possible event, and that in such exceptional cases the Court has gone beyond the statutes and provided a remedy. But, in doing so, the Court has always acted in the exercise of its *nobile officium*, and never in the course of ordinary litigation. The case of *Anderson*, 13th March 1866, 4 Macph. 577 (where the Court in the exercise of its *nobile officium* declared a sequestration at an end nearly two years after it had been granted) furnishes a

No. 161. his purpose in bringing the action was to obtain possession of a sum of £2000, which he averred was lodged in a bank in Scotland and belonged

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somewhat remarkable instance of the exercise of that exceptional judicial power. No such remedy could have been granted by the Court in the exercise of its ordinary jurisdiction.

"In this case there is no conclusion that the decree of reduction should be recorded in the Register of Sequestrations and Inhibitions, and as the statute does not authorise any such entry the result would be that the award of sequestration would appear in these registers, but not the decree of reduction if it were pronounced. If the statute had contemplated a reduction it would, no doubt, have provided for the registration of the decree.

"I hesitate to say, and it is unnecessary to do so, that these reasons would cover all cases which might be imagined. It is perhaps possible that a sequestration might be granted in such circumstances as to take it out of the Act altogether. For example, if an award were obtained through false personation, there might be room for an action of declarator that there had been no real sequestration. Possibly also some remedy might be devised in a case where it appeared that a sequestration had been obtained by fraud. It is not necessary to determine that.

"3. There is no adequate ground for reduction stated supposing reduction had been competent. It was argued that an award of sequestration is utterly incompetent, and a total nullity when another bankruptcy is pending elsewhere,—a proposition which was sought to be supported by reference to *Young v. Buckle*, 17th May 1864, 2 Macph. 1077; *Goetze v. Aders*, 27th November 1874, 2 R. 150; *Phosphate Sewage Company v. Dawson*, 20th July 1878, 5 R. 1125; *Okel v. Foden*, 11th June 1884, 11 R. 907, and earlier cases there referred to. The language employed in some of these cases was certainly very general. But I doubt whether the pursuer's proposition can be affirmed in absolute and unqualified terms. It is true that the existence of a bankruptcy elsewhere would be, if not always, yet generally, a sufficient reason for refusing a petition for sequestration or for recalling a sequestration. The defender argued that this resulted from rules of international comity, and not because the second sequestration would be incompetent. There are, however, opinions of very great authority which seem to go further than that, and I doubt whether our rule or practice can be referred to comity alone. But still it does not follow that an award of sequestration granted in such circumstances would be a nullity incapable of producing any consequence. It may also be true that a trustee in a bankruptcy has a universal title covering the whole estate, that there cannot be a partial bankruptcy, and that a second sequestration would be ineffectual to carry any part of the estates. If that be so it would appear that the Scotch sequestration can do the pursuer no harm. Still a sequestration has other consequences than the transference of the bankruptcy estate, and I think it has not been our practice to regard a second sequestration as wholly a nullity. It is of common occurrence that two petitions for sequestration of the same estate may be presented and granted, the earlier by a creditor, and the later by the bankrupt, and the more recent practice has apparently been to allow both awards of sequestration to subsist when that course appeared convenient—*Tennent v. Martin & Dunlop*, 6th March 1879, 6 R. 786; *Fletcher v. Anderson*, 30th March 1883, 10 R. 835. I do not think it has been decided that an award of sequestration or adjudication in bankruptcy deprives a Judge before whom a second petition is presented of jurisdiction; and I think that when the bankrupt—being undoubtedly a Scotsman—presented his petition in the Bill-Chamber, the Lord Ordinary had jurisdiction to entertain it, and having such jurisdiction, could (if not made aware of the English bankruptcy) do nothing but grant it. He may have acted under ignorance of the English bankruptcy, and therefore in error, but I see no ground on which that error can be corrected at this date.

"4. As I have said, I think I am entitled to assume that the English trustee knew of the proceedings in Scotland. Since the decree of sequestration many interests may have been affected by it, of which I have no information, and

to the bankrupt, and that he did not propose that the proceedings in the sequestration should be set aside except in so far as they might be a bar to the recovery of this sum. In answer to the Court, counsel for the pursuer further stated that he did not desire to call any other defenders, but asked for decree on the record as it stood. No. 161.
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Argued for the pursuer;—The sequestration ought to be reduced on the ground that the Court had no jurisdiction to award it, there having been at the date of the award an existing liquidation in England of the estates of the bankrupt. A sequestration in Scotland was *funditus* null if at the date when it was awarded there was a pending liquidation of the debtor's estates in the Courts of another civilised country;¹ at all events a sequestration in Scotland was null if there was a pending English liquidation, since that was regulated by an Act of the British Parliament which the Scots Courts were bound to recognise.

Argued for the defender;—Reduction of the sequestration of a bankrupt's estates was incompetent, the Bankruptcy Acts having made no provision for such a proceeding. Assuming that reduction of a sequestration was competent in certain cases, the present action was not of that class. The sole ground of reduction was that the Lord Ordinary on the Bills who awarded sequestration had no jurisdiction to do so, by reason of a liquidation in England of the debtor's estates, which the pursuer said was then in dependence. But the dependence of a liquidation in England, or in any other country, did not affect the jurisdiction of the Scots Courts to grant sequestration, if that jurisdiction was otherwise well founded. The true plea was *forum non conveniens*, not no jurisdiction, and that plea must be stated within the period allowed by the statute for the recall of a sequestration, and as a ground for not granting sequestration or for recalling it. It was not a relevant ground for reduction of the sequestration. It was not a question of jurisdiction; it was a question for the discretion of the Court whether the existence of bankruptcy proceedings in another country was a ground for refusing, or terminating, a sequestration in this country.² In any case, the trustee was not the only defender necessary to be called in an action like the present. The pursuer now said that he did not propose to interfere with the proceedings that had already taken place in the sequestration.

there may be various rights dependent on the sequestration. Various legal proceedings have taken place (all of them were probably, and some of them certainly known to the English trustee), in which the validity of the sequestration was assumed or decided. I consider that in these circumstances this action is met by the pleas of personal bar and *mora*.

"5. The pursuer has stated no interest to reduce the decree of sequestration. If he has none it would, in my opinion, be out of the question to grant a decree of reduction, of the consequences of which one cannot be assured. In the argument for the pursuer it was said that he contemplated proceedings against the Scotch trustees. Had these been indicated on the record, the relevancy of the pursuer's claims would have been discussed, and if they were found irrelevant the result would have been absolutor from the whole conclusions. It seems to me that this case must be taken on the footing that he has no such claims. X

"I, therefore, am of opinion that I am in a position to repel the whole pleas of the pursuer, and to sustain the second, fourth, eighth, and ninth pleas for the defender, C. J. Munro, so far as these refer to the decree of sequestration."

¹ Cases cited by the Lord Ordinary; also *Wilkie v. Cathcart*, Nov. 19, 1870, 9 Macph. 168, 43 Scot. Jur. 88.

² *Ex parte Robinson*, 1883, L. R., 22 Ch. Div. 816; *Piggot*, Foreign Judgments, 2d ed. pp. 336-7; *Bar's International Law*, trans. by Gillespie, 2d ed. pp. 1023-24; *Westlake's International Law*, p. 150.

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Assuming that the effect of decree of reduction could be so limited, the trustee had no interest to defend, his only interest being that he should not be treated as a vitious intromitter. But the pursuer asked for decree on record as it stood, and if such a decree were pronounced, other persons,—creditors of the bankrupt for example,—might take advantage of it. The defender, on the assumption of the sequestration being reduced, would not represent the creditors. All parties therefore had not been called.

LORD YOUNG.—This case, as the Lord Ordinary says, is unprecedented in this respect, that it is the first instance that has occurred in which a pursuer seeks to reduce an award of sequestration and all the proceedings that have followed on that award, and I hope it will be the last.

The statute under which all awards of sequestration in bankruptcy in this country are granted is the Bankruptcy Act of 1856. By the 13th section of that statute it is enacted that “sequestration may be awarded of the estate of any person in the following cases :—1st, In the case of a living debtor subject to the jurisdiction of the Supreme Courts of Scotland (a) on his own petition with the concurrence of a creditor or creditors qualified as hereinafter mentioned”; and then follow other cases to which I need not now refer. In the case before us sequestration was granted of the estate of a man named Robertson, who was subject to the jurisdiction of the Supreme Courts of Scotland, on his own petition, and with the concurrence of a creditor named. Therefore, *prima facie*, there is no doubt of the competency of the application for sequestration, or of the jurisdiction of the Court to grant it, and it was granted accordingly in 1885. It is no part of the pursuer’s case in this action that in the granting or carrying on of this sequestration anything was done which was not in all respects regular and according to the requirements of the statute. The proper advertisements were made, a trustee was appointed, the estate was ingathered and distributed among the debtor’s creditors, and the trustee was discharged; but now in 1893 this reduction of the award of sequestration, and of all the proceedings that have followed on it, is brought without any previous notice, and that on the ground that the estate of the bankrupt had been put into liquidation in England in 1881, so that eight years after the granting of the Scots sequestration it is for the first time challenged on the ground of an *ex parte* proceeding in England thirteen years before, and the ground of the challenge is that by the common law of Scotland it was incompetent for the Courts in Scotland to apply the provisions of the Scots Bankruptcy Act in the case of a debtor domiciled in Scotland, and to grant sequestration of his estates, when proceedings in liquidation were pending against him in any other country.

The Lord Ordinary expresses some doubt as to whether a real process of liquidation in England existed with reference to this debtor’s estate, but he assumes, and I will also assume, that if this case went to proof the pursuer could establish that such a liquidation was technically in subsistence in 1885 when the sequestration was awarded. Now, on that assumption, the question is, whether we are to entertain an action for the reduction of an award of sequestration on the mere statement of the existence of these liquidation proceedings at the time the sequestration was granted without any averment that any assets had been recovered under the liquidation, or that anything had ever been done in it except the appointment of four trustees in succession. There is no averment that they were ignorant of the proceedings in this country, and there is no explanation of the delay in bringing this action until after the estate of

the bankrupt has been ingathered and distributed, and the trustee discharged. No. 161.
 For my own part, I concur with the Lord Ordinary in thinking that such an
 action cannot be entertained.

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I quite understand the view,—indeed I hold the law to be quite settled,—that the Court, in carrying out the Act of 1856, will not, as a matter of course, award sequestration, if, in answer to the advertisements in the *Gazette* for which the Act makes careful provision, or from any other source, it is brought under the notice of the Court that prior to the application in Scotland proceedings have been begun in England under which the estate of the bankrupt may be ingathered and distributed. Again, if sequestration has been granted and notice of the previous application in England is given to the Court within the period allowed by the statute for stating objections, I do not doubt that the Court, if it sees fit, may recall the sequestration. But that is a totally different thing from reducing the whole proceedings as null and incompetent from the beginning on the ground of want of jurisdiction to grant the sequestration, and that although the case may be represented as an instance of one in which the Court ought not to have granted, or ought to have recalled, the sequestration, if an application for either of these purposes had been made timeously. In short, the pursuer of an action such as we have here stands necessarily upon a rule of the common law, or of international law, and the rules of international law, and the considerations of comity and courtesy upon which they are based are part of the common law of the civilised world.

Now, the rule of international law on this matter is, I have no doubt, that which was expressed by the learned Judges in England in one of the cases cited to us,—*Ex parte Robinson*, L. R., 22 Ch. Div. 816,—to the effect that the Courts of each country have jurisdiction to liquidate the affairs of debtors within their jurisdiction, notwithstanding the existence of a liquidation process in another country, although in their discretion they may decline to exercise that jurisdiction on account of the existence of the proceeding in the other country directed to the same end. I think it is the same with us. I have no doubt that this Court has jurisdiction to award sequestration for all the purposes it may effect, notwithstanding the fact that a liquidation process has been begun in another country with respect to the same debtor's estates, if the Court sees fit to use its discretion by granting sequestration, or the Court may, if it sees fit, refuse to award sequestration. But to ask the Court to refuse to award sequestration is a very different thing from the creditors waiting until after the sequestration has been granted, and the estates of the debtor ingathered and distributed, and then coming forward and asking that the whole proceedings should be set aside as null on account of want of jurisdiction, and that without giving explanation of the delay or suggesting any reason for ignorance of the Scots proceedings. I have no doubt that we have jurisdiction, and when Lord Trayner, as Lord Ordinary on the Bills, granted this sequestration, I have no doubt that he had jurisdiction, and if the circumstances which have now been mentioned to us had been brought under his notice he would have considered them, and his judgment might have been brought under the review of the Inner-House on the merits. But in all this the Lord Ordinary and the Inner-House would have been exercising their jurisdiction, although it may be that had the circumstances which have now been mentioned been brought under the notice of the Court upon the application for sequestration that jurisdiction would have been exercised differently, and sequestration refused, or, it may be,

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In this case, however, apart from that view, and without going the whole length of the opinion which I have just expressed, I think that the action may be decided upon the consideration that it is an action against the trustee in bankruptcy, an officer of this Court, brought when he has done all that he was empowered to do, and is discharged of his office by the Court, and brought upon the ground that the Court had no jurisdiction to appoint him originally. I think that such an action is altogether out of the question. I do not mean to say that I cannot figure an action which might competently be brought against an officer of Court. I can imagine the case of a pursuer coming forward and saying that he wanted to have the whole proceedings in a sequestration reduced on the ground of something which the officer himself had done, and which had the effect of making the whole proceedings null, and the officer himself a vitious intromitter with the estate. But there is no suggestion here that this trustee acted otherwise than regularly and within the scope of his duties, and he has been discharged. There is no suggestion that he is liable to give any other account of his intromissions than that which he has given, and from which he has been discharged. The proposition, however, is that he can competently be made the defender of this action of reduction, the purpose of which is to set aside the whole proceedings as null *ab initio*, on the ground of want of jurisdiction. I think that that is altogether out of the question.

It may be quite competent for the pursuer here, or for anyone else who is pursuing a remedy to which a discharged sequestration may be set up as a defence, to bring a reduction of the award of sequestration, but then such a reduction must be brought upon relevant grounds. It was stated at the bar that there was a sum of money in a bank which the trustee in the English sequestration wished to get hold of, and it was said that if the bank were asked to hand over the money they would put forward the Scots sequestration as a bar to doing so. But it has not been ascertained that the bank has in fact taken up this position. The proper course would have been to make a judicial claim on the bank, and if the bank in defence pleaded the sequestration then it might be stated as an answer to this defence that the sequestration ought not to have the effect contended for because of the existence of the prior English liquidation. But the bank is not here, and I confess that I am not a little surprised that this discharged trustee took any notice of the action at all. I think that he might have wrapped himself in his cloak of office and said,—“I was appointed by the Court, I have been discharged by the Court, and it is not said that I did anything wrong in the conduct of the business entrusted to me. All that is said is that the Court which appointed me had no jurisdiction to do so. But I am not the guardian of the jurisdiction of the Court. I assumed that they had jurisdiction when they appointed me.” I am, therefore, for repelling generally the reasons of reduction here stated against this trustee.

LORD RUTHERFURD CLARK.—This is an action of reduction of an award of sequestration and all that followed on it. The defender is the last trustee appointed under the sequestration, and before this action was raised he was discharged. On a question being put by the Court, the pursuer's counsel stated that he desired judgment upon the record as it stands and without calling any other defender.

I think we must dismiss the action. I doubt if a discharged trustee is the proper defender. I am clear that he is not the only person that should be called.

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LORD TRAYNER.—The Lord Ordinary has expressed his opinion on several points in this case, regarding which I shall merely say that I am not to be held as concurring in them. But I agree with the Lord Ordinary in this, that the pursuer has not stated in his record any interest to prosecute this reduction. The only interest stated at the bar which the pursuer had to reduce the sequestration, assuming that interest to exist, is one with which the defender Mr Munro has no concern. The only interest therefore which is pretended is one in reference to which the pursuer has not called the proper contradictors. On this point I concur with Lord Rutherford Clark.

LORD JUSTICE-CLERK.—I concur with Lord Trayner.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against, and dismiss the action."

A. W. GORDON, Solicitor—R. BROATCH, Solicitor—Agents.

JAMES CLYNE, Petitioner.—*Cooper.*

No. 162.

Trust—Sale of heritage by trustee without authority of the Court—Confirmation of sale—Nobile Officium—Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), sec. 3.—A trustee acting under a trust-disposition and settlement which contained no power to sell heritage sold a part of the trust-estate without having first obtained the authority of the Court. The purchaser having objected to the title offered by the trustee, the latter presented a petition craving the Court "to approve, ratify, and confirm" the sale. The Court refused the petition.

THIS was a petition presented by James Clyne, the sole acting trustee under the trust-disposition and settlement of George Sinclair Waters, in which he craved the Court to "approve, ratify, and confirm" the sale of a property called Thuspister, forming part of the trust-estate, which he had sold by public roup to Alexander Clyne.

The petitioner stated that the purchaser had taken exception to the title offered to him, on the ground that the petitioner had no power to sell heritage. The petitioner admitted that the trust-disposition and settlement of Mr Waters contained no power of sale, and explained that he had omitted *per incuriam*, and in ignorance of the necessity for it, to obtain the authority of the Court before exposing the subjects. He further explained that he was unable to obtain the consent of all the beneficiaries interested in the trust-estate, as some of these were in minority, but that all those who were major approved of the sale, and were consenters to the petition.

He further stated that the sale of the property in question was expedient for the execution of the trust, and not inconsistent with the intention thereof.

The petitioner, in these circumstances, submitted that as the Court would have empowered him to sell had he duly presented a petition for authority to do so,* and as the sale was otherwise unexceptionable, he

* The Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), sec. 3, enacts,—"It shall be competent to the Court of Session on the petition of the trus-

No. 162. was entitled to have the defect cured by a decree of the Court ratifying the sale. He admitted that there was no precedent for the petition.
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LORD PRESIDENT.—It is impossible for us to grant the prayer of this petition, for the reasons which have been indicated in the course of the argument. But while I think that we should refuse the petition, it may be open to the parties, if they can free themselves of the existing contract, to come back to the Court with an application for authority to sell.

LORD ADAM.—I concur.

LORD M'LAREN.—I agree with your Lordship that we must refuse the prayer of this petition for the reason that, *ex facie* of the decree which we are asked to grant, all objections to the sale founded on grounds distinct from the question of power to sell would be excluded. That being so, it appears to me that the confirmation which we are asked to grant would itself be reducible at the instance of a beneficiary who might wish to challenge the sale on extrinsic grounds. I agree with the suggestion made by your Lordship, that the only way of working out the remedy desired is probably for the parties to make an application for authority to sell, when it might possibly be given in such terms as would enable the trustee to give a valid and otherwise sufficient title.

LORD KINNEAR.—I agree with your Lordships. The Court may enlarge the powers of trustees by authorising them to sell, and this appears to be a case in which we should have had little difficulty in giving that authority. But the validity of any sale which they may have carried through in the exercise of their powers may depend upon other considerations. We cannot, in this form, determine that a sale which trustees have already carried into effect is good or bad.

THE COURT refused the prayer of the petition.

AULD & STEWART, S.S.C., Agents.

No. 163. JOHN HUNTER, Pursuer (Respondent).—*M'Lennan*—*D. Anderson*.
 REV. GEORGE F. A. MACNAUGHTON, Defender (Reclaimier).—
Comrie Thomson—*C. N. Johnston*.

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 MacNaughton.

Issue—*Counter Issue*—*Reparation*—*Slander*—*Veritas*.—In an action of damages for slander brought by an elder against a parish minister, the pursuer obtained an issue whether certain statements made by the defender on 16th July 1893 falsely and calumniously represented "that the pursuer was addicted to taking strong drink to excess, and that this was notorious to the parishioners. . . ." The defender who pleaded *veritas*, and set forth on record a number of occasions, giving dates and places, from 1887 onwards, on which he alleged that the pursuer had been intoxicated, proposed a counter issue in general terms. The Court, having regard to the specific averments on record to which the proof would be limited, *allowed* the counter issue.

1ST DIVISION. In March 1894 John Hunter, carrier and carting contractor, Carsphairn, raised an action of damages for slander against the Reverend George F. A. MacNaughton, assistant minister of the parish of Carsphairn. The
 LdStormonth-Darling.

tees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof. . . .

"1. To sell the trust-estate or any part thereof."

pursuer stated that he was, and had been for upwards of five years, an elder of the parish church, and that the defender had on Sunday, the 16th July 1893, in the parish church, and in the presence and hearing of the congregation—several of whom he specified—made the following intimation with reference to the absence of the pursuer from the Communion service on that day:—"All present know the sad cause of the absence of one of my elders from his place this day, but I trust every member of the church will consider it to be his duty now, both by example and in every other possible way, to strengthen and encourage him to fight against his enemy."

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He further averred;—"The said statements . . . falsely and calumniously . . . represent that the absence of the pursuer from the Communion service on Sunday, 16th July 1893, was due to intoxication, and that he was in such a state of intoxication on that day that he was unable to attend church. Further, the said statements . . . represent that the pursuer was guilty of conduct unbecoming his position of an elder in the church and of his character of a christian man; that the pursuer was accustomed to drink intoxicating liquors to excess; that he was an habitual drunkard; and that his character as a drunkard was notorious and was known to all the members of the congregation and inhabitants of the parish. The whole of said charges against the pursuer are false and unfounded."

The defender admitted that he had made the statements complained of, and that they were of and concerning the pursuer, and represented "that he had on recent occasions been taking intoxicating liquor to excess, and that this failing was known to the congregation and inhabitants of the parish of Carsphairn." He further averred that the statements were true, and specified thirteen different occasions from November 1887 onwards, giving the dates and places, on which he alleged that the pursuer "was seen either quite intoxicated or at all events affected with drink to a degree most unbecoming in an office-bearer of the Church."

The pursuer pleaded, *inter alia*;—(2) The defences being irrelevant . . . should be repelled.

The defender pleaded;—(2) *Veritas*.

The pursuer proposed the following issues:—" (1) Whether on Sunday, 16th July 1893, in the course of the Communion service in the parish church of Carsphairn, and in the presence and hearing of the congregation then and there assembled, including William Buck and Mrs Isabella Hunter or Buck, both residing at Brockloch Cottage, Carsphairn; James Hunter, Legget, Carsphairn, and others, the defender did say,—'All present know the sad cause of the absence of one of my elders from his place this day, but I trust every member of the church will consider it to be his duty now, both by example and in every other possible way, to strengthen and encourage him to fight against his enemy,' or did use other or similar words of like import and effect? Whether the said statements are of and concerning the pursuer, and falsely and calumniously represent that the pursuer's absence from the Communion service on said Sunday was due to intoxication, and that the pursuer was in such a state of intoxication on said Sunday that he was unable to attend church, or make similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage? (2) Whether the said statements are of and concerning the pursuer, and falsely and calumniously represent that the pursuer was addicted to taking strong drink to excess, and that this was notorious to the parishioners of the said parish of Carsphairn, or make similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage? Damages laid at £500."

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The defender proposed the following counter issue:—"Whether the pursuer, from November 1887 downwards, was addicted to taking strong drink to excess, and whether this was notorious among the parishioners and congregation of Carsphairn?"

On 22d May 1894 the Lord Ordinary (Stormonth-Darling) approved of the issues for the pursuer, and disallowed the counter issue proposed by the defender.*

The defender reclaimed, and argued;—The counter issue if taken along with the record exactly met the pursuer's issues. To adopt the course of specifying in the counter issue itself, or in a series of counter issues, all the particular occasions of intoxication which were already mentioned on record would be cumbrous and inconvenient. It was conceded that the defender was restricted to proving the instances specified by him on record. A counter issue, therefore, in general terms was sufficient,¹ especially as the defender had put in issue both the "addiction to drink" and "notoriety." The instances specified were relevant to raise the question of habit.

Argued for the pursuer;—The counter issue was too vague and indefinite.² It should state times and places, otherwise the pursuer had no notice of what particular incidents affecting his character he was called upon to explain. Further, there was no foundation on record for a general counter issue of "addiction." The several specific and isolated occasions on which during several years it was alleged the pursuer had been intoxicated could not instruct a habit. *Aird's* case was quite different, for there habitual and constant intoxication for some months was put in issue.

LORD PRESIDENT.—If we were to regard the counter issue apart from the record I should be of opinion with the Lord Ordinary, because there are no occasions specified in the issue, and of course it would be out of the question to send a person to trial on a question of character without giving him notice of the occasions upon which the accusation is based.

But the record gives notice of a number of specific occasions; and, that being so, the question seems to be one merely of practice or procedure,—whether notice having been given on record of the specific instances which are founded on to prove habitual drunkenness it is necessary to repeat these in asking the jury whether there existed that habit. It would seem more consistent with our modern general practice to allow the issue to stand in general terms, the specific occasions legitimately falling within the inquiry being those of which notice has been given on record.

The only other question appears to be whether the record contains a relevant averment of "addiction." Now it is hardly fair, I think, to represent that question as being the same as this, whether given nine or ten instances of intoxication, that is enough of itself to instruct the habit. The jury would be entitled to consider the circumstances of each occasion, and to draw their own

* "OPINION.—The Lord Ordinary has disallowed the counter issue proposed by the defender in respect that it does not specify the occasions on which the pursuer is alleged to have taken strong drink to excess."

¹ *Aird v. Kennedy*, Feb. 22, 1851, 13 D. 775, 23 Scot. Jur. 339; *Carmichael v. Cowan*, Dec. 19, 1862, 1 Macph. 204, 35 Scot. Jur. 95; *Innes v. Swanson*, Dec. 8, 1857, 20 D. 250, 30 Scot. Jur. 128.

² *Macrostie v. Ironside*, Nov. 14, 1849, 12 D. 74; *Bertram v. Pace*, March 7, 1885, 12 R. 798, Lord President p. 800.

inferences as to whether they were specimens of the habit, or whether the cases which turn out to be proved were isolated and pardonable instances of this gentleman being overtaken. Therefore, I think, the question being a proper jury question, and the record containing a sufficient amount of specific notice to support the general averment, and the jury being entitled to draw their own inferences as to the representative character of the specific occasions, that the record is quite sufficient for its purpose.

I therefore think that we should recall the Lord Ordinary's interlocutor in so far as it disallows this counter issue, and approve of the issues and counter issue as the issues for the trial of the cause. Much has been said as to what will take place at the trial in consequence of the pursuer involving himself in the question of notoriety; but these are matters which will extricate themselves, or be extricated by the Judge at the trial, and do not affect the question which we have now to determine.

LORD ADAM, LORD M'LAREN, and LORD KINNAR concurred.

THE COURT recalled the interlocutor of the Lord Ordinary so far as it disallowed the counter issue proposed by the defender, and allowed the counter issue, &c.

P. J. PURVES, S.S.C.—J. B. M'INTOSH, S.S.C.—Agents.

ISABELLA ANDISON SCOTT AND ANOTHER, Pursuers (Respondents).—*Kennedy—Cooper.*

No. 164.

THOMAS SCOTT, Defender (Appellant).—*Strachan—A. S. D. Thomson.*

June 6, 1894.
Scott v. Scott.

Husband and Wife—Aliment—Voluntary separation—Parent and Child.—Under a voluntary deed of separation and aliment, dated in August 1891, a wife was entitled to the income of £1000 vested by the husband in trustees. In October 1891 the wife gave birth to a daughter, and in May 1893 an action was raised in name of the daughter, with her mother's concurrence, against the father for aliment. In this action the pursuer alleged that no provision had been made for her aliment, and that her father was possessed of between £2000 and £3000.

Held (1) that the action was to be regarded as an application by the mother for additional aliment; (2) that the agreement made in August 1891 must be held to have been made in contemplation of the birth of the child; and (3) that no relevant ground had been stated for giving additional aliment.

Observations on the proportion of a husband's income which the Court will allow to a wife living separate from him.

IN June 1891 Mrs Rachel Scott raised an action of separation and aliment against her husband, Thomas Scott, but in August an arrangement was come to by the parties to the following effect:—By a minute of agreement, dated 4th and 6th August 1891, First, Mrs Scott, in respect of the provisions in her favour contained in a separate trust-disposition after mentioned, agreed to abandon the action of separation and aliment: Second, Mr Scott having undertaken to conduct himself as a husband should, Mrs Scott agreed to resume cohabitation with him, "but specially declaring that it shall be left to" her option "to choose her own residence, in respect she declines to reside in Jedburgh with the family of the second party by a previous marriage": Third, In the event of the second party failing so to conduct himself, which shall again necessitate the first party separating from her husband, she shall be entitled to apply to the Court for a decree of judicial separation and of aliment, and the Court in awarding aliment shall be entitled to

1st DIVISION.
Sheriff of Roxburghshire.

No. 164. take into consideration the provisions in the trust conceived in favour of the first party."

June 6, 1894.
Scott v. Scott.

By the trust-disposition dated 4th August 1891, Mr Scott conveyed to trustees the sum of £1100, for, *inter alia*, the following purposes:—First, that the trustees should pay the annual income of the fund to Mrs Scott so long as she should live with the truster. "Said annual income to be applied by her *pro tanto* towards the upkeep of the household, including her wearing apparel and the maintenance of her paraphernalia": Second, that the trustees should have power to purchase furniture to the extent of £100 out of the funds vested in them to furnish any residence which Mrs Scott should choose: Third, Said trustees shall pay over the remainder of the annual income or produce of the remaining £1000 during all the days of her life for her liferent use alienably." The fourth purpose provided for the trust coming to an end on the death of the wife.

It appeared that shortly after the foregoing arrangement was come to Mrs Scott took up a separate residence from her husband.

On 17th October 1891 Mrs Scott gave birth to a daughter, who lived with and was brought up by her.

In May 1893 an action was raised in the Sheriff Court at Jedburgh at the instance of the child, with the consent and concurrence of her mother Mrs Scott, against Mr Scott, concluding, *inter alia*, for aliment at the rate of £1, 5s. a-month.

The pursuer averred that from the date of her birth the defender had made no provision whatever for her upbringing and keep, and that he was possessed of between £2000 and £3000.

The defender denied these averments, referred to the above-mentioned deeds as containing ample provision for the pursuer, and offered "to receive the child in family, and to support and maintain her."

The pursuer pleaded;—The defender being the father of pursuer, and she being in pupillarity, is bound to contribute towards her aliment and upbringing.

The defender pleaded;—(3) The action is irrelevant. (4) The defender being entitled and willing to support and maintain the pursuer in family, should be assoilzied. (5) The defender and the pursuer's mother having entered into an arrangement for the support of the household, and the defender having implemented his part thereof, and being willing to implement it, should be assoilzied.

After a proof the Sheriff-substitute (Spiers), on 19th October 1893, sustained the fourth plea in law of the defender, and assoilzied him. In the course of the proof the Sheriff-substitute disallowed certain questions put with the view of ascertaining the amount of the defender's estate prior to the raising of the action. The defender deponed, *inter alia*, that he had no estate, and was being kept by his family by his first wife.

The pursuer appealed, and on 24th January 1894 the Sheriff sustained the appeal, and, *inter alia*, decerned against the defender for the sum of £1 per month.

The defender appealed to the Court of Session, and argued;—The offer made by the defender to take the child into family was a conclusive answer to the pursuer's demand. The age of the child made no difference,¹ and it was not suggested on record that its interests would be prejudiced. Poverty did not deprive a father of his legal right.² But further, the provision in the trust-deed was intended for both mother and child, the birth of the latter having been contemplated by the parties,

¹ Nicolson v. Nicolson, July 20, 1869, 7 Macph. 1118, 41 Scot. Jur. 613.

² Leys v. Leys, July 20, 1886, 13 R. 1223.

and it was amply sufficient. There had been no change of circumstances which would warrant the Court altering the deliberate arrangement of the parties. No. 164.

June 6, 1894.
Scott v. Scott.

Argued for the pursuer;—The question of the custody of a child was always one of circumstances. An offer to receive into family, if not made *in bona fide*, must be disregarded.¹ The defender's offer was manifestly not *in bona fide*, for he was unable to implement it, having, according to his own statement, neither home nor money. The mother, moreover, was the appropriate custodian of an infant child. As regarded the provision in the trust-deed, the birth of a child was not contemplated at the time it was made. It was intended for the wife alone, one-third being the usual proportion of a husband's income allowed to a wife justified in living separate from him. The birth of the child entitled her to an additional aliment for it.² The pursuer should be allowed to prove that the defender had between £2000 and £3000, for questions directly bearing on that had been improperly disallowed by the Sheriff-substitute.

LORD PRESIDENT.—The spouses here entered into an agreement making arrangements for their living apart. The agreement, so far as money was concerned, was that the husband should assign to trustees the sum of £1100, and the purpose of the trust, which applies to the existing state of matters,—that, namely, of the spouses living apart,—is that the trustees should have power to purchase furniture to the extent of £100 out of the funds vested in them for any residence which the wife should choose, and the income of the remaining £1000 was to be applied to the life rent use of the wife. Now, it is important to observe that the agreement was come to on the 4th August 1891, and that the child was born on the 17th October following, or little more than two months afterwards. In these circumstances it must, I think, be taken, that when the parties separated they knew that a child was shortly to be born, and made their arrangements with that contingency in prospect. The child now comes forward in form to claim aliment. It is manifest, however, that the application is really that of the wife, and she raises the question whether she is entitled, now that the child is born, to get more than the income of the fund vested in trustees for her behoof. She says that her husband has, over and above that fund, from £2000 to £3000, and for the purposes of the present case I assume that he has that amount. The question is whether, assuming that the mother is right in her estimate of her husband's means we are to grant her additional aliment in consequence of the birth of the child, the nominal pursuer of the action. Now, even supposing that this was a matter not provided for in the agreement, it is manifest that a small increment only is all that could reasonably be suggested by the wife. But when the facts shew clearly that the parties at the date of the agreement not only contemplated living apart, but also the birth and existence of a child, I am not inclined to give even that small increase unless the amount already provided is palpably and grossly insufficient and disproportionate to the whole income of the husband. Now, on the wife's own statement of them the figures do not shew any such disproportion, and there is no case of necessity on the part of the child or the mother. I am therefore for recalling the Sheriff's interlocutor.

¹ Mackenzie v. Mackenzie, March 18, 1893, 20 R. 636.

² Hay v. Hay, Feb. 24, 1882, 9 R. 667.

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Scott v. Scott.

It will be observed that I do not at all proceed on the evidence of the state of the husband's means. If it were necessary to go into the facts there would be much to be said as to the right of the pursuer to obtain the evidence excluded by the Sheriff-substitute. But in what I have said I go, not on the evidence, but, on the pursuer's own averments.

LORD ADAM.—This is an action raised in name of an infant child, with the consent of its mother, to recover certain sums from the father, who is living apart from the mother. Although the action is in the name of the child it is undoubtedly raised in the interests of the mother. The spouses are living separate under a deed of arrangement. At the date of the agreement the birth of a child was imminent; the deed was executed in August, and the child was born in October, and no one can doubt that its birth was expected, and that the parties contemplated that if the mother were to live apart from the husband the child was to live with its mother, and not with its father. Accordingly, the sum of £1100 was set aside and vested in trustees to meet that contingency. That being so, and the sum set aside for the support of the mother and child being not less than one-third of the whole estate of the husband, we are now asked when the child is still an infant to open up the agreement of the parties and award a larger sum. I am not prepared to follow that course. There is no fixed proportion of the husband's income which the Court will allow, but only such as appears to it to be fitting in the whole circumstances of the case. Considering the position in life of the parties here the sum of £40 may be sufficient. In the case of other parties, or in different circumstances, it might not. There is the case of *Hay*, in which, in an action of separation and aliment, the wife obtained decree for £40 out of an income of £115. That seems to me a very liberal award, but there were special circumstances no doubt which led to its being given. But what followed there was this: A child was born after the decree was pronounced, and the Sheriff awarded a sum as aliment of the child. The Court sustained that award, although they fixed a somewhat smaller sum. But I observe that the Lord President, in giving the leading judgment, said,—“Very soon after this decree was pronounced,”—that is the decree for £40,—“the respondent, Mrs Hay, gave birth to a child, and that was a fact not before the Lord Ordinary, and the maintenance of the child could not be under his consideration in fixing the amount of aliment. The respondent in this appeal maintains that she is entitled to a sum for aliment of the child.” The difference between that case therefore and this is, that here we cannot shut our eyes to the fact that the birth of the child was contemplated by the parties when they entered into the agreement. It is fair and reasonable therefore to consider that the matter of the child's aliment was then settled between them.

LORD M'LAREN.—If the summons itself were to be considered, I doubt whether the action could be maintained at all, because the summons is at the instance of the child, and it is proved that the child is being maintained by the mother—a person who is under a natural obligation to maintain it—so that there is no case of necessity calling for our interference in the interests of the child. But considered as an action by the mother against the father to have the latter ordained to contribute to the child's maintenance, I think that when the spouses entered into the contract of separation they had in view that a sum was to be allowed by the husband for the maintenance of the mother and

also of the child during the time it should be properly under the mother's care. No. 164.
 But I also agree that, if that were doubtful, and the case were to be considered on its merits, we could not award a further sum without opening up the terms of the contract of separation, and considering whether the wife has not already received an allowance sufficient for the maintenance of herself and her child. June 6, 1894.
 So far as my own experience bears on that question, I am not aware of any case in which the Court has allowed the wife more than one-third of the income of the husband's estate in cases of judicial separation. One case was cited in which a small additional amount was allowed in case of the birth of a child after the date of the separation. If there is no legal limit to the amount of the allowance which may be made to the wife, there has been a practical limit to the income of such a share of the estate as the wife would take on the death of the husband. There are, however, many cases in which a smaller annuity would be suitable to the wife's position in life, and the wife is only entitled to such an amount as suits her position in life, and not to any certain proportion of the husband's estate. Here the husband, who is a retired tradesman, has made a provision as large, if not larger, than the law would give to his widow, and I do not think we should increase it. *Scott v. Scott.*

LORD KINNEAR.—I am of the same opinion. I agree that the action is in substance an action by the mother, because the mother is the proper claimant and proper creditor for the aliment of a child of two years.

Now, if we know that the parties had agreed that the aliment of the wife alone should be £40 a-year, and that in making this arrangement they had not contemplated the possibility of a child being born, then I should be disposed to consider whether, on the occurrence of this unexpected event, an additional allowance should be made to the mother for the child's support. But I agree that, when we look at the agreement with reference to its date and the circumstances in which it was concluded, it is impossible to doubt that the parties had the birth of the child in contemplation when they entered into it, and I think that, the parties having settled the matter for themselves, no sufficient ground has been stated for interfering with the arrangement they have made.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutors of the Sheriff dated 24th January 1894 and of the Sheriff-substitute dated 19th October 1893: Find that within three months prior to the birth of the pursuer, her mother and the defender entered into the agreement No 9 of process, and that the defender conveyed to trustees the sum of £1100 for the purposes set forth in the trust-disposition, No. 8 of process, referred to in the said agreement: Find that the pursuer's mother, with whom she lives, is in the enjoyment of the income provided under the said agreement for the event of her living (as she has done) separate from the defender: Find that the pursuer is at present being alimented by her mother: Find in law that the pursuer's averments as to the amount of the defender's means are not in the present circumstances found as matter of fact relevant to entitle her to a decree against him for aliment: Dismiss the petition, and decern."

THOMAS M'NAUGHT, S.S.C.—J. MURRAY LAWSON, S.S.C.—Agents.

No. 165.

MRS JESSIE B. A. ELLIOTT OR WOOD AND OTHERS (Elliott's Trustees),
Pursuers (Reclaimers).—*D. Dundas—Howden.*June 7, 1894.
Elliott's Trustees v. Elliott.SIR WILLIAM F. A. ELLIOTT, BART., Defender (Respondent).—*Watt—A. M. Anderson.*

Lease—Invalid lease—Liability of tenant to implement obligations.—The lease of a mansion-house and shootings granted by trustees, after being acted on for fourteen years, was reduced on the ground that it had been *ultra vires* of the trustees to grant it. In an action of damages at their instance against the tenant, held that the tenant, who had had no other title of possession to the subjects, was bound by its terms during the period of his occupancy.

Lease—Game—Excessive stock of game—Claim for damages by landlord—Relevancy.—A lease of shootings gave the tenant the exclusive right to the game, including hares and rabbits, and bound the tenant to relieve the landlord of all claims which might be made by any of the agricultural tenants on account of damage sustained from the game, including hares and rabbits.

In an action by the landlord against the shooting tenant for damage alleged to have been caused to the estate by the tenant permitting an excessive and unreasonable stock of rabbits to remain upon it, the pursuer did not allege that any claims had been made against him by the agricultural tenants.

Held that the action was not relevant.

Kidd v. Byrne, Dec. 16, 1875, 3 R. 255, commented on.

Lease—Landlord's claim for damages—Mora.—Where, in the course of a lease for a term of years, a landlord considers that he is entitled to damages from his tenant, and where the tenant might be prejudiced in his defence through the loss of evidence, the landlord is bound, without delay, to give notice to his tenant of his claim, and of his intention to enforce it, otherwise he will be barred from doing so.

1ST DIVISION.
Ld. Kyllachy.

SIR W. F. ELLIOTT of Stobs and Wells, by his settlement disposed the estate of Wells to trustees empowering them to let from year to year the mansion-house, policies, &c., and provided that during the subsistence of the trust it should be in their power to permit the institute in an entail executed by him to possess the mansion-house and policies, &c., "and that rent free, but only for such space as the said trustees should think proper."

In September 1879 the trustees entered into a lease with Sir William Francis Augustus Elliott, the institute, whereby they let to him the mansion-house of Wells, and "also the exclusive right to the game of every kind, including hares and rabbits, and of shooting and killing the same" on the estate "for the space of one year" from Whitsunday 1879, but renewable from year to year as after mentioned. It was further provided that unless the tenant gave six months' notice of his intention to remove, the lease should be held to be renewed for another year. No power was given to the trustees to bring the lease to an end. The lease contained the following clause:—"Further the said Sir William Francis Augustus Elliott, Baronet, binds and obliges himself and his foresaids during his occupation of the subjects hereby let to free and relieve the said trustees and their foresaids of all claims which may be made by any of the agricultural tenants upon the said estate of Wells and Easter Fodderlie against them for or on account of damage sustained by such tenants from the game, including hares and rabbits, upon the said estates, and to make good to the said trustees any loss which may arise to them in such claims."

In October 1892 the trustees raised an action for reduction of the lease against Sir William, and on 31st October 1893 the Court reduced the deed, on the ground that it was *ultra vires* of the trustees to grant it.

On 14th June 1892 the trustees raised the present action against Sir William, concluding for £600 in name of damages. No. 165.

They averred, *inter alia* ;—“ During his whole tenancy of Wells, and particularly since the year 1888, the defender has permitted an excessive and unreasonable stock of rabbits to remain upon the estate, whereby great injury and damage has been done to the estate. . . . The said excessive stock maintained on the estate has also had the effect of materially reducing the value for grazing purposes of certain grass parks which are annually let by the pursuers, and the rents obtained for them have in consequence fallen. The pursuers have repeatedly remonstrated with the defender, and have made application to him to remedy the present state of affairs and to reduce the number of rabbits upon the estate, but without avail.” June 7, 1894.
Elliott's Trustees v. Elliott.

The pursuers pleaded ;—(1) The defender having wrongfully, and in breach of the obligations incumbent on him as tenant of the shootings on the estates, kept upon the said estates an excessive and unreasonable stock of rabbits, and the same having been to the loss, injury, and damage of the pursuers, the defender is bound to make reparation to the pursuers in the premises.

The defender pleaded, *inter alia* ;—(1) The action is irrelevant.

On 1st December 1893 the Lord Ordinary (Kyllachy) sustained the first plea in law for the defender, and dismissed the action.*

* “ OPINION.— . . . The pursuers are the trustees on the estate of Wells, and it appears that so far back as 1879 they professed to let to the defender—on what was in substance a lifeferent lease, with a yearly break in the defender's favour—the mansion-house and shootings of the estate. The defender possessed under this lease until the other day, when, in an action at the pursuers' instance, the Court found that the lease in question was beyond the pursuers' powers, and therefore reduced it, and decerned the defender to remove. The pursuers now seek in the present action to recover damages from the defender to the extent of £600, in respect that since the date of the lease, and in particular since 1888, he permitted the stock of rabbits on the estate to increase beyond a reasonable stock, and also beyond the stock at the date of his entry.

“ I am unable to discover any legal ground on which the pursuers can base this claim. It has long been settled that in an agricultural lease, where the landlord reserves the game, and the tenant—being bound for a term longer or shorter—has no means of protecting himself against damage to his crops, the landlord is held bound as under an implied condition of the lease to prevent an increase of game beyond a reasonable stock, or at all events beyond the stock at the date of the lease—*Wemyss v. Wilson*, 10 D. 194. It is probably also settled that it is an implied condition of a lease of game to a game tenant that the latter shall not allow the stock of game to be increased to an extravagant extent—*Kidd v. Byrne*, 3 R. 255. But the obligation in question always rests, not upon delict, but upon contract ; and where there is no contract between the parties, it is not easy to see how such an obligation can be implied. In the present case the result of the recent judgment is that the defender is and has all along been a precarious possessor, occupying the house and shootings by tolerance, and liable to be dispossessed at the pursuers' pleasure. It does not appear to me that there is room under such a tenure—if tenure it can be called—for implying any undertaking by the defender with respect to the rabbits on the estate. If the defender failed to keep them down, the pursuers had the remedy in their own hands. They might at any time have protected themselves, or, if necessary, have given the defender notice to quit.

“ It may be suggested that the lease, although bad as a lease for a term of years, may be read as constituting a good yearly tenancy. I doubt whether this could be so without making in effect a new contract between the parties—a contract to which neither of them in fact consented. But even apart from that difficulty I do not, I confess, see how such a tenancy would help the

No. 165.

June 7, 1894.
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The pursuers reclaimed, and argued ;—The defender had been for fourteen years tenant under a contract which both parties believed to be a valid lease, and was necessarily bound by its terms, for he had had no other title of possession. The defender therefore, as a game tenant, was not entitled to keep up more than a fair sporting stock of rabbits. That was an implied term of every game lease.¹ It was enough for the landlord to shew that he had suffered from the excessive stock.² There was a sufficient statement on record of an intimation of the claim of damages by the landlord to entitle the pursuers to a proof at least on that point.

Argued for the defender ;—The so-called lease having been *ultra vires* of the landlord was of no legal effect, and the defender therefore could not be bound by its terms, express or implied. The pursuers had acted illegally in granting it, and were not entitled to claim damages arising from their own illegal act. Assuming, however, that the defender was in the position of tenant under the lease, it contained no express stipulation about keeping down game. *Kidd v. Byrne*¹ was very special, and ought not to be followed. But further, no implied term of liability for game damage should be read into this lease, the extent of the defender's liability having been made matter of express contract between the parties, viz., to relieve the landlord of claims made by agricultural tenants. In these circumstances, therefore, as it was not averred that any claims had been made by the agricultural tenants, the action was irrelevant. In any view, the pursuers were barred by *mora*, for the most they had done, according to their own statement, was to grumble. That was not enough to warrant an action many years after the alleged injury had been done.³

LORD ADAM.—This is an action at the instance of the trustees of the estate of Wells, and it is brought under somewhat peculiar circumstances. The defender has been in possession of the mansion-house and shootings on that estate for the last fourteen years. His title to possession was a certain document, as it is now called in the third article of the condescendence, in the form of a lease, dated in September 1879, by which the pursuers the trustees let to him "All and Whole the mansion-house of Wells, with the garden, office-houses, orchards, and policy thereto belonging," and "also the exclusive right of fishing in the River Rule and its tributaries," and "also the exclusive right to the game of every kind, including hares and rabbits, and of shooting and killing the same on the said estates." Then the record goes on to say that it was provided by the lease that "the said Sir William Francis Augustus Elliott, Bart., binds and obliges himself and his foresaids during his occupation of the subjects hereby let to free and relieve the said trustees and their foresaids of all claims which may be made by any of the agricultural tenants upon the said estate of Wells and Easter Fodderlie against them for or on account of damage sustained by such tenants from the game, including hares and rabbits upon the

pursuers' case. The pursuers had the opportunity at the end of each year of terminating the tenancy. Each year's increase must therefore have founded a separate claim of damage. That being so, and no such claim having been either enforced or reserved during the whole period of fourteen years, I do not, I confess, see how it can now be maintained.

"I therefore propose to pronounce an interlocutor sustaining the first plea in law for the defender, and dismissing the action."

¹ *Kidd v. Byrne*, Dec. 16, 1875, 3 R. 255.

² *Ewing v. Ewing*, Oct. 26, 1881, 19 S. L. R. 20.

³ *Christie v. Young's Trustees*, March 16, 1894, *supra*, p. 710, cf. *Johnstone v. Hughans*, May 22, 1894, *supra*, p. 777.

said estates, and to make good to the said trustees any loss which may arise to them in such claims." No. 165.

That was the condition on which Sir William Elliott was in possession of this shooting. He paid no rent. He was the heir of entail under the trust, and the trustees were not entitled to give him possession of the shootings rent free. However, the trustees did let to him the shootings on the estate without exacting any rent in return. An action was raised in this Court in which that lease, under which Sir William Elliott was in possession of this estate, has been reduced, and he has been obliged, as I understand, to leave the mansion-house and shootings. It was during the dependence of that action that the present action was brought by the trustees. The ground of this action is that during his tenancy of the shootings the defender allowed the rabbits on the estate, which at the time of his entry were a reasonable stock, to increase to an excessive and unreasonable extent, whereby great injury and damage has been done to the estate. Then the pursuers go on to say, "In particular the rabbits have destroyed a great number of trees upon the estate," and add that the grazing parks which are let annually have been reduced in value. It will be observed that it is not said anywhere on this record that any of the agricultural tenants have made claims for injury to them by this alleged excessive amount of game and rabbits, of which claims Sir William was bound to relieve them. The amount of damages asked for is the sum of £600, and I beg further to call your Lordships' notice to the fact that this claim goes back to 1886, and that the damage is said to have occurred and accumulated from that year down to the present date. It is not said that any express intimation was made to Sir William that the trustees would hold him liable for any damage that might be done, or anything of that sort. All that is said upon that matter is,—“The pursuers have repeatedly remonstrated with the defender and have made application to him to remedy the present state of affairs, and to reduce the number of rabbits upon the estate, but without avail,” and as we have previously held, such a statement as that amounts to nothing more than a mere grumble. We have in cases of a tenant's claim against a landlord held that the tenant must make a distinct intimation and claim upon the landlord, and that he is not to allow such claims to run up and then insist upon damages. If that be so in the case of a claim by a tenant upon a landlord, it appears to me that the same principle applies in the case of a claim by a landlord against his tenant.

The Lord Ordinary has assoilzied the defender, and apparently he has gone upon this ground, that the Court having reduced the document or lease under which Sir William possessed, the effect of that decision was to put Sir William into the position of having been a precarious possessor, that he was not bound by any of the conditions in the document under which he possessed, and that he is to be treated as being under no obligations or conditions at all. Now, I cannot altogether agree with the ground on which the Lord Ordinary has disposed of the case in that respect. There is no doubt at all that Sir William's title to the possession of the mansion-house and shootings was this document, and he beyond doubt did possess under it, and I do not think a tenant is entitled to dispute the document which is his only title to possession. I think myself that although this document was ultimately reduced as *ultra vires* of the trustees, it was upon the terms and conditions contained in it that Sir William was in possession of the estate and shootings, and that this case must be considered in that light.

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But considering it in that light, I am still of opinion that the Lord Ordinary's judgment is right, and upon this ground: It will be observed that the right given to the defender is the exclusive right to game of every kind, including hares and rabbits, and of shooting and killing the same on the estates. Now, everybody knows that it is the interest of a shooting tenant to have as large a stock of game and rabbits as he can have upon the estate. The larger the stock the more sport he has. Accordingly, if landlords and tenants act in this view, we must consider Sir William in the position of a tenant and the trustees as his landlord. Landlords and tenants usually stipulate for mutual protection in that matter. A common course on the part of the landlord, if he is afraid that the tenant will injure his property by encouraging too many rabbits or hares, is to take the tenant bound to keep them down. That is a very common clause in sporting leases, with this further condition, that if the tenant does not keep them down the landlord will be entitled to enter upon the estate and protect himself. Another very common provision is—and we find it in this lease—that the shooting tenant will relieve the landlord of all claims of damages by the agricultural tenants. These are the ways in which landlords and tenants of shooting leases protect themselves, and the point I am coming to is this, that the parties to this lease or to this document, as the pursuers call it, have contracted with each other as to the protection which the landlord was to have in regard to game, because there is a special clause dealing with that very matter to the effect that the tenant shall relieve the landlord of claims of damages by the agricultural tenants. If they have dealt with this matter in that lease, and have provided a certain protection to the landlord, are we to imply—for it comes to implication—that the landlord is entitled to have additional protection beyond that which the parties have made a matter of contract? That is actually the pursuers' case. They say, no doubt, we have that stipulation for our protection, but we want another and implied condition. I do not know what is meant—that the tenant shall keep only a fair and reasonable stock of game upon the estate. They want us to read into the lease a clause of that sort. In my opinion the parties have dealt with this matter, and having dealt with it specially, we are not entitled to imply further conditions.

That differentiates this case from the case we were referred to by the Lord Ordinary of *Kidd v. Byrne*, 3 R. 255. I cannot altogether appreciate that case, because I do not quite understand what in the eyes of a shooting tenant is a fair and reasonable amount of game, but nevertheless it was decided in that case, there being no stipulation whatever, and the matter of game not being dealt with at all in the lease, that it was to be implied that the shooting tenant was not entitled to keep more than a fair amount of game, whatever that may be. But that case is different from this in the way I have pointed out, namely, that the amount of protection to be given to the landlord is dealt with in this case. Therefore I do not think that it is an authority to regulate this case.

Then the Lord Ordinary says,—“But even apart from that difficulty I do not, I confess, see how such a tenancy would help the pursuers' case. The pursuers had the opportunity at the end of each year of terminating the tenancy. Each year's increase must therefore have founded a separate claim of damage. That being so, and no such claim having been either enforced or reserved during the whole period of fourteen years, I do not, I confess, see how it can now be maintained.” I do not see either how after this long delay the pur-

suers' claim can now be insisted in. How can a tenant defend himself against a claim brought for the first time now as to the state of the trees in these woods seven or eight years ago? I suppose nobody living could say what the state of the trees was seven or eight years ago. Yet that is what the pursuers propose the tenant should be bound to do. I agree with the Lord Ordinary on that point also, that this claim,—if it was a good claim,—is barred by *mora*.

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LORD M'LAREN.—This is one of the rare cases where it is possible to do justice so as to give perfect satisfaction to all the parties concerned, because I presume it is not the intention of these trustees to act the part of the cruel stepmother to the gentleman whose interests are under their charge, but they are really trustees for creditors, and as such feel under obligation to collect every asset that might possibly fall into their trust. I have no doubt it was very much against their own inclinations that this claim was put forward.

The claim of damages arises out of a lease of the mansion-house and shootings which was granted by the trustees of Sir William Elliott's father to him in the supposed exercise of powers conferred by his settlement. The lease has been reduced, and the Lord Ordinary has disposed of the case upon the principle that there never was any contractual relation between the trustees as proprietors and Sir William Elliott as tenant. That is no doubt quite true, but it hardly appears to me to exhaust the considerations that go to the solution of this case, because, as your Lordship has pointed out, although the actual relation of landlord and tenant did not exist, yet, as Sir William Elliott was allowed to be in possession under the lease for a term of years, and has received all the benefits which the lease conferred upon the tenant, he cannot claim the privileges of a *bona fide* tenant without submitting to the obligations which would have rested upon him if the lease had been a valid one. There is an old principle that he who invokes equity must be prepared to do equity, and I can hardly see how any *bona fide* possessor could claim to have all the rights of possession and also to be relieved from these obligations which as a tenant under a real lease he would have been bound to recognise.

But it is necessary to distinguish precisely what Sir William's position was in regard to the shootings, because although we speak popularly of a lease of shootings, yet if the privilege be nothing more than the right to kill game, it is so far different from an ordinary lease that there is really no subject of lease,—nothing but a right for a certain term of years to the exercise of a personal privilege. In such a case it is difficult to affirm that the obligations which the law would imply from the relation of landlord and tenant in a heritable subject are necessarily binding as between the granter and the grantee of a purely personal privilege. In the case of *Kidd v. Byrne* Lord Moncreiff said, referring to the obligations contained in the game tenant's lease to keep up the game,—“I do not think that the obligation upon the game tenant to maintain a fair stock of game and rabbits implies the obligation to keep down their number to a fair stock. The object of the clause is to maintain the stock, and not to diminish it.” That I should conceive to be a sound principle, but I am not so clear that the principle was well applied in the case of *Kidd v. Byrne*, because the Court proceeded upon a certain view of an implied obligation resulting independently of contract, and held that the game tenant was liable. If it were necessary to consider that question again the inclination of my opinion would be that there

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can be no such liability unless it is either contained in the written contract or is to be plainly inferred from it.

But then there is another ground which I think is sufficient for the disposal of the present claim. I mean the one last referred to by your Lordship, founded upon the rule which has been very generally recognised in questions between landlord and tenant, that where a claim of damage is founded upon a misuse of a subject or privilege let, there is a duty to give notice of the intention to make such a claim—notice that the one party considers that the other has failed in his obligation, and notice of the intention to claim indemnification against that breach of contract. There is no allegation that any claim of damage of this nature was notified to Sir William Elliott during the currency of his possession, so as to reserve the present question, and, in the absence of such a claim and notice, I think we are justified in dealing with this case on the principles that have been very widely applied in reference to agricultural leases.

There is also a third ground. It may perhaps be classed with the one which I first considered. That is, that there is here an obligation to relieve the trustees and their foresaids of all claims made by the agricultural tenants for damage sustained from the game, including hares and rabbits. Now, as far as this question depends upon contract that clause appears to me to contemplate that the game tenant is to be entitled to use his own discretion as to the preservation of the game on relieving the proprietors of all claims that may be made against them—that is, against the trustees. The clause seems to me to be inconsistent with the notion that the tenant was bound to keep down the game, because it contemplates that he is to be responsible as for an excess of game, the trustees protecting themselves against all liability in consequence of such excess. But it is not said that any claim has been made by the agricultural tenants. The only damage alleged is damage to fields let from year to year, and to property in the possession of the trustees, and which they hold in the meantime for the benefit of Sir William Elliott himself. I am therefore of opinion that the case for the trustees has failed, and that the defender is entitled to be assoilzied.

LORD KINNEAR.—I am of the same opinion. I am unable to agree with the Lord Ordinary in thinking that Sir William Elliott has been relieved of all the obligations he may have undertaken in the contract of lease between him and the trustees, merely by reason of its having now been found that the contract was *ultra vires* of the trustees, and therefore that he was in fact possessing precariously during the fourteen years that elapsed after the date of the contract. The judgment of the Court that the contract was *ultra vires* does not establish that there was no contract between the parties in point of fact. If indeed both parties had known from the first that they had no power to contract in these terms, and if they had entered into a formal contract of lease which they knew to be perfectly futile, from some indirect motive, then I could have understood its being held that there never had been any real agreement between them. But I do not understand it to be disputed that both the one party and the other were acting in perfect good faith, and I do not understand the view upon which it is held that because it is found after fourteen years that the contract is invalid in law, as being beyond the power of the contracting parties, there was therefore, in fact, no agreement on which the parties can be said to have acted during the period of fourteen years. I see no reason to doubt that from 1879 down to 1893 Sir William Elliott was in possession of

the mansion-house of Wells, and of the privilege of shooting over the estate under a contract of lease between him and the trustees, although it has turned out that the contract cannot be enforced, so as to entitle him to further possession. That being so, I am unable further to hold that he is not responsible for the due performance of any of the stipulations of that contract by which his possession was regulated during the period that it lasted, and therefore it appears to me that the only question we have to consider is whether there is any relevant averment of breach of contract on the part of the defender?

Now, I think there is none. The lease gives Sir William Elliott the occupation and possession of the mansion-house, and it gives him the exclusive right of shooting game, including hares and rabbits, over the estate, and also the exclusive right of fishing in the Water of Rule. The parties chose to stipulate for the protection of the landlords' property against the excessive use of this right of shooting, and they did so by a perfectly clear stipulation that if the result of Sir William Elliott's exercise of his right should be to give rise to claims of damages against the landlords, the trustees, at the instance of agricultural tenants upon the estate, then he should be bound to relieve them of these claims of damages. That is a perfectly intelligible and eminently reasonable stipulation. It appears to me that that exhausts the rights for which the proprietors chose to stipulate, and when one bears that in view, it appears to me that there is no relevant allegation of breach of contract on the part of Sir William Elliott at all. The pursuers do not say that any damage has been done to the agricultural part of the estate, and they do not say that any claim of damage has been brought against them by agricultural tenants. What they do say is, that a number of trees have been destroyed by rabbits, and also that the number of rabbits at present on the estate is so great that it is useless to plant young trees, although a considerable amount of planting is necessary for the proper management of the estate. The only additional averment of damage is that the stock of rabbits maintained upon the estate has reduced the value for grazing purposes of certain grass parks which are annually let by the pursuers. It is impossible to infer from any of these statements the existence of any claim of damage at the instance of the agricultural tenants. But, then, it is said that in addition to the express stipulation in the contract there is an implied stipulation not to keep more than a reasonable stock of game upon the estate. I can quite understand that even although the remedies to which a proprietor should be entitled in the event of any excessive use of his privileges by a shooting tenant are expressly stipulated for in the lease, there might nevertheless be a claim against the tenant if it could be charged against him that he had done anything equivalent to dilapidation of the estate—that is to say, that he had brought great quantities of game upon the estate, and so increased the stock to an extravagant extent, causing an amount of injury which never could have been in the contemplation of the parties when the shooting lease was granted. It might very well be that such an excessive use of his privileges as that would be beyond the powers which the contract of lease contemplated, and therefore would be a wrong done to his landlord. But there is no suggestion of anything of that kind upon record, because all that is said is not that he did anything to increase the stock of game, but simply that he has not kept it down, and has permitted the rabbits to increase on the estate. Therefore the pursuers' case is, that there was an obligation on this gentleman to exercise the right of shooting rabbits while living in the mansion-

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house, and not only so, but to exercise it so effectually as to prevent injury to trees and plantations, and injury to grass parks. I agree with your Lordships that it is impossible to read into this contract any stipulation of the kind.

I agree also that if there were any contractual obligation which the defender had broken, it is too late for the pursuers now to bring an action at this date, reverting back to damage which has continued for so long a period of time. I think that the principle upon which it is held that if a tenant is to claim damages from his landlord he must give notice of the fact of such damage existing and of his claim at a reasonable time, is still more directly applicable to the case of a proprietor claiming damages from his shooting tenant, because the landlord is left in the uncontrolled administration of his estate for all purposes except those of sporting, and therefore he is upon the spot and must see that the damage is arising. It appears to me, therefore, that there is a very clear duty lying upon him if he means to maintain a claim of damage for what he thinks an excessive use of his tenant's privileges to give notice at once, so that the tenant may have an opportunity of exercising his right to kill game on the one hand, or, on the other hand, of preserving evidence that the amount of game is not excessive. On these grounds I agree with your Lordships.

The LORD PRESIDENT was absent.

THE COURT adhered.

MACKENZIE & BLACK, W.S.—J. L. OFFICER, W.S.—Agents.

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Allan v.
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JAMES ANDREW ALLAN, Pursuer (Appellant).—*Ure—Salvesen.*

WORMSER HARRIS & COMPANY, Defenders (Respondents).—*C. J. Guthrie.*

Jurisdiction—Reconvention—Foreign.—In an action raised by an English firm in the Sheriff Court the pursuers obtained a final judgment on the merits, with a finding of expenses. While the pursuers' account of expenses was before the Auditor the defender brought an action relating to the same subject-matter against the pursuers as subject to the jurisdiction of the Court *ex reconventione*. Held (*diss.* Lord Rutherford Clark) that notwithstanding the judgment on the merits the action of reconvention was competent.

Jurisdiction—Reconvention—Foreign—Partnership.—An English firm raised an action in Scotland against a Scotsman, but before final judgment the firm was dissolved, one of the partners continuing the business under the original firm name. No notice of the dissolution was given to the defender of the action, and, *ex facie* of the proceedings, the firm continued to litigate to the end. The defender thereafter raised an action in Scotland against the firm by its firm name pleading that jurisdiction existed *ex reconventione*. Held that jurisdiction *ex reconventione* existed notwithstanding the dissolution of the firm.

2D DIVISION.
Sheriff of
Lanarkshire.

In August 1893 James Andrew Allan, lithographic printer, 126 Renfield Street, Glasgow, brought an action in the Sheriff Court at Glasgow against Wormser Harris & Company, stockbrokers, 61 Old Broad Street, London, "and subject to the jurisdiction of this Court *ex reconventione*," for payment of £100, or such other sum as might appear to be the true balance due to the pursuer by the defenders under an agreement produced.

The pursuer averred that the defenders were subject to the jurisdiction of the Sheriff of Lanarkshire *ex reconventione*, in respect that at the date when the action was raised another action, arising out of the same agreement, at their instance against him, was pending in the Sheriff Court of Lanarkshire.

In defence Wormser Harris & Company pleaded, *inter alia* ;—(1) No jurisdiction.

Both actions arose out of an agreement embodied in the following letter No. 166. (dated 1st June 1891) by Allan to Wormser Harris & Company:—

"Gentlemen,—In course of your acting for me as my brokers on the London Stock Exchange, and allowing me half of the commissions charged, as was arranged verbally, I agree to be responsible for half the losses that may arise through default of the person or persons for whom you act through me."

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The first action, that at the instance of Wormser Harris & Company, was for payment of £630, 10s. 6d., being the alleged amount of half the losses incurred by Wormser Harris & Company through the default of persons introduced by Allan, after giving Allan credit for £67, 18s. 9½d., as being half of the commissions earned by Wormser Harris & Company upon Stock Exchange transactions carried through by them under the agreement.

In the first action the Sheriff-substitute (Guthrie), on 2d November 1892, gave decree for the sum sued for (as restricted by minute), found the pursuers entitled to expenses, and remitted to the Auditor to tax and to report.

On 31st July 1893 the Sheriff (Berry), on appeal, pronounced this interlocutor:—"Adheres to the interlocutor appealed against . . . Finds the appellant liable in the expenses of the appeal, and decerns: Directs the Auditor to allow a £5 debate fee for the debate under the appeal."

The second action, that at the instance of Allan, was for payment of a further sum in name of commissions.

On 11th August 1893 warrant was granted to cite Wormser Harris & Company as defenders in the second action by service on Frame & Macdonald, writers, Glasgow, the agents for Wormser Harris & Company in the first action, and on 14th August Frame & Macdonald accepted service.

On 16th September the decree of 31st July (in the first action) was extracted.

Defences in the second action were lodged on 22d September. In support of the plea of no jurisdiction the defenders averred (1) that the first action had been decided before the second action was raised, and (2) that the firm of Wormser Harris & Company had been dissolved on 15th April 1893.

On 27th September, in the first action, the Sheriff-substitute pronounced an interlocutor approving of the Auditor's report, and decerning for payment of the expenses as taxed.

On 29th September Allan on being charged implemented the decrees on the merits and for expenses by paying the sums decerned for.

On 5th October the record in the second action was closed, and on 25th November a proof was allowed of Wormser Harris & Company's allegations bearing on their first plea in law in that action.

The evidence led at the proof was directed entirely to the question of the dissolution of the firm of Wormser Harris & Company. The evidence shewed that, according to the law of England, the firm which raised the first action was dissolved on 13th April 1893. The only intimation of the dissolution was by the following notice sent to the secretary of the London Stock Exchange, and posted in the Exchange,—“Kindly inform the members of the Stock Exchange that the partnership hitherto existing between us has been dissolved this day by mutual consent. All outstanding bargains will be settled by Mr Percy Wormser Harris at the above address under the same style as heretofore.” No alteration was made in the instance of the first action after the dissolution of the firm, and *ex facie* of the proceedings in that action the old firm continued to litigate to the end. No notice of the dissolution was made to Allan, the pursuer.

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On 8th February 1894 the Sheriff-substitute (Guthrie) sustained the first plea in law for the defenders, and dismissed the action.*

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* "NOTE.—Reconvention founds jurisdiction when the action in which it is pleaded is between the same parties as those in the action on which it is based. Here the firm of Wormser Harris & Company of London, being pursuers in an action in this Court, was dissolved in April 1893, while that action was still pending. It was not taken out of Court till 16th September, when a decree against the present pursuer in their favour was extracted. This action by Mr Allan against them was brought into Court in August, having been served on the defenders' agents, who were agents for the pursuers in the other action. No objection to the service has been stated, and the defenders have appeared and defended.

"From the evidence which has been taken, I am prepared to hold that the former firm was dissolved at the date mentioned. Possibly the new firm, which bears the same name, has taken up the assets and liabilities of the former, and got and holds the decree in the former action, but there is no evidence of this. It only appears that the new firm intimated that it would settle the claims against the old by members of the London Stock Exchange, and, so far as the late action in this Court is concerned, the person who really carried it on may be the partner who retired, or some third party, liquidator. There is therefore considerable difficulty, as the case has been argued on the proof, in sustaining the jurisdiction, for it is not clear that the Wormser Harris & Company who are called, and on whom the action was served, are the same Wormser Harris & Company, or have any interest in the former action.

"Reconvention, however, is an equitable plea, analogous to or rather an extension of the principle of compensation. This is clearly laid down as the origin and ground of the rule in the leading case of *Thomson v. Whitehead*, 24 D. 331, and where, as here, the *actio conventionis* is finished and extracted before the plea is stated at the bar, when consequently the questions between the parties cannot be tried contemporaneously, or so that the decision on the *actio reconventionis* can have any effect on the decision on the other, the reason of the rule, and therefore the rule itself, ceases to exist. The judgment of Lord Rutherford in *Baillie v. Hume*, 15 D. 267, appears to be inconsistent with this view. That judgment, however, is reported without any note by that very eminent Judge, and the circumstances on which it was based are imperfectly known from the report. It is, moreover, anterior to the judgments in *Thomson v. Whitehead* and *Longworth v. Yelverton*, 7 Macph. 70, and I think is inconsistent with the principles fully explained there. I do not think that the equitable principles on which reconvention is founded were extended by *Morrison & Milne v. Massa*, 5 Macph. 130, although that case supplies us with a novel application of the rule. A *dictum* of Lord Deas in that case, quoted by Mr Mackay, Manual, p. 62, appears at first sight to extend the principle beyond what is warranted by the judgments in the cases cited, and, when read without regard to the facts with reference to which it was spoken, beyond the meaning of the Court which was giving judgment. His Lordship says that the principle of reconvention is 'that a person is not entitled to take the benefit of the jurisdiction of our Courts and at the same time refuse the jurisdiction of the Court in relative matters.' This is quite true, but it was not the intention of the Judges, all of whom had taken part in deciding *Thomson v. Whitehead*, to ignore the definition of the rule by that case, or to make the principle of reconvention operate as a personal bar to a challenge of the jurisdiction of our Courts by any man who had ever applied to them for relief. On the contrary, there was the most obvious justice in applying the rule in the case of *Milne v. Massa*, and so little question of convenience or of the possibility of a contemporaneous trial, that it was wholly unnecessary to refer to that point. Here that is the thing mainly to be considered. For a few weeks or days there was a technical concurrence of two actions between parties who, for this purpose, may be assumed to be the same parties litigating about relative matters. But before the question of jurisdiction could be stated at the bar, that concurrence

The pursuer appealed, and argued;—There was jurisdiction here *ex reconventione*. The *actio conventionis* was still pending when this action was brought. A judgment had indeed been pronounced in the original action which afterwards became final, but when the second action was raised the judgment in the original action was still appealable, and the decree had not been extracted. The basis of jurisdiction *ex reconventione* was the equitable principle that he who appealed to a Court was not entitled to decline its jurisdiction in regard to questions relative to the subject-matter of the original action, when both actions were susceptible of being tried or decided together or nearly together. Here, as much as in *Baillie v. Hume*,¹ there was a depending process. That was, it is true, only a decision in the Outer-House, but it was before the Court in *Whitehead v. Thomson*,² and nothing was there said against its authority. In the present case, the Sheriff was not *functus officio* when the second action was raised. He could still have superseded extract until the present action should be tried.³ The change in the firm was of no moment. The old firm, which was the pursuer in the original action, still existed for all purposes connected with the ingathering of its effects and the payment of its debts, and having taken advantage of the decree in the original action, it could not escape liability under the *actio reconventionis*.

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Argued for the defenders;—Here the first action was no longer a pending process. It was true that so long as a foreigner was *in petitorio* he could not decline the jurisdiction of the Court which he had himself invoked. But when, as here, he had got all that he asked for, the process was no longer depending for judgment, and reconvention was no longer possible. By paying under the decree, and thus implementing the Sheriff's decree, the pursuer had waived any objection that he might have otherwise been able to state. The fact that the interlocutor in the original action was appealable when this action was brought was of no importance. The Sheriff was *functus officio*, and if the defenders were subject to any jurisdiction, it was to the jurisdiction of the Court of Session, to which an appeal *ex hypothesi* lay. The fact that the decree had not been extracted was of no moment. Extract merely enabled the holder of a judgment to make use of it. So soon as judgment was pronounced a pursuer ceased to be *in petitorio*. Further, the dissolution of the old firm was a material fact. Having been dissolved, it could be summoned only through its individual partners,⁴ and this had not been done.

At advising,—

LORD JUSTICE-CLERK.—In this case the question is whether the defenders being outwith the jurisdiction of the Scottish Courts, there is jurisdiction *ex reconventione* in respect of an action raised by them against the present pursuer within Scotland.

The circumstances are these: The pursuer of this action was sued by the

had ceased, beyond the possibility of being restored. I therefore think that there is no jurisdiction against the defenders."

¹ *Baillie v. Hume*, Dec. 17, 1852, 15 D. 267.

² *Thomson v. Whitehead*, Jan. 25, 1862, 24 D. 331, 34 Scot. Jur. 163.

³ *Other Authorities*.—*Ord v. Barton*, Jan. 22, 1847, 9 D. 541, 19 Scot. Jur. 223; *Milne & Morrison v. Massa*, Dec. 8, 1866, 5 Macph. 130, 39 Scot. Jur. 57; *Longworth v. Yelverton*, Nov. 5, 1868, 7 Macph. 70, 41 Scot. Jur. 19; *Barr v. Smith & Chamberlain*, Nov. 18, 1879, 7 R. 247; *Cleland v. Clason & Clark*, July 27, 1850, 7 Bell's App. 155; *M'Ewan's Trustees v. Robertson*, Dec. 17, 1852, 15 D. 265.

⁴ *M'Naught v. Milligan*, Dec. 17, 1885, 13 R. 366.

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defenders before the Sheriff of Lanarkshire for £630, 10s. 6d., as being the proportion of loss falling upon him under an agreement with them by which he was to receive a share of the commission on Stock Exchange transactions done by them for clients introduced by him, and in respect of which share of commission he undertook to be liable for one-half of any losses caused by default of such clients. In that case the Sheriff-substitute decerned, and his judgment was affirmed by the Sheriff on 31st July 1893. The pursuer within a few days of this judgment, and a month before extract, served the present defenders with the present summons, and the sum sued for in it is a balance said to be due to him of commissions on the same transactions, service of this summons being accepted on 14th August, a month and two days before extract of the judgment in the first case.

The question which thus arises is one of no little difficulty. It is one on which I do not think that we have any sure or certain guidance from past decision. There certainly is no case which can be held conclusively to rule the present, for however instructive the very full exposition of the law may have been in the case of *Whitehead*, 24 D. 331, its decision did not depend upon any principle applicable to this case, for it was decided upon the nature of the case itself, it being held that it did not give ground for the application of the rule. It did not turn upon the time when the action was raised. On the other hand, although the case of *Baillie v. Hume*, 15 D. 267, was almost if not altogether the counterpart of the present, it was not a decision in the Inner-House, but only by a Lord Ordinary, the parties having acquiesced.

Certain of the elements necessary to found jurisdiction *ex reconventionem* exist in the most complete form in the present case. First, there is the element of association between the subject-matter of the two actions. For here the matters in dispute in both causes actually take their origin out of the same transactions. They are claim and counter claim in regard to the business following upon the same agreement. Further, as I think, the action of reconvention was brought into Court while the *actio conventionis* was still a depending process before the same Court. But it is as regards the requirement expressed by the late Lord President Inglis in *Whitehead's* case that the two actions must be capable of being terminated by a single sentence, or by two sentences contemporaneous, or nearly contemporaneous, that the question arises. It is the latter alternative of that statement of conditions which alone is in question. Now, I make this remark upon these words—"nearly contemporaneous"—that they are words which are by no means of the character of words of definition, and the Lord President, who used them, did not give—as in the case he was dealing with it was unnecessary to give—any definite statement of what they were intended to cover. It is plain that they must involve some degree of uncertainty, and I cannot but think that the absence of definiteness must have been intentional, for the late Lord President, where he saw his way to state a matter of law on distinct lines, did so, as for example, where he thought that a line of demarcation as between competent and incompetent or the like could be laid down. But he adopts the somewhat vague phrase of Bartolus as all that can be safely laid down on this point. The word "nearly" as applied to the contemporaneous progress or decision of cases before a Court seems to admit of a very considerable margin, just as the word "summarily" may not suggest the same speed in one Court as it does in another. Such a word may reasonably be read as referring to different periods of time. "Nearly contemporaneous"

may mean days in one state of circumstances, and weeks or months in another. The speed or slowness with which the business of the same Court is conducted at different periods may make a narrower or wider reading reasonable. It must be a question of circumstances. An excellent illustration of the impossibility of justly drawing any line approaching hardness and fastness is afforded in this present case. It so happened that the time of the raising of this action was almost simultaneous with the commencement of a long vacation of Court, and thus a case which might possibly have come to final judgment in a few weeks was not taken up by the Judge for about three months. And again a delay of three months was caused by the allowing of an incidental proof, which practically added nothing to the materials for disposing of the case.

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All this seems to me to make it clear how inequitable it would be to settle the question what is covered by "nearly" contemporaneous, upon what may happen in a particular case in the way of innocent delay or of procedure occupying time. The true reading of the rule seems to me to be that the case which is raised against the foreigner in the Court in which he has sued another must be such that there is nothing in it which makes a nearly contemporaneous decision impracticable, and if that be so, then further, that an action such as this, relating to the very same transactions and between the same parties, is one which fulfils this as well as the other conditions, being raised before the first case was out of Court.

What must be looked to, in considering the question, is the state of matters at the time when the *actio reconventionis* is raised, and doing so here, I hold that the pursuer was then in a position to maintain that his case fulfilled all the named conditions formulated by the late Lord President as tests of the right of a pursuer in an *actio reconventionis*.

I said before that the case resembling this one which was to be found in the books could not be considered a binding authority. But I may be permitted to say that having formed the opinion I have done, with much diffidence, and feeling that confidence would be presumptuous, I cannot but have some satisfaction in knowing that the view I have come to is the same as that held by one so eminent as the late Lord Rutherford.

There is another question in the case which does not appear to me to be attended with anything like the same difficulty. It is maintained by the defenders that as their firm was dissolved in 1893, the pursuer, in calling into Court the same firm as were pursuers in the first action, has for this reason failed to bring into Court the same parties as were pursuers of that action. I do not think that this contention can receive effect. The pursuers in the first action remained the pursuers down to and past the time when they were summoned in the *actio reconventionis*. No alteration was made in the instance on the face of the proceeding. They continued to maintain their action without any notice to Mr Allan. It was these pursuers who were called in the new action. And as the firm, though dissolved, would still continue for settlement of existing liabilities, of which the claim in this case, if well founded, is one, I see no good ground for holding that if the action is well laid otherwise, it can be thrown out on that ground.

LORD YOUNG.—I am also of opinion that the Sheriff has jurisdiction against these English defenders, and that on the doctrine of reconvention, which is a doctrine of the common law. It is not established by any statute, it is nothing

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but a rule of the common law resting on considerations of good sense and expediency as to what is best for the convenience of both parties.

The rule itself is an exception to the general rule *actor sequitur forum rei*. That also is a rule of the common law founded upon the same considerations of good sense and expediency as the exception to it, and simply means that if a person wishes to sue another he must sue him in his own country and under the laws of that country. There are exceptions to that rule, and this doctrine of reconvention, as I have said, is one of them. As I understand that doctrine, it is simply this,—If a foreigner is suing in this country a person who is subject to the jurisdiction of the Scottish Courts, on some matter in dispute between them, then the other, the Scotsman, may sue the foreigner in the same Court upon any dispute arising out of the same matter as that in dispute in the original action. He is not obliged to follow the *reus* into another country, he is allowed to arraign him in the same Court as that in which the *reus* is suing him.

Now, where the considerations of good sense and expediency upon which the doctrine of reconvention is founded apply, I know of no other rule which would prevent the doctrine from being held good. The question before us therefore is, Do these considerations of good sense and expediency exist in this case? I am of opinion that they do. One reason that was urged against the application of the doctrine of reconvention was that there was a technical objection of this nature. It was said that where the original action had been heard out, a judgment given, and the case decided, there was an end of the matter, and that the rule *actor sequitur forum rei* must apply. Now, if these considerations of good sense and expediency, of which I have spoken, cease to exist when the interlocutor giving judgment in the case is pronounced, it goes without saying that the rule *actor sequitur forum rei* must apply, but if these considerations do not necessarily cease to exist at that time, then I do not think that the doctrine of reconvention is inapplicable to give the relief which it would admittedly have been able to give if the interlocutor had not been pronounced. I am of opinion that these considerations of good sense and expediency do not necessarily cease when the Judge has pronounced his judgment in the original action. The case was argued to us by the respondents on the footing that these considerations did not cease to exist during all the time that the proof was being taken, when the case was being argued, and when it was at *avizandum*, but that they did cease to exist when the Sheriff put his name to the interlocutor. I cannot appreciate the force of this reasoning. I accordingly look at the case before us to see whether these reasons did, as a matter of fact, cease to exist.

The original action was brought by Wormser Harris & Company against James Allan, the appellant in this action, upon a written contract between the parties in which each had certain rights and was under certain obligations therein set forth. They sued Allan on the ground that in their view there was a certain sum due by him to them under the contract. They brought their action some time before 11th December 1891, and it had a somewhat slow course, because it was not disposed of until 31st July 1893. I suppose that the action of reconvention could have been brought, and all the considerations of good sense and expediency upon which both the rule and the exception are founded would have been in existence, up to the date when the Sheriff signed his interlocutor upon 31st July 1893, but the respondents' view is that they ceased to exist and that an action *ex reconventione* became impossible whenever he did sign it. Now, I must say that these views do not seem to me to be so weighty, or to be

so sensible of being practically worked out, as to be proper for the foundation of our decision in such a practical question as that which we have here, viz., whether it is expedient, in view of the considerations of good sense and expediency upon which this rule of the common law is founded, that this action of reconvention should be allowed to proceed or not.

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I pointed out during the course of the discussion that the defender's observation as to what might be the leaning of the Sheriff's mind in the original action might very well be the ground for his bringing the second action to vindicate what seemed to him to be his rights under the contract. The defender might well say to himself,—“ Well, this pursuer has brought his action against me in the Sheriff Court of Glasgow ; I have heard him explain what was his view of our obligations under the contract towards each other, and I have seen the inclination of the Sheriff's mind as to our respective positions : I will accordingly convene him in the same Court to recover what is due to me under the contract, and will urge against him the same arguments that he has urged against me.” This of course implies that very considerable progress has been made with the original action. But I think that it is right and expedient in the interest of both parties that all questions between the same parties arising out of the same subject-matter should be tried before the same Court, and I cannot agree to the view that the considerations of good sense and expediency which lead me to think that it is right these actions should be tried in the same Court cease to exist whenever the Sheriff signs the interlocutor in which he gives judgment in the original cause. No doubt considerations of time may arise,—even when the original case has not been decided there may be considerations of time. Lapse of time may make these considerations of good sense and expediency inapplicable to any given case, and then I should not act upon them. That would be a matter within the discretion and intelligence of the Court in each particular case, but it does not appear to me that it would be expedient to lay down any stern or fixed rule which would make the doctrine applicable down to one point of time, and not afterwards. If we were going to do that, I think that a safer rule would be to hold that the doctrine applies until the original action is clearly out of Court, but not after that, so that we could say that the one party is not convening the other in the Court in which the other is suing him.

With regard to the question of extract, I believe that this matter has been affected by recent legislation. Formerly no extract of a decree could be given until the question of expenses had been disposed of. Now, by statute there may be extract of decree after the merits have been disposed of, although the question of expenses has not been decided, and the parties still remain convened before the Court. There might for instance be an appeal to the Court of Session, and the cause might be remitted back to the Sheriff Court, and even in a discussion upon the question of expenses there is that convention upon which the reason and expediency of the rule is founded. Therefore, in my opinion, extract has not the importance in this case which we were asked to attribute to it.

On these grounds I am of opinion that this case is one for the application of the rule that when a foreigner has sued a Scotsman subject to the jurisdiction of the Scottish Court he is liable to be sued in the Scottish Courts upon any question arising out of the same subject-matter as that upon which the original action is founded, and that there are in existence here all the considerations of reason and expediency upon which the rule is founded. With regard to the Sheriff-substitute's first ground of judgment, that there was no jurisdiction

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LORD RUTHERFURD CLARK.—The respondents, who are domiciled in England, raised an action in the Sheriff Court of Lanarkshire against the appellant. It was founded on a contract into which the respondents and appellant had entered. On 31st July 1893 it was finally decided by an interlocutor under which the appellant was decerned to pay the sum concluded for as restricted by minute, and was found liable in expenses.

On 27th September 1893 the Sheriff decerned for the expenses, and on the 29th of the same month the appellant implemented the decrees by paying the sums due under them.

On 11th August 1893 the appellant raised the present action in the same Court and on the same contract. Defences were lodged on 22d September. A plea was stated against the jurisdiction of the Court which did not and could not in ordinary course come under the consideration of the Sheriff until a date later than 29th September, when, as I have said, the decree of 31st July 1893 was implemented. The Sheriff sustained it, and we have now to consider whether his judgment is right.

The sole ground of jurisdiction is reconvention. The appellant contends that jurisdiction exists, because his action is brought on the same contract as that on which he was sued, and because at the time when his summons was served the action at the instance of the respondents was still in dependence inasmuch as the judgment of the Sheriff had not been extracted. There is no doubt that there would have been jurisdiction if the appellant's action had been brought before the other was decided. The question is whether the final decision excludes jurisdiction *ex reconventionis*.

It is not necessary to inquire whether reconvention is a source of jurisdiction. Assuming that it is, which seems to be the most favourable view for the appellant, it is settled by *Thomson v. Whitehead*, 24 D. 331, that the jurisdiction is not universal. There is some uncertainty as to the matters which may be embraced within the *actio reconventionis*. But it is, I think, clear that reconvention is an equitable right, and I give it its broadest meaning when I say that it holds its place in our jurisprudence on the equity that a foreigner who is appealing to a Scottish Court must submit to the jurisdiction of that Court in such actions as his adversary may raise which are necessary to enable the Court to do justice between the parties. It is a remedy given in extension of a jurisdiction which is in the course of being exercised, in order that the admissible claims of the defender may be before the Court at the same time as the claims of the pursuer. I say "admissible," because the jurisdiction is not universal; it is limited to claims which, having a relation to those of the pursuer in the original action, may be usefully tried along with them. I say "at the same time," both because it is common ground that the *actio reconventionis* cannot be brought after the *actio conventionis* has ceased to be in dependence, and because the very purpose of the jurisdiction is to enable the Court to consider the claims of the litigants in relation to each other. These considerations lead me to the conclusion that it is a condition of jurisdiction *ex reconventionis* that the second action must be brought while the first is in dependence for judgment.

When the Sheriff pronounced the decree of 31st July, his functions as a Judge were at an end. Nothing remained for him to do except to decern for

the expenses which he had found to be due, and this was a mere matter of course. An action cannot be in dependence for judgment after final judgment has been given. It may be in dependence in another sense. For instance, it is in dependence before extract in the sense that an appeal may be taken if an appeal is otherwise competent. But the function of the Judge is ended, not by the extract, but by his own decree.

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In the older process of the Court of Session the judgments of the Court were considered to be the warrants of the decrees rather than the decrees themselves. Bankton (iv. 36, 1) says,—“Even the judgments which are the warrants of decrees are only interlocutors till the decrees are extracted by the clerk, for till then they are in the power of the Judges and may be altered by them.” When such a power existed an action necessarily remained in dependence in the fullest sense until the final decree was extracted. But it has long ceased, and it is the rule that a Judge cannot alter his judgment after it has been pronounced. It follows, I think, that though an action may until extract be in dependence for certain purposes, it cannot after final decree be in dependence for judgment.

I am not speaking of the power to correct *de recenti* errors which have occurred in the framing of the judgment. I assume that such a power exists in the Sheriff Court as it does in the Court of Session. But it exists only to the effect of enabling the Judge to express in accurate form the judgment which he has already pronounced. His powers as a Judge are at an end, though he is entitled to see that his judgment is correctly recorded.

It was argued that the Sheriff on being informed of the appellant's action might have prohibited the extract of his decree, and that inasmuch as he possessed this power, the respondents were subject to his jurisdiction in that action. I do not think that any such power exists. The decree belongs to the party who holds it, and it is his absolute right to enforce it in ordinary form. The Sheriff cannot review or alter his decree by staying execution, and by consequence he cannot stay execution in order to any such purpose. But were it otherwise, I do not think that the case of the appellant is advanced. It is not pretended that the Sheriff was bound to use the power, and I do not see how his jurisdiction can depend on the manner in which he exercises a discretion. Nor do I think that the appellant's action would furnish even a stateable reason for prohibiting the extract of the decree. A claim is no answer to a decree, and cannot be a ground for staying execution. If the parties before us had both been resident in Lanarkshire, a motion on the part of the appellant to stay execution ought, in my opinion, to have been at once refused. It could not fare better, because it was made to preserve or create a jurisdiction which would not otherwise exist.

To hold that the *actio reconventionis* may proceed when the *actio conventionis* is not in dependence for judgment is to act on a principle after the reason of it has ceased to exist. For the Judge after final decree is in the same position as if the first action had never been brought. It seems to be a strange anomaly that there should be jurisdiction before extract, and no jurisdiction after extract, when the powers of the Judge are the same in either case. They are non-existent. I can see no reason for the want of jurisdiction after extract, except that the first action is not in dependence for judgment, and the same reason applies with equal force when final judgment has been pronounced.

I may appeal to the authority of Voet, who seems to me to explain accurately the reason as well as the limits of the rule, and I am led to do so all the more

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because in the case of *Thomson v. Whitehead* he was thought to carry the doctrine of reconvention to its utmost length. He uses a very significant equivalent for *reconventio* (vol. i. 78) in calling it "*mutua petitio*" a phrase which implies that each petition is before the Court for judgment. In his view reconvention is admitted on this ground—"Aequum enim visum fuit, ut iudicem tanquam idoneum agnoscat unusquisque tanquam reus, quem tanquam actor etiamnum agnoscit . . . in tantum, ut et tanquam actor repellendus sit, qui causam reconventionis excipere tanquam reus recusat, neque reus ultra procedere teneatur in causa conventionis, si reconventus nolit ad mutuum respondere petitionem." No language could express more clearly that the *actio reconventionis* is admitted as an answer to an existing *actio conventionis*, and existing in the sense that it is before the Court for judgment. He makes his meaning even more clear in a subsequent passage, when he says (vol. i. 80),—"Post litem conventionis, jam judiciali sententia terminatam reconventionem frustra fieri, inter omnes fere convenit neque enim ullo tempore mutuae petitiones dici possunt, quarum una jam finem habuit, antequam alterius initium esset." I cannot imagine any words more directly applicable to the case before us. He is not dealing with technicalities. He is discussing a point of general law, and he gives it as the almost universal opinion of jurists that a final judgment in the *actio conventionis* excludes the *actio reconventionis*. The reason is obvious. After such a judgment the two actions cannot be "mutual" actions, or in other words they cannot be described as existing for judgment.

The point which we have to decide was not directly raised in *Thomson v. Whitehead*. The Court had only to determine whether a certain claim could be comprehended within the *actio reconventionis*. But they could not do so without entering more or less upon the considerations on which this question turns, and in holding that the jurisdiction was of a limited nature they went far to solve it. The late Lord President said that the rule will only apply "when the two claims—the *conventio* and the *reconventio*—may be tried simultaneously, and terminated by a single sentence or by two sentences contemporaneous or nearly contemporaneous." These words are to my mind very clear, nor do I see how they fail in definition. They limit the jurisdiction to the case where the two actions can be tried together, or in other words, to the case where both are at the same time in dependence for judgment. The power of pronouncing sentence is mentioned as a corollary to the fact on which the jurisdiction depends; and though the Judge must have the capacity of pronouncing contemporaneous sentences it is not necessary that they shall be absolutely contemporaneous. The period which may intervene between them can have no bearing on the question of jurisdiction.

I see nothing to the contrary in the opinions of the other Judges, and much in confirmation. Most, if not all, seem to recognise that reconvention is an equitable remedy in aid or extension of a jurisdiction which is being exercised, and therefore that the two actions must be in dependence for judgment at the same time. Lords Cowan and Benholme cite with approval a passage from Vinnius which I think it worth while to quote at length—Vinn., lib. 4, tit. 6, ed. 1761, p. 859,—"*Illud obiter adjicio, posse eum, qui per se competens non est, ex accidenti competentem fieri, idque vel propter iudicium jam coeptum vel propter prorogationem jurisdictionis. Coepti iudicii hæc vis est, tum ut actorem mutuae petitioni seu reconventioni, ut nunc in foro loquimur, obnoxium reddat, hoc est, ut mutuas rei actiones ibi excipere cogatur, ubi ipse litem movit,*

tametsi prius ibi conveniri non potuisset, tum ut litigatores retineat in judicio conjuncto." Lords Neaves, Mackenzie, and Jerviswoode shew that the action of reconvention is intended to enable the Court to deal effectually with all the questions which are raised in legitimate connection with the action of convention—as for example, to reduce a deed on which the foreigner founds, or to consider pleas of compensation or of retention which are raised on the part of the original defender. Their view seems to be that the purpose of the action of reconvention is to complete an existing process, to the effect of enabling the Court to settle the claims on both sides.

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If the two actions must relate to the same subject-matter it seems to be the natural consequence that the judgments in both must be contemporaneous, or nearly contemporaneous. There may not be the same necessity if the action of reconvention has a wider range. But in either case there must exist the capacity of pronouncing a contemporaneous judgment. It may be said that if the first judgment is pronounced in the action of convention the jurisdiction in the other action must cease. It is not so. The existence of the first action is necessary to give jurisdiction in the other. But after the defender in the second action has pleaded on the merits, the contract of litiscontestation is complete, from which he cannot withdraw.

It is urged that the circumstance that the decree is not extracted satisfies the technicality, and that the jurisdiction may therefore be sustained. I do not understand the argument. It seems to me that the essential facts on which an equity depends must exist in truth, and that none of them can be represented or satisfied by a technicality. If it be a condition that the first action must exist for judgment at the time when the second is brought, that condition cannot be satisfied after judgment has been pronounced. We cannot give an equitable remedy when the conditions of it do not exist in truth and substance.

I am aware that the decision of Lord Rutherford in *Baillie v. Hume*, 15 D. 267, is against me, and I need hardly say that I have an unfeigned respect for any decision of that Judge. But no reasons were assigned for the judgment, and there was a strong inducement to entertain the action from the fact that it was laid on the wrongous use of diligence in the action on which the foreigner had sued. It raised a pure and somewhat technical question of Scots law, and the defender may not have been very reluctant that it should be decided in a Scotch Court. Considerations of that kind, however, can do no more than indicate a reason why the defender should have acquiesced in the judgment, which remains an important authority against me. But availing myself of the light which has been thrown on the subject by the case of *Thomson*, I can come to no other conclusion than that which I have expressed.

There is another matter which deserves to be considered. Before the case was or could be heard on the plea of jurisdiction the final decree in the first action had been implemented. In accordance with our practice, all the pleas—whether preliminary or peremptory—were stated in the defences. But there could be no litiscontestation until the plea to the jurisdiction was decided. For there can be no litiscontestation before a Judge who has no jurisdiction. The question is, whether the Sheriff was entitled to sustain his jurisdiction after the decree had been implemented, or in other words whether in determining the question of jurisdiction he was to have regard to the state of facts at the date when the summons was served, or at the time when his decision was asked. I am here assuming that in the former view the jurisdiction would be sustained.

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If the jurisdiction depended on law there could be no doubt. When a defender is by law subject to the jurisdiction of the Court at the date of citation the jurisdiction will continue whatever changes may take place. We are not however dealing with a jurisdiction of that kind, but with a jurisdiction which depends upon equity alone. I do not think that anyone can appeal to an equity when the reason on which it depends has ceased to exist, on the simple ground that he cannot use the equity for the purpose for which it was given. It is given in order that the two cases may be considered together—though in my opinion not necessarily with a view to a simultaneous decree. But when the final decree pronounced in the *actio conventionis* has been implemented, I see no principle on which the pursuer of the *actio reconventionis* can ask the Court to proceed with it. He is then suing what has come to be an entirely independent action. It aids no defence; for the defences to the previous action have been surrendered. It has not been brought to enable the Court to dispose of the claims of both parties in mutual actions; for if it is to proceed it must proceed alone. There is nothing on which the decree of the Court can operate; for the sum decerned for in the previous action has been paid to the creditor. Nothing remains to justify the Court in sustaining its jurisdiction except the fact that the respondents had been the first suitors—a reason which is in itself insufficient. In short, it seems to me that at the time when the appellant asked the Court to sustain its jurisdiction, the equity which could alone have justified the demand had ceased to exist, and that his motion was properly refused.

For those reasons I am of opinion that the interlocutor of the Sheriff should be affirmed.

LORD TRAYNER.—I agree with the majority of your Lordships in holding that the Sheriff-substitute has erred, and that his judgment should be recalled.

We have, in the opinion of the Lord Justice-Clerk in *Thomson v. Whitehead*, 24 D. 331, a very full and clear exposition of the grounds on which jurisdiction *ex reconventionis* is to be sustained, and all of the requirements necessary, according to that opinion (as I read it), to found such jurisdiction are to be found in the present case. The claim now made, as well as that which formed the subject of the *actio conventionis*, arise out of the same contract or transaction, and both cases were in dependence before the same Court at the same time,—that is to say, this action was brought into Court while the *actio conventionis* was still a depending process. The only point in which the present case can be said to be wanting in the requirements necessary for jurisdiction *ex reconventionis* is this—that looking to the state of the two processes, they could not have been terminated by a single sentence, or by two sentences, contemporaneous, or nearly contemporaneous. I leave out of view the fact that they could not be terminated by a single sentence, as that admittedly is not essential. It only remains to consider whether the two cases could have been terminated by sentences “contemporaneous or nearly contemporaneous.” It is obvious that here we have no hard and fast rule. The words “contemporaneous or nearly contemporaneous” admit of a certain latitude as regards time as well as some differences of opinion as to what time will fulfil the description thus given. It is unfortunate that the rule should be expressed in language vague enough to admit of considerable diversity of opinion as to its meaning and application. Does “nearly contemporaneous” mean that the two sentences must be pronounced within days, or weeks, or

months of each other? Or does the contemporaneousness of the judgment in the second action depend on what actually takes place, or upon what might have taken place? In the case before us it appears that the judgment in the *actio conventionis* was pronounced on 31st July 1893, and the judgment appealed against was pronounced on 8th February 1894, the interval being a little more than six months. If the Sheriff, instead of allowing a proof as he did on an incidental question about the dissolution of the defenders' firm, had at once allowed a proof of the whole averments of parties, he might have been in a position to decide the case on its merits (assuming jurisdiction) within the same time; and if so, it would not be extravagant to say that judgments so pronounced within six months of each other were "nearly contemporaneous." Indeed, but for the fact that the vacation in the Sheriff Court commenced the day after the Sheriff's judgment in the *actio conventionis*, the decision in the reconvention could have been pronounced a month or perhaps two months sooner. But I cannot think that the matter of jurisdiction is to depend on the accident of a vacation, or upon the manner in which the Judge thinks right to deal with the case. I am not suggesting that in the present case there is the least room for finding fault with the Sheriff's mode of procedure. He was quite entitled to take the course he did. I am merely pointing out that a different course, if adopted, would have brought the two judgments considerably nearer each other in point of time. I can easily suppose circumstances under which the judgments in two actions like those we are now dealing with, arising out of the same transaction, depending before the same Judge, might not be decided within a much greater interval than six months, and where such interval could not possibly raise a doubt as to the jurisdiction. But if that is so, then the question of jurisdiction cannot depend on the circumstance of the time, greater or less, which intervenes in point of fact between the judgment in the one case and the judgment in the other. I venture to think that what is meant by the cases being terminable by judgments nearly contemporaneous is this—that there shall be nothing in the cases themselves which precludes them from being so determined, but that no account is to be taken of anything in the forms of process, the sittings of the Court, the orders of the Judge, or other accidental circumstance which may postpone the judgment in the one case longer than in the other. Viewed thus, I think the present case was one which might in ordinary course have been disposed of almost contemporaneously with the *actio conventionis*, and that in so far as the Sheriff has proceeded on the ground that the cases could not be so decided, he has erred.

But further, I think that the point of time when the question of jurisdiction or no jurisdiction is to be determined is the date when the *actio reconventionis* is brought. If there is jurisdiction then, the subsequent procedure in the case or cases will not destroy it. And, in my opinion, the only tests, at that date, of jurisdiction are (1) do the actions arise out of the same transaction, or are they *ejusdem generis*? (2) is the *actio conventionis* still in dependence? and (3) do the cases in themselves admit of being terminated by judgments nearly contemporaneous? If these questions are answered in the affirmative, there arises jurisdiction *ex reconventionione*; if otherwise, not. Applying these tests here, I think jurisdiction *ex reconventionione* was well founded.

I do not go into the other question disposed of by the Sheriff-substitute as to the constitution of the defenders' firm. I agree in what has been said on that subject by your Lordship in the chair.

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June 8, 1894.

Allan v.

Wormser

Harris & Co.

No. 166.

June 8, 1894.
Allan v.
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THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutor appealed against: Remit to the Sheriff to proceed in the cause as accords."

DOVE & LOCKHART, S.S.C.—AULD & MACDONALD, W.S.—Agents.

No. 167.

June 8, 1894.
Dunn & Co. v.
Anderston
Foundry Co.,
Limited.

JAMES DUNN & COMPANY, Pursuers (Respondents).—*Dickson—Younger.*
ANDERSTON FOUNDRY COMPANY, LIMITED, Defenders (Reclaimers).—*Asher—Ure—Salvesen.*

Reparation—Interest—Rate of interest.—A firm of shipbrokers contracted to supply tonnage to an iron company for the conveyance of 130,000 tons of iron sleepers from Middlesborough to the Argentine Republic, the iron company binding themselves to despatch for shipment 1000 tons of sleepers a-week, or 4000 to 5000 tons a-month. The iron company having ceased to despatch sleepers in implement of the contract after they had sent about half the total amount contracted for, the shipbrokers brought an action against them for damages for breach of contract.

The pursuers having been found entitled to damages, *held* (1) that the amount of damages was to be calculated on the footing of determining the amount of the loss for each month in which the defenders had tendered less than the stipulated quantity of iron; (2) (*rev. judgment of Lord Low*), that interest on the amount of each monthly loss, from the date at which the loss accrued, was to be included in the total damages due; and (3) that the rate of such interest was 5 per cent.

2D DIVISION.
Lord Low.

In February 1890 James Dunn & Company, shipbrokers, Glasgow, contracted with the Anderston Foundry Company, Limited, Glasgow, to provide the Anderston Foundry Company with tonnage for the conveyance of about 130,000 tons of cast-iron sleepers from Middlesborough to the Argentine Republic at 33s. 6d. per ton, the Anderston Foundry Company undertaking to despatch the sleepers at the rate of "not less than 1000 tons per week, which means shipment of 4000/5000 tons monthly."

In pursuance of this contract the Anderston Foundry Company despatched, and Dunn & Company provided shipping for, 60,648 tons of sleepers between the middle of March 1890 and the middle of May 1891, being at the average rate of 1000 tons a-week. Thereafter the parties respectively despatched and provided shipping for 1950 tons on 21st June, 1201 tons on 23d July, and 2800 tons on 19th August, all in 1891. The shipments in implement of the contract then ceased, the Anderston Foundry Company having despatched no further lots of sleepers for shipment. There had thus been shipped only 66,599 tons in all out of the total of 130,000 tons contracted for, leaving a balance of 63,400 tons.

In consequence Dunn & Company, in November 1892, brought an action against the Anderston Foundry Company, averring that since the date of the action the rate of freight had fallen greatly, and concluding for £65,000 as damages for breach of contract.

A variety of questions were thus raised between the parties, but the only one here to be reported was the following:—

The pursuers prepared a state shewing the amount of loss which they maintained that they had suffered each month in consequence of the stipulated monthly shipment of sleepers not having been made; and they further, in their total claim of £65,000, included interest at 5 per cent from the respective dates of these monthly losses.

The defenders, while they also prepared a state shewing the monthly amounts of damages to which they said the pursuers were entitled, on the assumption that the pursuers were entitled to damages (which the defenders denied), maintained that interest ought not to be allowed on these monthly amounts of damage, but only on the aggregate of them from the date of citation.

On 2d March 1894 the Lord Ordinary (Low) pronounced this interdictor:—"Decerns against the defenders for payment to the pursuers of the sum of £40,285, 8s. 7d., with interest at 5 per cent per annum from 23d November 1892, the date of citation: Finds the defenders liable in expenses," &c.*

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The defenders reclaimed.

The pursuers took advantage of the reclaiming note to maintain that the Lord Ordinary's judgment on the question of interest was erroneous. The arguments on this question sufficiently appear from the opinions of the Lord Justice-Clerk and the Lord Ordinary.¹

At advising,—

LORD JUSTICE-CLERK.—(After considering the other points in the case)—The last point is, whether the damages which the pursuers are entitled to recover are limited to the sums which fell due in each month of failure of the defenders to ship goods, as then ascertained, or whether in fixing the damage, interest on

* "OPINION.— . . . (3) The next question is that of interest. Both parties prepared the estimates of the amount of damages on which they relied upon the footing of ascertaining the loss sustained by the pursuers month by month upon the quantity of sleepers which ought to have been shipped during each month. I adopted the same method of assessing the damages, not only because I thought that it was a fair method, but because it was the only method suggested, or for which materials were furnished. The pursuers in their estimate calculate interest upon each month's loss in estimating the total amount of damages. . . .

"The pursuers contend that they are entitled to add the interest, because without it they would not recover the full amount which they have lost. The damages, they argued, being estimated upon the footing that they would have earned a certain sum in each month during the currency of the contract, their loss is not only that sum, but in addition what they have lost by not actually earning it at the time, or, in other words, by not having the use of the money which *ex hypothesi* they would have earned month by month.

"There seems to me to be a good deal of force in the pursuers' argument, but I think that the claim is a novelty in our law, and is not to be lightly admitted. Interest is due when there is a contract to that effect; in the case of bills it is provided for by statute, in the case of loans the obligation to pay interest has been long recognised, and interest will be awarded where payment of a sum which is due and of which payment has been demanded has been wrongfully refused. I think that that exhausts the classes of cases in which decree will be given for interest, and it is no novelty for a party to whom a sum of money is due not to be entitled to interest, as in the case of arrears of feu-duties or ground-annuals. Further, although claims for loss arising from breach of contract sustained a considerable period before the action was brought must frequently have occurred, no case could be cited in which interest upon the loss prior to the date of the action had been allowed. Therefore, although I do not say that cases might not occur in which a jury, or a Judge sitting as a jury, might competently award as damages interest upon loss sustained through breach of contract prior to the date of the action, yet I think that the circumstances of the case would require to be very exceptional in order to justify the adoption of such a course. Here there does not seem to me to be anything exceptional in the case, unless it be that the contract appears to have been unusually favourable to the pursuers, and consequently the amount of damages unusually large.

"I am therefore, upon the whole, of opinion that I ought not to allow the periodical interest which the pursuers claim. . . ."

¹ *Pursuers' Authority*.—Denholm v. London and Edinburgh Shipping Co., May 16, 1865, 3 Macph. 815, 37 Scot. Jur. 421. *Defenders' Authority*.—Blair's Trustees v. Payne, Nov. 8, 1884, 12 R. 104, per Lord Fraser, at p. 110.

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money not paid at the contract time is to be put along with the contract sums, so as to make up the true sum of the damage suffered by the breach of contract. The Lord Ordinary holds that it is not, on the general ground that interest does not run on a claim of damages before the damage has been ascertained. That is a well-established principle, but the question is, does it apply to such a case as this, where money contracted to be paid at a particular time, and therefore due at that time, has not been paid, with the result that the contracting party has been kept out of his money and deprived of its use? Here if the defenders had fulfilled their contract, and paid the freights monthly for the rails shipped, the pursuers would have had the use of the money, and presumably—as is always presumed where money due is withheld—would have used it to profit. The defenders have broken their contract, withheld and retained in their own possession what the other party would have been paid as for debt but for their breach, and they must therefore make good that loss to those who have suffered by their breach. I hold that the monthly sums which would have been due under the contract, and the loss occasioned by their not being timely paid, put together, are the measure of the damage caused by the breach. To give to the pursuers both of these things is not, as I think, giving them damages and adding interest to the damages, but truly making up the damage they are proved to have suffered by non-fulfilment of their contract by the defenders. I therefore think that on this matter also effect should be given to the pursuers' contention by awarding to them such an amount of damages as will cover both the principal sums not paid and the additional amount they have lost through having not had the use of their money, which addition, although it can of course only be calculated in the form of interest, is truly an element of the actual damage sustained.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

Upon the question of the rate of interest the pursuers maintained that interest at 5 per cent should be allowed; the defenders that the rate should be 3 per cent.

LORD YOUNG.—I think that 4 per cent is enough.

LORD RUTHERFURD CLARK.—The old rule certainly was 5 per cent, and I do not think it has yet been altered. It may, however, be worthy of reconsideration, looking to the fact that investments now earn so much less than they used to do.

LORD JUSTICE-CLERK.—I think we must adhere to the old rule, and calculate the interest at the rate of 5 per cent.

LORD TRAYNER concurred with the Lord Justice-Clerk.

THE COURT recalled the Lord Ordinary's interlocutor, and decerned against the defenders for payment to the pursuers of a sum which included interest at 5 per cent on the monthly amounts of damages from the dates when the respective monthly damages accrued.

WEBSTER, WILL, & RITCHIE, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

JOHN WADDELL, Pursuer (Reclaimer).—*Comrie Thomson—Deas.*
ANDREW ROXBURGH, Defender (Respondent).—*R. L. Orr.*

No. 168.

June 9, 1894.
Waddell v.
Roxburgh.

Reparation—Slander—Innuendo—Verbal injury—Issue.—A newspaper, commenting on the manner in which a contract for printing a register of voters had been secured, said—"This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract." The successful offerer brought an action against the printer and publisher of the newspaper, in which he innuendoes the statement to mean that he had obtained the contract by dishonest and improper means. He also averred that the statement had been made with the design and the result of injuring him. The Court held that the statement would bear the innuendo put upon it, and allowed the pursuer an issue of slander, but that the pursuer was not entitled to an issue of verbal injury.

Paterson v. Welch, May 31, 1893, 20 R. 744, commented on.

THIS was an action of damages at the instance of John Waddell, 1st Division. printer and publisher, Alloa, against Andrew Roxburgh, printer and publisher in Tillicoultry and Alloa. Lord Kincairney.

The pursuer averred that he was printer and publisher of the *Alloa Circular*, a weekly newspaper, and that the defender was printer and publisher of the *Alloa Weekly News and District Reporter*; that in November 1893 the Tillicoultry Burgh Commissioners sent out circulars to the printers in Tillicoultry and Alloa inviting them to estimate for the printing of the register of voters for the burgh of Tillicoultry for a period of five years; that he had sent in a tender, and that his tender being the lowest had been accepted. He stated that for some time the defender had borne a groundless illwill at him, and then averred;—"In his said newspaper, the *Alloa Weekly News and District Reporter* of Wednesday, 20th December 1893, the defender inserted an article headed 'Burgh Commissioners,' and in a note to that article he stated,—'This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract.—ED.'—meaning thereby that the pursuer had obtained the said contract by dishonest or fraudulent and improper means. . . . The statements and representations contained in said note were made and published by the defender falsely and maliciously to gratify his spite and illwill against the pursuer, and with the special design and object of injuring the pursuer in his trade, as well as in his feelings and reputation, and of exposing him to public contempt. The pursuer was the lowest and successful offerer in the contract above referred to, and the said statements by the defender are of and concerning the pursuer, and are false, malicious, and slanderous. The statements referred to have been read by a large number of people, . . . with the result that he has been injured in his feelings and reputation as well as in his trade and business as a printer and publisher."

The pursuer pleaded;—(1) The defender having printed and published the false, slanderous, and malicious statements and representations condescended on, of and concerning the pursuer, is liable in reparation as concluded for. (2) The statements and representations complained of being false, and having been made by the defender regarding the pursuer maliciously and with the design of injuring the pursuer, and the pursuer having thereby been injured in his trade and in his feelings and reputation, is entitled to reparation from the defender.

The defender pleaded, *inter alia*;—(1) No relevant case.

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The pursuer proposed the following issues:—“(1) Whether the said statement was of and concerning the pursuer, and falsely and calumniously represented that the pursuer had obtained the said contract by dishonest and improper means, to the loss, injury, and damage of the pursuer? (2) Whether the said statement was of and concerning the pursuer, and whether the said statement was false, and was made and published by the defender with the design of injuring the pursuer, to his loss, injury, and damage?”

On 13th March 1894 the Lord Ordinary (Kincairney) disallowed the issues, and assoilzied the defender.*

The pursuer reclaimed, and argued;—The innuendo put on the words complained of was not so strained or extravagant as to disentitle the pursuer to the decision of a jury on it. The second issue was warranted by the case of *Paterson v. Welch*.¹ It might be that without amounting to slander, the words had so injured the pursuer that he had suffered patrimonial loss. Under the second issue he might recover damages for that, though not by way of *solatium*.

* OPINION.—This is an action of damages for defamation by the printer and publisher of an Alloa newspaper against the printer, publisher, and editor of another newspaper, also published in Alloa. The words complained of, published in the defender's newspaper, are these:—‘This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract.’ The contract referred to was a contract for printing the register of voters for Tillicoultry, and the paragraph is said to refer to the pursuer. Two alternative issues have been tabled by the pursuer, the one appropriate to an action for slander, the other to an action for verbal injury.

“The first issue is whether the paragraph referred to represented that the pursuer had obtained the contract by dishonest and improper means. The question debated was whether the paragraph complained of could reasonably be innuendoeed as involving a charge of dishonesty. I have answered that question in the negative, although not without hesitation. The case is presented as a mere question of construction of the paragraph, and no circumstances are averred as colouring the paragraph, or as suggesting that the words meant more than their ordinary construction conveys. The idea of dishonesty involves some kind of fraud or falsehood perpetrated by misrepresentation, or concealment, or some sort of circumvention; but it is not suggested that the paragraph pointed at anything of that kind, and therefore it does not appear to me that according to its reasonable construction it can be held to involve a charge of dishonesty. The words ‘unfair advantage,’ read in connection with what precedes, seem to suggest some undue advantage taken by the pursuer which might be characterised as mean and contemptible, but not as fraudulent or dishonest.

“It was not maintained that the words, although objectionable and insulting, were defamatory without the innuendo.

“The alternative issue was proposed to meet the event of the paragraph being held not to be defamatory, and was said to be warranted by the recent case of *Paterson v. Welch*, 31st May 1893, 20 R. 744. The model of the issue in that case has not been followed exactly in the present case, but there would have been no difficulty in altering this issue so as to bring it into conformity with the issue in *Paterson v. Welch*. But I have disallowed the issue on other grounds, because I do not think that this is a case to which the judgment in the case of *Paterson v. Welch* applies, unless it applies to every false statement of which it is averred that it was made with a design to injure. I think that it cannot be reasonably suggested that the words complained of were used with any design to injure the pursuer, or to expose him to public hatred and contempt.”

¹ May 31, 1893, 20 R. 744.

The defender argued ;—The innuendo was too forced and unnatural to warrant the Court in sending it to a jury.¹ No suggestion of dishonesty could be read out of the words used.

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The defender was not called upon to speak to the second issue.

LORD ADAM.—The Lord Ordinary has refused the first issue proposed by the pursuer, but he says that he has done so with hesitation, and Lord Kinnear observed in the course of the hearing that that in itself was enough to shew that there was a question which ought to go to a jury. I agree with that observation. In an action of slander the question of slander or no slander, libel or no libel, is always, *prima facie*, a question for the jury. Accordingly, if it is not quite clear that by no reasonable interpretation of this language could it be affirmed that there was a libel, we are not entitled to refuse to send the case to a jury. Here the averment of the pursuer just comes to this, that the defender said of him that he, the pursuer, took advantage of other persons in a mean and contemptible and unfair manner. If the innuendo which the pursuer puts upon the words in question were sent to a jury and they found for the pursuer, Mr Orr admitted that the defender could not ask for a new trial. That seems to me a conclusive test of the matter. I cannot say that the jury might not by reasonable construction of the words put the interpretation proposed upon them. I therefore think that the first issue must be allowed.

LORD M'LAREN.—It was pointed out from the bar, and is well recognised in practice, that a different and stricter standard of construction is to be applied to calumnious expressions affecting a person in his business relations from that applied to expressions used of the same person in his public capacity. We have discouraged actions of damages directed against public men for language used by them whether in the more important field of general politics or in regard to the administration of municipal affairs, or even of charitable societies. No doubt language used of a public man may be libellous, as, for instance, if one were to accuse a member of Parliament of having obtained his seat by bribery, but such accusations are rarely made, and, as has been often observed, there is practically no limit to the language that may be used in public controversy except that which is imposed by good taste and good feeling towards an opponent.

In the present case the kind of unfairness attributed to the pursuer is not specified, but point is given to the expression by reference to a particular contract, and that, I think, is sufficient to justify the innuendo that the kind of unfairness meant was dishonesty.

I agree, accordingly, that the first issue should be allowed.

LORD KINNEAR.—I am of the same opinion. I think it is a question for the jury whether the words of which the pursuer complains really impute dishonesty to him or not. I cannot say that it is impossible that they should bear the meaning which he seeks to put upon them. That is for the jury to determine. As to the alternative issue proposed for the pursuer, I have no hesitation in holding, and I understand your Lordships are of the same opinion, that if he is not entitled to the first issue he cannot obtain the second. It appears to me that the case of *Paterson v. Welch* has been somewhat misunderstood. It was

¹ *Archer v. Ritchie*, March 19, 1891, 18 R. 719; *Turnbull v. Oliver*, Nov. 21, 1891, 19 R. 154.

No. 168. not intended by the Court in that case to lay down that whenever the words of which a pursuer complains are not in themselves slanderous, he may have an issue whether they exposed him to public hatred and contempt. I understand that the opinion of the Lord President in that case proceeded on this, that the words which the pursuer in that action was said to have used of a class of persons were not slanderous of that class, but that, nevertheless, to impute to the pursuer that he had used these words was an actionable wrong, because he undertook to shew that they had been ascribed to him by the defender with the design of injuring him, and that he had in fact thereby been exposed to the public hatred and contempt. There were specific allegations of the special damage which had arisen to the pursuer from the words in question having been ascribed to him. I have no doubt that the form of issue adopted in that case was better calculated to bring the question fairly before the jury than the ordinary form of issue. Therefore I see no reason for dissenting from the judgment. It may be that to confine the use of the word slander to cases where the language complained of is obviously and on the face of it defamatory and injurious would be convenient, but I should rather have thought that all actionable words which are either injurious to the character or the credit of the person of whom they are spoken, or which expose the person with reference to whom they are uttered to public hatred and contempt, are defamatory or slanderous words. However that may be, I am of opinion that if the language of which the pursuer complains is calculated to expose him to public hatred and contempt, then it is slanderous language. If it is not calculated to expose him to public hatred or contempt, or to do him any injury,—if, when properly construed, it does not assail his character or credit,—then it is not slanderous or actionable at all. I have no doubt that the pursuer must have an issue of slander in ordinary form, or no issue at all.

LORD M'LAREN.—I desire to express my concurrence with what has been said by Lord Kinnear as to the case of *Paterson v. Welch*. I thought the case a narrow one at the time, and it certainly was not intended to give such an extension to the form of issue then allowed as is now claimed.

LORD ADAM.—I was one of the Judges in the case of *Paterson v. Welch*, and I concur in the observations made by Lord Kinnear upon it.

The LORD PRESIDENT was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and approved the first issue proposed by the pursuer.

ANDREW NEWLANDS, S.S.C.—GEORGE INGLIS & ORR, S.S.C.—Agents.

No. 169. **REV. DAVID SMITH PETERS, Pursuer (Respondent).**—*Dickson—M'Lennan. MAGISTRATES AND TOWN-COUNCIL OF GREENOCK, Defenders (Reclaimers).*
 —*Johnston—Sym.*
 June 9, 1894.
 Peters v.
 Magistrates of
 Greenock.

Church—Minister—Stipend—"Competent and legal stipend"—Arrears of stipend—Burgh—Interest—Mora.—Where the magistrates of a burgh, who admitted liability to provide a parish minister with a certain limited stipend, were found to be under a contractual obligation to provide him with a "competent and legal stipend suited to the circumstances of the time, and the position and duties of the benefice," held that the minister was entitled to stipend at the rate of £320 from 1880, when he first made his claim to an increase, down to 1891, when he raised action, and £400 a-year thereafter so long as the circum-

stances remained the same; and (2) that he was entitled to interest on arrears accruing down to 1891 at the rate of 2 per cent, and to interest on arrears accruing thereafter at the rate of 4 per cent.

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[SEE *ante*, March 16, 1892, 19 R. 643, May 18, 1893, 20 R. (H. L.) 42, July 6, 1893, 20 R. 924.]

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In 1891 the Rev. David Smith Peters, minister of the New or Mid Parish, Greenock, raised an action against the Provost and Magistrates of the burgh of Greenock for declarator that he was and is entitled to be furnished with a competent and legal stipend to be paid out of the revenue of the burgh or out of the other funds, &c. held by the defenders for the use of the minister of the said church, from the date of his ordination and induction, and in all time coming during his lifetime, and serving the said cure.

2D DIVISION.
Ld. Kyllachy.

The pursuer also concluded for payment to him of £320 per annum from Whitsunday 1880 to Martinmas 1890, under deduction of payments to account, and thereafter of the sum of £400 per annum, or such other sum as should appear to the Court to be a "competent and legal stipend." The pursuer had since 1880 protested against the stipend offered by the defenders, and since 1884, owing to his refusal to give unqualified receipts, he had received no payments.

On 23d June 1891 the Lord Ordinary (Kyllachy) pronounced an interlocutor, in which he found that the defenders were bound to provide the pursuer and his successors "with a legal and competent stipend suited to the circumstances of the time and the position and duties of the benefice; therefore finds, declares, . . . in terms of the first declaratory conclusion of the summons: *Quoad ultra* appoints the cause to be enrolled that parties may be heard as to the petitory conclusion."

The defenders reclaimed. The Second Division, on 16th March 1892, adhered.

On appeal the House of Lords, on 18th May 1893, affirmed this judgment.

The cause was then enrolled before the Lord Ordinary to dispose of the petitory conclusion.

On 8th July the Lord Ordinary appointed the pursuer "to lodge in process a statement of the stipend which he claims, and of the facts and circumstances on which he relies in support thereof, and that *quam primum*."

It is unnecessary to refer to the pursuer's minute and the defenders' answers thereto (lodged in obedience to the foregoing interlocutor) further than to say that the pursuer maintained that the stipend claimed by him was justified by a comparison with stipends paid to other parish ministers in Scotland holding cures similar to that of the Mid Parish of Greenock, and that the defenders maintained that looking to the fact that the pursuer had a manse, and to other considerations, the stipend should be fixed at £300 per annum.

On 2d February 1894 the Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer is entitled to stipend at the rate of £320 per annum, for the period from Martinmas 1880 to Whitsunday 1891, payable half-yearly at Whitsunday and Martinmas, and at the rate of £400 per annum thereafter, payable said stipend of £400 at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first half-yearly payment as at the term of Martinmas 1891, and the next half-yearly payment at the term of Whitsunday 1892, and so forth, half-yearly and termly thereafter; but reserving the right of the pursuer and his successors in the cure to apply for an increase of stipend, in the event of the said stipend at the rate of £400 at any time ceasing to be a com-

No. 169. petent and legal stipend; and the right of the defenders and their successors in office to apply to have the stipend fixed at a less amount in the event of stipend at the foresaid rate at any time coming to be in excess of a competent and legal stipend, according to the circumstances of the time and the position and duties of the benefice: Finds that the pursuer is entitled to interest at the rate of 2 per centum per annum upon the balance in the hands of defenders, from time to time, of stipend accruing due to the pursuer during the said period from Martinmas 1880 to Whitsunday 1891, calculated at the foresaid rate of £320 per annum, payable half-yearly as aforesaid: Finds that the pursuer is entitled to interest at the rate of 4 per cent per annum upon stipend accruing due to him from and after the term of Whitsunday 1891, at the rate of £400 per annum, payable half-yearly as aforesaid: Appoints the defenders to lodge in process an account shewing the amount due by them to the pursuer in accordance with the foregoing findings. . . .”

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Thereafter, on 21st February, the Lord Ordinary gave decree, giving effect to the foregoing interlocutor.

The defenders reclaimed, and argued;—If the Court were of opinion that the defenders were bound to pay the pursuer a larger sum than they maintained in their answers they were bound to give him, then the decree must have effect only from the date of the raising of the action. He was not entitled to receive arrears as from 1880, when it was admitted he had protested against the stipend offered.¹

Argued for the pursuer;—It was now ascertained that in 1880 the money value of the defenders' obligation was £320. They must pay the debt, for the pursuer had never discharged it.² The sum of £400 was in the existing circumstances not too high a stipend.

At advising,—

LORD TRAYNER.—Two questions were submitted to us under this reclaiming note, (1) whether the sum fixed by the Lord Ordinary as a legal and competent stipend was not excessive, and (2) whether in any view the defenders were liable to the pursuer in the stipend so fixed for any period anterior to the date of the summons.

On the first of these questions I see no reason for interfering with what the Lord Ordinary has done. The information laid before us as to the stipend paid to other parish clergymen in Scotland holding cures similar to that of the pursuer appears to justify the amount at which the pursuer's stipend has been fixed. With regard to the second question, I entertain no doubt that the pursuer is entitled to the decree pronounced in his favour. It is not disputed (at least cannot now be disputed) that the defenders were at Martinmas 1880 liable to provide the pursuer with a legal and competent stipend. That was their obligation then, although it was not then ascertained what in money value was the extent of the obligation. It is now ascertained that £320 a-year was the money value of the defenders' obligation at that date; and accordingly it is now ascertained that at Martinmas 1880 the defenders were bound to pay, and should have paid, the pursuer a yearly stipend of £320. That was their debt to the pursuer then; they have not paid it; they must pay it now. The delay on the part of the pursuer to bring this action to enforce his rights does not

¹ Donald v. Donald, May 26, 1860, 22 D. 1118, 32 Scot. Jur. 496; M'Millan v. M'Millan, July 20, 1871, 9 Macph. 1067, 43 Scot. Jur. 598.

² Dunnet v. Campbell, Dec. 11, 1883, 11 R. 280; Finlayson v. Gown, July 7, 1809, F. C.

diminish or preclude them; there has been no abandonment or discharge of them, and the pursuer seems sufficiently punished for his delay in only being allowed interest at the rate of £2 per cent on his just claim for about eleven years.

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The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THE COURT adhered.

MILLER & MURRAY, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

JAMES MORRISON, Petitioner.—*Young—Gunn.*
WILLIAM QUARRIER, Respondent.—*Ure—Clyde.*

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Minor and Pupil—Custody—Orphans—Minor's choice of residence—Brother's right to custody—Curator ad litem—Charity.—Two orphan children, a brother and sister, twelve years of age, were placed by their brother, thirty years of age, in a charitable institution, not Roman Catholic. Shortly afterwards he presented a petition to the Court to have them restored to his custody, averring that they were not being brought up in the Roman Catholic faith, which he alleged to be that of their father, and that the children themselves wished to be removed. He also averred that he had arranged for their being suitably brought up in a Roman Catholic institution, and that he was "willing, should the Court require it, to retain them under his own care or under the care of a relative." Answers were lodged for the manager of the institution. The Court, in order to ascertain the actual facts in the interests of the children, before answer, appointed a curator ad litem (*diss.* Lord M'Laren, who was of opinion that the sole ground of the application was the objection to the religious education of the children, and that such an objection when taken by a brother, who was not maintaining them, was not a relevant ground for the Court interfering).

ON 18th May 1894 James Morrison, brushmaker, Dundee, presented a 1st Division. petition to the Court to interdict William Quarrier, manager of the Orphan Homes of Scotland, Bridge of Weir, Renfrewshire, from removing from the jurisdiction of the Court the petitioner's brother and sister, Alexander and Margaret Morrison, and thereafter to ordain him to deliver the children into the custody of the petitioner.

He averred that he was thirty years of age, and that Alexander and Margaret, who were twins, were twelve years of age; that on the death of their father in October 1893, the survivor of their parents, the children had lived with the petitioner; that on a threat of prosecution by the officer of the School Board for neglecting the education of the children he had placed them in an institution known as the Orphan Homes of Scotland on 26th February 1894, organised and carried on by the respondent. He further averred that the parents of the children had been of the Roman Catholic faith, and that the children had themselves been baptised and brought up in that faith.

"The said children are not being retained in the Roman Catholic faith, in which they were baptised and brought up, and the petitioner is anxious, for that and other reasons, to have them removed from the custody of Mr William Quarrier and restored to himself. The petitioner has made arrangements to have them educated and maintained in a Roman Catholic institution, and he is willing, should your Lordships require it, to retain them under his own care or under the care of a relative, who has signified her desire to have them. The said children desire to be restored to the petitioner's care, but the said William

No. 170. Quarrier refuses to hand said children over to the petitioner although repeatedly requested to do so.

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"The petitioner believes and avers that unless immediate interdict is granted against Mr William Quarrier he will remove said children out of your Lordships' jurisdiction and send them abroad."

The Court granted interdict, and answers were thereafter lodged by Mr Quarrier.

The respondent stated that he had first heard of the children from Mr Shepherd, the president of the Children's Free Breakfast Mission, Dundee, on 10th January 1894, and that he had received them into the Homes in the following circumstances:—"On or about 24th January 1894 the petitioner presented himself at the respondent's Homes in Glasgow, along with the two children and a letter of introduction from Mr Shepherd.

"The terms upon which the respondent was willing to receive the children were explained to the petitioner, and he then and there signed the usual printed form which the respondent is in the habit of getting signed by persons leaving children with him. The form is in these terms:—

"ORPHAN HOMES OF SCOTLAND AND DESTITUTE CHILDREN'S EMIGRATION
"HOMES.

"Form of Agreement.

"I, James Morrison, make application to have my brother and sister Alexander and Margaret (twins), aged eleven and eleven years, received into the above-named Homes, with the view of being emigrated to Canada, under the care of William Quarrier or his agents, or to be kept at home, or otherwise disposed of as Mr Quarrier thinks best, in proof whereof I affix my signature." (Signed) "JAMES MORRISON.

"J. JAMIESON, witness.

"Glasgow, 24th January 1894.

"Nothing was said at this interview about the children or their parents being Roman Catholics. On the contrary, the respondent understood that they were Protestants. Whether they were Protestants or Roman Catholics would not have affected the respondent's willingness to receive the children, the Homes being entirely unsectarian, although the respondent is himself a Protestant."

The respondent heard no more of the matter until the 22d February 1894, when he received through Mr Shepherd a letter from the petitioner addressed to Mr Shepherd in which he, *inter alia*, said,—“If through you I could get the two of them in Mr Quarrier's Home, I would most heartily hand the two of them over to Mr Quarrier, on all his conditions, for good and all. I will be exceedingly obliged to you and happy if you could get them the chance they had before.”

Thereafter, on 24th February 1894, the petitioner presented himself at the Homes with the children. “He explained that he and all the other relatives of the children were now quite satisfied to leave them in the respondent's Homes, and they were left accordingly.”

The respondent further stated that in the end of April 1894 endeavours had been made to recover the children from the respondent by the Society of St Vincent de Paul; that the Society's agent had stated that a Mr and Mrs Brown were willing to adopt the children; that the respondent had made inquiries, and had satisfied himself that it would not be for the interests of the children to allow them to leave the Homes. He further stated,—“The girl is no longer in pupillarity, and has already, in connection with Mr and Mrs Brown's proposal, stated her preference for

remaining in the Homes. The respondent does not at present, and never did, contemplate emigrating the children to Canada." No. 170.

Argued for the petitioner;—As the brother and nearest male agnate of the children, the petitioner had an undoubted title to present the petition. He was their natural guardian, and though not able to support them in his own home, he had made arrangements for their education and upbringing. The respondent, on the other hand, being an utter stranger to the children, had absolutely no legal right to their custody. It was an accident that they were in his Homes, and the petitioner's averment was that they were anxious to be restored to his charge. Except under the petitioner's control, there was no guarantee that they would be brought up in the religion of their parents, and in which they themselves had been baptized.¹

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Argued for the respondent;—The petitioner had no title to present the application. He was not the tutor of the children. At anyrate, he had no absolute right to their custody. The girl being a *minor pubes* was entitled to select her own residence,² and the fact was that she was unwilling to leave the Homes. If that were so, the Court would not separate the brother and sister. Besides, the interests of the children were the paramount consideration,³ and it was not suggested that they were not well cared for in the Homes. On the question of religion, there was nothing to shew a sincere preference on the part of the parents of the children, even assuming their wishes to be a relevant consideration. It was really, however, for the Court, having regard to the welfare of the children, to say what their religion should be.⁴ The petition, therefore, should be dismissed, or otherwise, the course adopted in *Flannigan's* case² should be followed, and a curator ad litem appointed to ascertain the facts.

LORD ADAM.—This is a petition presented by James Morrison to have restored to him the custody of two children, who are his brother and sister, and are twins. They are just over twelve years of age, and the girl is thus above pupillarity, while the boy is still a pupil. The position of matters, as I understand, is this: These two children, after the death of their father and mother, were left in the hands of their elder brother, the petitioner. Although he had no legal title to their control, he very naturally and properly assumed the care of them, and as acting for them he handed them over to a Mr Quarrier, who, it seems, has certain Homes which he keeps for children who are not properly provided for—that was in February last.

Now, I cannot say that I altogether like the form which Mr Quarrier requires to be signed, and which he obtained on this occasion. It is in these terms:—"I, James Morrison, make application to have my brother and sister . . . received into the above-named Homes, with the view of being emigrated to Canada, under the care of William Quarrier or his agents, or to be kept at home, or otherwise disposed of as Mr Quarrier thinks best, . . ." and it is signed by the petitioner. Under that writing a very absolute power is supposed to be given to Mr Quarrier, but however that may be, the petitioner has now seen reason, as he supposes, to change his mind, and wishes the children removed from the custody of Mr Quarrier. What he says in the petition is this, that

¹ Brand v. Shaws, Dec. 22, 1888, 16 R. 315.

² Flannigan, June 21, 1892, 19 R. 909.

³ Markey v. Colston, July 14, 1888, 15 R. 921; Sutherland v. Taylor, Dec. 22, 1887, 15 R. 224; Smith v. Smith's Trustees, Dec. 13, 1890, 18 R. 241; Mackenzie v. Keillor, July 6, 1892, 19 R. 963.

⁴ M'Grath, L. R. [1893], 1 Ch. 143; *In re Nevin*, L. R. [1891], 2 Ch. 299.

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the children are Roman Catholics, and that he has ascertained that they are not being brought up in the Roman Catholic faith, and then he goes on to say,—
“The said children are not being retained in the Roman Catholic faith, in which they were baptised and brought up, and the petitioner is anxious, for that and other reasons, to have them removed from the custody of Mr William Quarrier and restored to himself. The petitioner has made arrangements to have them educated and maintained in a Roman Catholic institution, and he is willing, should your Lordships require it, to retain them under his own care or under the care of a relative, who has signified her desire to have them. The said children desire to be restored to the petitioner's care, but the said William Quarrier refuses to hand said children over to the petitioner, although repeatedly requested to do so. The petitioner believes and avers that unless immediate interdict is granted against Mr William Quarrier he will remove said children out of your Lordships' jurisdiction and send them abroad.”
Now, the averments might, and perhaps ought, to have been much more specific. The Court ought to have had more information as to the position of the petitioner and his relative, and also as to the Roman Catholic institution to which he refers. But the question is now before us, and we have to deal with it as it stands. As to the title of the brother to present the petition I have no doubt whatever. He is the nearest male agnate of the children, and has quite a right, when they are not being looked after by anyone else, to intervene on their behalf. On the other hand, I am equally clear that he has no power of control over these children. He is not entitled to say, “I have a right to dispose of these children.” In these circumstances it is for us to do what seems best. My only difficulty is this: Of Mr Quarrier's Homes I know nothing, of Mrs Brown I know nothing, and of the Roman Catholic institution to which the petitioner referred I know nothing. It therefore occurs to my mind that it is our duty to inform ourselves in the matter. The proper course to follow is that followed in a recent case, being to appoint a person in whom we have confidence as curator ad litem to meet with these children and to inform us what in the interests of his wards it is advisable for us to have before us in dealing with the custody and control of these children. I cannot say that the mere accident of their being in the hands of a perfect stranger gives him a right to bring them up. Taking into consideration the wishes of the brother and the other members of the family on the one hand, and those of Mr Quarrier on the other, I would not hesitate to say—other things being equal—that the wishes of the family should prevail. But we know nothing of how the facts stand. On the one hand it is said that the children are able to express their own mind, and that they wish to leave Mr Quarrier's Home. On the other, that they wish to remain. But we are not bound to yield to the desire of the children if we do not otherwise approve of it. It is our duty, I think, in the whole circumstances, to appoint a curator ad litem for the purposes I have indicated.

LORD M'LAREN.—Under ordinary circumstances I should not have thought it necessary to make a formal dissent from such a step as the appointment of a curator ad litem, which of course leaves the decision on the merits quite open. But it seems to me that in the present case an important point of principle is involved, and as I am of opinion that no relevant statements are made in the petition calling for the interference of the Court, I do not think that it would

be fair to the parties to withhold at this stage the expression of my view, which is, that the petition should be dismissed. I do not entertain, and I do not suppose that any of your Lordships entertain, the idea that this Court has any general supervision or duty with reference to the upbringing and education of the poor children of the country. It is only when an application is presented to us on proper grounds that we can interfere, and it is necessary, in my opinion, that, in view of our intervention even to the extent of ordering inquiry, a *prima facie* case must be set out in the petition. I do not propose to consider the statements made in the answers, though it is undoubtedly consistent with our practice in disposing of summary applications to look at the statements made by the respondent. The case, to my mind, is so clear that, without looking at the answers, it is apparent that the petitioner has no right to the claim which he makes for the removal of the children from Mr Quarrier's Home. If it had been said that the children were being ill-used in this school or home, then, although unable to provide for them, the petitioner might still have an interest to apply to the Court, and in such a case I should think it might be the duty of the Court to inquire, because the Court might at least make an order to have the children removed to the poorhouse, where they would be maintained. Or again, if the petitioner, being a relative—and I do not know that in a matter of this kind a brother is in a better position than an uncle or other near relative—if the petitioner had come forward and said that though not legally bound to support his brother and sister, yet from motives of duty or affection he wished to maintain them in his own house, I should have given the most favourable consideration to such a petition. But the petitioner makes no complaint against the charity which is maintaining these children, and does not profess the ability or desire to bring up the children himself. He asks us to order the removal of the children from the school where they are at present being well cared for, and to put them in some other institution not designed, except that it is Roman Catholic; and the only ground upon which he asks this order is that he is a Roman Catholic, and that he wishes the children also to be brought up as Roman Catholics. Now, I cannot entertain the doctrine that a brother is entitled to impose his religious opinions on a brother or sister whom he is not maintaining, or that he is entitled, on the ground of difference of religious opinion, to insist on the children being removed from a charitable institution to another institution of the same kind. I agree with the observations quoted from a recent case, that where the question is between a charity and relatives who are willing to maintain the child, or between one relative and another relative, the religious opinions of the parents or of the family may be an element. But no question of that sort is here raised.

I may say that, like your Lordship in the chair, I have no knowledge of the institution called Quarrier's Homes, but that is not necessary, for there is no complaint against the Home, and in the absence of any complaint, I assume that the children are comfortably maintained according to their station in life. My opinion therefore is that the petition should be dismissed, and that it is not necessary that a curator should be appointed.

LORD KINNEAR.—I agree with your Lordship in the chair that a curator must be appointed for the purpose of enabling us to determine whether the children should be left where they are at present or should be given up to

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No. 170. the petitioner. I think with both your Lordships that the petitioner's statement of the reasons for which he seeks the removal of the children is extremely unsatisfactory. The reasons are very vague and indefinite. But still I am not prepared to throw out the petition at once. The petitioner, though not the tutor-at-law of the children, is in the popular sense their natural guardian. He is the eldest brother, being thirty years of age, and these children are twelve years of age, both their father and mother being dead. It was the obvious duty of an elder brother to look after these two young children, and he says that he did so. His statement comes to this, that as the best way open to him of doing his duty to the children, he put them into the custody of Mr Quarrier. Now, it is true that the petitioner is not entitled as matter of right to demand the custody of these children. But Mr Quarrier is just as little entitled as matter of right to insist upon retaining them in his custody. The petitioner now says that he thinks that he has made a mistake in handing them over to Mr Quarrier, and he wishes them restored to him. He says that they are not being brought up in the faith in which they were baptised and brought up until their father's death, and in the second place, that the children themselves desire to be restored to his (the petitioner's) care, but that Mr Quarrier refuses to hand them over. These are the only specific statements or grounds alleged, and I think they are such as to justify inquiry, though I do not say that either or both would be conclusive if there were strong grounds the other way. Then the petitioner says that he has made arrangements to have the children educated and brought up in a Roman Catholic institution, and for that purpose he is to keep them in his own house or the house of a relative. Now, these averments are very vague, but there is enough to necessitate inquiry, and to make us appoint a curator, who may see the children and ascertain how they are being maintained at present. That we have a discretion, and therefore a duty in the matter, I have no doubt whatever. But we do not know the facts with reference to which our discretion must be exercised.

The LORD PRESIDENT was absent.

THE COURT, before answer, appointed Mr Bremner P. Lee, advocate, to be curator ad litem to the children, and allowed him to see the process.

JOHN MACKAY, S.S.C.—DOVE & LOCKHART, S.S.C.—Agents.

No. 171. ANGUS MACKAY, Pursuer (Appellant).—*Guy*.
 JOHN MACKENZIE, Defender (Respondent).—*C. K. Mackenzie—Glegg*.
 June 12, 1894. *Process—Sheriff—Interlocutor—Findings in fact—Act of Sederunt, 15th February 1851.*—An interlocutor of a Sheriff disposing of a case in which a proof had been led contained no findings in fact as required by the Act of Sederunt, 15th February 1851. The Court *remitted* to the Sheriff to recall the interlocutor, and pronounce one in the form prescribed by the Act of Sederunt.

2D DIVISION.
 Sheriff of
 Ross-shire.

IN an action raised in the Sheriff Court at Dornoch by Angus Mackay, farm-servant, against John Mackenzie, farmer, for payment of £34 as wages, and of £20 in name of damages, the Sheriff-substitute (Mackenzie), after a proof, pronounced findings in fact, and decerned against the defender for payment to the pursuer of £33, 15s. and £5.

On appeal the Sheriff (Johnston), on 14th April 1894, pronounced this interlocutor:—"Having considered the minutes of debate for the parties,

proof, record, and whole process, recalls the interlocutor of the Sheriff-substitute, and, for the reasons stated in the subjoined note, assoilzies the defender from the conclusions of the summons."

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The pursuer appealed.

At the commencement of the argument Lord Young pointed out that the Sheriff had failed to pronounce findings in fact as required by the Act of Sederunt of 15th February 1851, and his Lordship expressed the opinion that the case should be remitted to the Sheriff in order that he might correct his interlocutor.

Counsel for the defender admitted that the undernoted cases¹ appeared to make that course imperative, but contended that in the recent case of *Caird v. Sime*,² where, under the Judicature Act, 1850, the Second Division ought to have inserted in their interlocutor a finding upon a certain matter of fact, the House of Lords had, in order to save the delay and expense of a remit to have the interlocutor corrected, and with the consent of both parties, permitted the hearing of the appeal on the merits, the views of the majority of the Court upon the matter of fact being clear from the opinions. That would seem to indicate that the Court was entitled, both parties consenting, to hear the appeal as if the interlocutor was correct in point of form, the Sheriff's opinions being shewn in his note.*

THE COURT (LORD JUSTICE-CLERK, LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER) pronounced this interlocutor:—"In respect the Sheriff, in the interlocutor complained of, has failed to comply with the provisions of the Act of Sederunt of 15th February 1851, remit to the Sheriff to recall the said interlocutor, and to pronounce an interlocutor on the defender's appeal against the interlocutor of the Sheriff-substitute in the form prescribed by the Act of Sederunt."

JAMES HEPBURN, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

GLASGOW POLICE COMMISSIONERS, Pursuers (Respondents).—*Lees—Deas.* No. 172.
THOMAS DONALD, Defender (Appellant).—*Strachan—A. S. D. Thomson.*

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Glasgow
Police Com-
missioners v.
Donald.

Police—Private improvement assessment—Abortive assessment—Reparation—Action of damages against collector—General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), sec. 106.—An action by the Police Commissioners of a burgh against a ratepayer of the burgh for recovery of a private improvement assessment imposed by them was dismissed on the ground that the ratepayer had not received notice of the imposition of the assessment at least two weeks before the day fixed for the hearing of appeals, as required by section 106 of the General Police and Improvement Act, 1862. The Commissioners then raised an action against their collector for payment of the amount of the assessment, averring that their failure to recover the assessment had occurred through his neglect to send the notice within the statutory time.

The Court *dismissed* the action, holding that the pursuers had not proved loss through the defender's fault, in respect that it had not been determined whether the sum sued for might not still be recovered from the ratepayer by re-imposing the assessment and giving him timeous notice under the statute.

¹ Glasgow Gas-Light Company v. Glasgow Working-Men's Total Abstinence Society, July 11, 1866, 4 Macph. 1041, 38 Scot. Jur. 530; Melrose v. Spalding, June 25, 1868, 6 Macph. 952, 40 Scot. Jur. 545.

² Caird v. Sime, June 13, 1887, 14 R. (H. L.) 37, Lord Watson, p. 42.

* Sheriff Court Act, 1853 (16 and 17 Vict. cap. 80), sec. 13.

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2D DIVISION.
Sheriff of
Lanarkshire.

IN January 1893 the Police Commissioners of Glasgow raised an action in the Sheriff Court at Glasgow against Thomas Donald, house-factor, 83 Renfield Street there, for payment of £28, 0s. 5d.

The pursuers averred that on 14th June 1892 they, as in right of the Police Commissioners of Govanhill, under the City of Glasgow Act, 1891 (54 and 55 Vict. cap. cxxx.), brought an action in the Sheriff Court at Glasgow against David Sommerville, 34 Calder Street, for payment of £28, 0s. 5d., being the amount of a private improvement assessment imposed on Sommerville, on 13th October 1891, by the Police Commissioners of Govanhill under the powers of the General Police and Improvement (Scotland) Act, 1862, as his proportion of the cost incurred by the Commissioners in the improvement of Calder Street; that on 22d September 1892 the Sheriff-substitute (Guthrie) dismissed that action in respect that Sommerville had not received notice of the imposition and allocation of the assessment upon him at least two weeks before the day fixed by the Commissioners for the hearing of appeals, as required by section 106 of the General Police Act, 1862*; that the defender was at the time of the imposition of the assessment the collector of the burgh of Govanhill; that as such it was his duty to give due notice, as required by the statute, to Sommerville, of the imposition of the said private improvement assessment; that in breach of his duty as collector the defender failed to give such notice to Sommerville within the time required by the statute; and that in consequence of the defender's said failure in duty the pursuers had been held not entitled to recover the said sum of £28, 0s. 5d. from Sommerville.

The pursuers pleaded;—(2) The defender having culpably neglected and failed to discharge duties imposed on him by statute, should be held liable in the consequences of such failure or neglect. (3) The pursuers having suffered loss to the extent sued for in consequence of the defender's culpable failure or neglect of his statutory duty, are entitled to decree, as craved.

The defender averred that the loss, if any, sustained by the pursuers had not been caused by any negligence on the part of the defender, but was occasioned by the fault of the clerk to the Police Commissioners of Govanhill in not giving the defender due intimation of the resolution of the Commissioners imposing the assessment, and fixing the day for hearing appeals.

The defender pleaded;—(1) The action is irrelevant. (7) Any loss sustained by pursuers not having been occasioned by or through the negligence of the defender, he ought to be assoilzied.

A proof was allowed. It was proved that the defender was not present at the meeting of the Commissioners at which the assessment

* The General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), section 106, enacted,—“The said rates or assessments may be imposed and levied yearly, half-yearly, or at such other periods as the Commissioners may think fit, and shall be payable at such times as they appoint; and at the meeting imposing the same the Commissioners shall appoint a day on which such rates or assessments shall be payable, and another day on which appeals by any parties complaining that they have been improperly rated or assessed may be lodged with the clerk or collector, and another day or days on which appeals in reference to such rates or assessments shall be heard by the Commissioners; and notice to each party intended to be so rated or assessed, stating the particulars of the intended rate or assessment as regards such party, and specifying the several days fixed by the Commissioners as aforesaid shall be sent by the clerk or collector through the post-office at least two weeks preceding the day which may be fixed for hearing the appeal of such party. . . .”

was imposed, but there was a conflict of evidence as to whether the clerk to the Commissioners who was present at that meeting had duly instructed the defender to serve the notices.

On 8th January 1894 the Sheriff-substitute (Guthrie) pronounced this interlocutor:—"Finds, for the reasons stated in the note, that the pursuers have not proved that they have suffered loss through the fault of the defender as condescended on: Therefore assoilzies the defender."*

On appeal, the Sheriff (Berry) pronounced this interlocutor:—"Finds that in October 1891 the defender was collector of the burgh of Govanhill, which has since been annexed to the city of Glasgow, and that in the said month of October he failed in his duty as such collector by omitting, notwithstanding instructions received from the Burgh Commissioners, to issue to one David Sommerville a notice of a private improvement assessment in sufficient time in accordance with the provisions of the General Police and Improvement Act, 1862, 25 and 26 Vict. cap. 101: Finds that the pursuers, as succeeding to the rights of the said Commissioners in terms of the City of Glasgow Act, 1891, have sustained loss through, and in consequence of, the defender's said failure in duty, and that the loss they have so sustained is the sum of £28, 0s. 5d., the amount of said assessment, which, through the defender's failure to give the statutory notice, is not now recoverable from the said David Sommerville: Therefore . . . recalls the interlocutor appealed against: Finds the defender liable in damages to the pursuers to the said amount of £28, 0s. 5d., for which decerns against the defender."

The defender appealed, and argued;—Under the 106th section of the Act of 1862, the notice was to be sent to the person assessed by the

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* "NOTE.— . . . The failure to give such notice was, it is now averred, due to the negligence or error of the present defender, who was employed by the Commissioners to collect their rates and assessments, and also to issue the requisite notices. There is a question which is not, I think, very clear upon the evidence, whether he was properly qualified and duly instructed by his employers or their clerk, and whether the issuing of the notices was not properly a duty of the clerk. It does appear that it was naturally within the clerk's province, if not to send out the notices, at least to make sure that they were dispatched by the collector, who was not a lawyer, so as to meet the requirements of the Act, but I should have at least some difficulty in holding that Mr Donald was not duly instructed in this matter by the clerk.

"The case rather presents itself to me in this way. An action of damages cannot succeed, unless the pursuer clearly shews that he has suffered a loss by the fault of the defender. In this case it is not established beyond doubt that the pursuers are unable still to recover their private improvement expenditure from Mr Sommerville, the proper debtor. They have been defeated in an action against him, on the ground that the money which they sued for as private improvement assessment had not been duly imposed upon him as such an assessment, but it is not yet established that it is totally irrecoverable as against him. So far as appears—and I have heard a second and full argument on the point—it is still in the power of the pursuers, who are vested with every right and power possessed by the Commissioners of Govanhill, to allocate and impose the assessment anew, and to allow Sommerville an opportunity of appealing against it, under new notices duly issued. I do not know that there is any decision directly to the effect that this may be done, but it is suggested by the Lord Chancellor (Hatherley) at the end of his opinion in *Campbell v. Leith Police Commissioners*, Feb. 28, 1870, 8 Macph. (H. L.) 39, and no reason has been stated at the bar why inept proceedings, upon which this charge against the defender is founded, should be a bar in the way of another and regular allocation and notice. Unless this is made clear by the pursuers I am unable to find that they have sustained the loss which they seek to make good. . . ."

No. 172. "clerk or the collector." It was the natural duty of the former, for he always attended the meetings, and in the present case it was proved that the collector was not present at the meeting on the 13th October. Even assuming that culpable neglect of duty was proved against the defender, the action was premature, for it had not yet been determined that the pursuers had suffered loss to the extent sued for. Sommerville was still liable to pay the assessment, and the pursuers were quite entitled to impose the assessment anew, and allow him an opportunity of appealing against it under new notices duly issued.¹ The owner of the property assessed and the Commissioners were respectively debtor and creditor for the assessment as soon as the expenses were incurred in executing the works.²

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Argued for the pursuers;—They had no power to re-impose the assessment, and even if they had the defender was proved to have neglected his duty, and was liable in the loss which resulted.

LORD JUSTICE-CLERK.—This case relates to a private improvement assessment, which is the name given by the statute to a determination of the amount of expenses incurred by the authority in doing certain work which an individual ratepayer was bound to do and has failed to do. The statute provides that when the amount of these expenses is ascertained they may be charged as being a private improvement assessment. The object of that is plain. It is to enable the summary machinery of the statute for recovering assessments to be applied for the recovery of such expenses.

The facts are that in this case determination was given of the amount, and notice was given after that determination of the date on which an appeal might be stated; and the time for that appeal was fixed, but by some misfortune sufficient notice, viz., a fortnight, was not given to the party assessed of the sitting of the Court of Appeal. Accordingly he objected to pay the assessment on the ground that he did not get sufficient notice of an opportunity for stating an appeal. When an action was raised against him that action was unsuccessful on that ground.

The Commissioners have now raised an action of damages against the officer who they say should have given the proper notice of a fortnight before the day of assessment. They say that they have suffered loss and damage to the extent of the amount of that assessment which would have been paid by Mr Sommerville, but was not paid in respect of his not having got that notice. But we have no evidence before us that they have suffered any such loss. They have not taken any steps for recovering that money from Mr Sommerville except those which were based upon the bad notice. It was stated in the course of the argument that if in consequence of an insufficient notice the assessment cannot be recovered under an original levy, the Commissioners would still have power to fix a proper date for an appeal upon the assessment, and also that the assessment which is made upon a particular individual constitutes a debt due by him. In this case it is plainly a debt due by him turned into an assessment for the convenience of recovery. Is it to be said that he will be relieved of his obligation to pay simply from the fact that there has

¹ Campbell v. Leith Police Commissioners, Feb. 28, 1870, 8 Macph. (H.L.) 31, Lord Chancellor Hatherley, p. 39, 42 Scot. Jur. 310; M'Intosh v. Leith Commissioners of Police, May 18, 1875, 12 S. L. R. 455.

² Hornsey Local Board v. Monarch Investment Building Society, 1889, 23 Q. B. D. 149; Currie v. W. & D. M'Gregor, Nov. 16, 1871, 44 Scot. Jur. 68.

been some blot in the proceedings which prevents it being recovered under the first notice? That question has never been brought up, and has never been decided. When the Commissioners were asked what they had to say about it they said, "We are quite willing to hand over our right to press that plea to this defender." But that is not a ground for holding that any damages have been established by the evidence which is before us. Therefore on these grounds I think the general result at which the Sheriff-substitute arrived was right, although I think he erred in the case in assoilzieing the defender, because that would have practically precluded an action upon similar grounds relative to the same subject. It may turn out that they cannot recover this amount. If that were so, they may have a right to recover it from their collector as damages. Therefore, while adhering to the practical decision at which the Sheriff-substitute arrived, we confine ourselves simply to dismissing the action.

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LORD YOUNG.—I do not think that there is any practical distinction between dismissing an action such as this, and assoilzieing the defender from its conclusions. But on the case itself my opinion is entirely with the Sheriff-substitute, and against the views upon which the Sheriff has proceeded. The case is based really upon these words of clause 106 of the General Police Act,—“And notice to each party intended to be so rated or assessed, stating the particulars of the intended rate or assessment as regards such party, and specifying the several days fixed by the Commissioners as aforesaid, shall be sent by the clerk or collector through the post-office at least two weeks preceding the day which may be fixed for hearing the appeal of such party.”

The Sheriff-substitute says,—“There is a question which is not, I think, very clear upon the evidence, whether he (the collector) was properly qualified and duly instructed by his employers, or their clerk, and whether the issuing of the notices was not properly a duty of the clerk. It does appear that it was naturally within the clerk's province if not to send out the notices, at least to make sure that they were despatched by the collector, who was not a lawyer, so as to meet the requirements of the Act, but I should have at least some difficulty in holding that Mr Donald was not duly instructed in this matter by the clerk.” I also think that the evidence is doubtful upon this point, and although, with the Sheriff-substitute, I should not have been prepared to find that Mr Donald was not instructed, I am not prepared upon the evidence to affirm that he was. Not being at the meeting, he was not to know when the assessment was imposed and the appeal day appointed, but the clerk was, and there is a conflict of evidence as to whether the clerk duly instructed the collector to send the notice through the post-office, and unless we are able to affirm the proposition that the collector was properly instructed, there would be an end to the case entirely upon that ground, and I, for my part, am not prepared to affirm that proposition.

But irrespective of that, I agree with the Sheriff-substitute in holding that on the assumption that the collector was bound to issue notices fourteen days before the day appointed for the appeal, and was duly instructed to issue them, and that he failed, there is no case stated and no case proved that any damage arose to the Commissioners or their constituents in consequence. I think it is abundantly plain that if a party to whom an assessment applies declines to pay upon the ground that he has not got notice fourteen days before the day appointed for hearing an appeal, the proper remedy, which is quite competent

No. 172. under the Act of Parliament, is to give him notice again fourteen days before a day appointed to hear his appeal. But I do not know that it is necessary for us to decide that here, or that we could decide it effectually as in a question with Mr Sommerville, Mr Sommerville not being present and not being a party to this case.

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But unless we determine that the assessment is lost for all time in respect that the defender's failure to give notice was an irremediable slip, the case of damage relied upon by the pursuers fails. For it may be, for anything that we can decide in this case in Mr Sommerville's absence, that the assessment is recoverable, and that the only damage occasioned to anybody will be the damage to the Commissioners, or as many of them as are necessary to form a quorum, meeting upon another day upon which to hear this appeal. That may be no stateable damage at all. My impression is, as I have already indicated, that if Mr Sommerville was here, and we could determine the question, I should be inclined, for my part, to hold that he was still liable for the assessment, although he was entitled to have fourteen days' notice of a day appointed for hearing his appeal, if he chose to lodge one. In his absence we cannot certainly make affirmative findings which will affirm that.

Whatever may be the proper form of findings, I am quite prepared for my part to revert to the Sheriff-substitute's judgment, holding that this action cannot be sustained.

LORD RUTHERFURD CLARK.—I am of opinion that this action is premature, as it has not yet been determined that the assessment cannot be recovered, and I should prefer that it should be simply dismissed.

LORD TRAYNER.—This action of damages is based upon the statement of a plea for the pursuers that they have suffered loss to the extent sued for through the defender's fault. I think the alleged fact upon which the action is based is not substantiated, and that the pursuers have not proved that they have suffered any damage through the act of the collector. Upon that ground I am for dismissing the action.

THE COURT pronounced the following interlocutor:—"Find that it has not yet been determined whether the sum of £28, 0s. 5d. sued for cannot still be imposed as a private improvement assessment on Donald Sommerville, and recovered by the pursuers from him, and that the pursuers have not as yet proved that any loss has been sustained by them through fault on the part of the defender: Therefore sustain the appeal, and recall the interlocutor appealed against, as also the interlocutor of the Sheriff-substitute dated 8th January 1894: Dismiss the action, and decern."

CAMPBELL & SMITH, S.S.C.—JOHN VEITCH, Solicitor—Agents.

No. 173. JAMES MACDONALD AND OTHERS, Pursuers (Respondents).—*Watt—Trotter.*

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JAMES CAMERON AND OTHERS, Defenders.
JOHN JAMES DALGLEISH, Defender (Appellant).—*Johnston—C. N. Johnston.*

Crofter—Nature of right in holding—Property—March Fence—Crofters Holdings Act, 1886 (49 and 50 Vict. c. 29)—Act 1661, c. 41.—Held that a crofter within the meaning of the Crofters Holdings Act, 1886, is the tenant,

not the proprietor, of his holding, and that, therefore, he has no title to insist, under the Act 1661, c. 41,* upon the proprietor of lands adjoining his croft paying half the cost of the march fence. No. 173.

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In August 1893 James MacDonald and three others, crofters in Plocaig, Ardnamurchan, raised an action in the Sheriff Court, Oban, against James and Alan Cameron, farmers, Glendryen, Ardnamurchan, and John James Dalgleish, Esq., of Ardnamurchan, jointly and severally, or severally, to have the defenders ordained "to unite with the pursuers in erecting a march fence or dyke between the common pasture of the township of Plocaig and the farm of Glendryen on the estate of Ardnamurchan, and that to the extent of one-half thereof," and failing the defenders complying with the above prayer, for warrant to the pursuers to erect the said march fence, and for an order on the defenders "to pay to the pursuers one-half of the cost thereof."

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Sheriff of
Argyllshire.

The pursuers averred that they were crofters within the meaning of the Crofters Holdings Act, 1886, and occupied their holdings under the defender John James Dalgleish, and that the other defenders were tenants of the farm of Glendryen under Mr Dalgleish.

They further averred;—(Cond. 2) "The said farm of Glendryen marches with the common pasture of the township of Plocaig, but there is no march fence." (Cond. 3) "In consequence thereof the cattle, both of the pursuers and the defenders, stray into each other's territory and cause mutual damage." (Cond. 4) "It is therefore necessary in the interests of all the parties that a march fence or dyke should be erected between the said farm and township, and the defenders are jointly and severally, or severally, liable to the extent of one-half of the expense of erecting such a fence or dyke. The pursuers, as crofters foresaid, are heritors within the meaning of the Statutes 1661, c. 41, and 1685, c. 39, and as such are entitled to insist upon the concurrence of the defenders as craved in erecting a march fence between their respective lands."

The pursuers pleaded, *inter alia*;—(1) The defenders, jointly and severally, or severally, are either bound to unite with the pursuers in the erection of a march fence or dyke to the extent of one-half, or are so liable in one-half of the expense of the erection thereof. (3) *Separatim*, The pursuers being crofters within the meaning of the Crofters Holdings (Scotland) Act, 1886, are proprietors of their respective holdings within the meaning of the March Fence Acts, and the defenders, jointly and severally, or severally, are bound to concur with the pursuers in the erection of a march fence as craved.

The defenders pleaded, *inter alia*;—(2) The action being incompetent and irrelevant, ought to be dismissed, with costs.

On 21st November 1893 the Sheriff-substitute (MacLachlan) pronounced the following interlocutor:—"Finds that the pursuers are crofters within the meaning of the Crofters Holdings (Scotland) Act, 1886, and occupy holdings on the estate of Ardnamurchan, the property of the defender John James Dalgleish, including common grazing ground adjoining the farm of Glendryen, also on said estate, but not separated from it by a march fence: Finds that this action is one calling upon the said John James Dalgleish as proprietor, and the other defenders as tenants, of the said farm of Glendryen, to unite with the pursuers in

* The Act for Planting and Enclosing of Ground, 1661, c. 41, enacts, *inter alia*;—"That where enclosures fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dike which parteth their inheritance."

No. 173. erecting a march fence or dyke bounding the said common pasture, but finds that neither by statute nor by common law have the pursuers any right or title to make this demand: Therefore finds the action irrelevant, and dismisses the same.*

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On 13th April 1894 the Sheriff (M'Kechnie) recalled the interlocutor of the Sheriff-substitute, "in so far as it finds the action as directed against the defender John James Dalglish to be irrelevant: *Quoad ultra* adheres," and remitted the cause to the Sheriff-substitute to proceed.

On 11th May 1894 the Sheriff-substitute allowed a proof, and thereafter granted leave to Mr Dalglish to appeal.

Argued for the appellant;—The Sheriff-substitute had decided the case rightly. A crofter was not a heritor, and therefore the Act of 1661, cap. 41, did not apply to his case. The Crofters Holdings Act, 1886, again and again recognised, by using the words "tenant," "tenancy," "rent," &c., that, though the tenure of crofters was altered by certain privileges being given to them, they were still to remain tenants as they had been before its date. There could not be two heritors for one subject, and the Act did not oust the landlord; and further, they could not be looked upon as proprietors, as they had no power of alienating or redeeming their holdings, and, moreover, could be removed, like ordinary tenants, by the landlord, if they violated any of the conditions on which they held their crofts.

Argued for the respondents;—Crofters had an "inheritance" within the meaning of the Act 1661, cap. 41. They had a right in perpetuity, which passed to their heirs, and such a right in perpetuity gave them an interest and title to insist in the action. Their position as regarded forfeiture of their holding on non-payment of rent was analogous to that

* "NOTE.— . . . I must dismiss the action as irrelevant. In the first place, there is no common law of march fence in the law of Scotland (see rubric in the case of *Strang v. Stewart*, 31st March 1864, 2 Macph. 1015), and secondly, the statutes regarding march fences, in particular the Acts 1661, c. 41, 1669, c. 17, and 1685, c. 39, apply only to proprietors and not to tenants. A proprietor may be compelled by a neighbouring proprietor to erect a march fence or to concur with him in erecting it, and when the march fence is erected the tenants must preserve it,—that is to say, the obligation of keeping it up devolves on the tenants (*Dudgeon v. Howden*, 23d November 1813, F. C.) The pursuers are crofters on the estate of the defender Mr Dalglish, or, according to the definition in the Crofters Holdings (Scotland) Act, 1886, they were at the date of the passing of that Act tenants of holdings from year to year, and Mr Dalglish is their landlord, and I cannot give them any rights other than those which they had as yearly tenants that are not given by the Act. Their position may, popularly speaking, be considered equivalent to, and perhaps in some respects even better than that of proprietors or owners, but they are nowhere in the Act treated or alluded to as proprietors. The only rights given to them analogous to those of proprietors are their fixity of tenure or indefeasibility of title, and a limited power of bequeathing the holding to members of their families, but these are hedged about by very stringent conditions, none of which are applicable to proprietors, and on violation of these conditions they may be removed by the landlord in the same way as ordinary tenants. They cannot sell, assign, sublet, or sub-divide their holdings, neither can they borrow money on the security of their holdings, because if the creditors attempt to attack their holdings and thus make them notour bankrupt, the holdings are forfeited and the landlord may resume possession. These are a few of the considerations which make it perfectly clear to me that it was never intended by this Act to put crofters in the position of heritors in the sense of the old Acts regarding march fences, and enable them to put forward a claim such as that in the present action. . . ."

of feuars, who might be turned out of their feus in similar circumstances, No. 173.
and feuars were in the position of being proprietors of their feus. They
only insisted on the action as directed against Mr Dalgleish.

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LORD PRESIDENT.—I think that the Sheriff-substitute is right, and his note contains a very intelligent and lucid statement of his view of the case. The question before us really comes to be whether the pursuers are in a position to enforce against their own landlord the provisions of the Act 1661, cap. 41.

The whole of the Crofters Holdings Act of 1886 uses language suggestive of the relation of landlord and tenant, and the question is, does the Act of 1661 apply to a case of this kind? It seems to me that that Act was intended to encourage landlords in the full development of their estates, and it therefore provided that half of the cost of enclosing lands shall be paid by the one of two contiguous proprietors who does not initiate the improvement, to the proprietor who does. Now, are the pursuers in the position contemplated by that Act? The Crofters Holdings Act negatives the idea at every turn. They are tenants with certain privileges—that is, they cannot be removed from their holding if they comply with certain conditions, but they are not proprietors of the land, and they cannot dispose of it at their own hands. I am, therefore, clearly of opinion that the Act of 1661 does not apply to them. The mere proposition that they are heritors or proprietors seems to me to raise countless difficulties, and I cannot see my way to affirm it.

LORD ADAM.—I am of the same opinion. The Crofters Holdings Act found crofters in the position of tenants liable to be turned out at any minute at the will of the landlord. The Legislature thought that this was not a satisfactory state of affairs, and I agree that it is an astonishing proposition to say that the Act, in altering that, has put the crofters in the position of landlords.

LORD M'LAREN.—This action is instituted under the old Scots Statutes providing in terms for compensation to a proprietor who encloses his land to the extent of half of the expense incurred, by giving a right to recover it from the adjacent proprietor, who also takes benefit from the erection of the fence.

In considering whether crofters are in a position to exercise the powers conferred by the Acts upon heritors, it is not necessary to consider whether or not they are heritors in the sense of having to contribute to the rates or of having the right to attend church meetings. Heritors in the sense of the Act 1661, cap. 41, are proprietors of heritable estate. They must shew that they have a right of property in the subjects which they desire to fence. Now, we find in the Crofters Act a peculiar species of tenure, which is said by the Sheriff to amount to a right of property, but I do not think that it has that character. Crofters before the passing of the Act were nothing but annual tenants, and we know that by custom many such families enjoyed the benefits of a tenancy perpetually renewed, and in few cases were they evicted if they paid their rents, although the custom was not enforceable in a Court of law. Now by statute a crofter has a legal right to remain in possession, because the Act of Parliament provides that he shall not be removed if he complies with certain conditions. In giving this right the Legislature never intended, as is seen from the phraseology of the Act, that the tenure should be essentially different from what it had been, viz., annual tenancy. They are not tenants for a specific number of years, and if they fail to pay their rent, or become bankrupt, or fail to observe certain

No. 173. other conditions, crofters may still be removed, and the landlord may then put in motion the privileges of eviction which he possesses in the case of ordinary annual tenants. This is a very different right from that of property. These crofters have more than an ordinary common law right of tenancy, but they have not enough to give them the right to compel their landlord to join with them in erecting a march fence. I therefore agree with your Lordships.

LORD KINNEAR was absent.

THE COURT sustained the appeal, and dismissed the action.

M. GRAHAM-YOOLL, Solicitor—DALGLEISH & BELL, W.S.—Agents.

No. 174. ROBERT CAMPBELL M'KENZIE, Pursuer (Respondent).—*Ure*—*M'Lennan*.
JAMES MURDOCH CAMPBELL, Defender (Reclaimant).—*D. Dundas*—*Guy*.
June 12, 1894. MacDonal v. Dalgleish.
June 13, 1894. M'Kenzie v. Campbell.

Bankruptcy—Agent and Client—Funds in agent's hands for special purpose—Defence in criminal trial.—A, a person charged with crime, wrote on 12th October to a law-agent, asking him to act for him in the criminal charge. On the same day he sent him £285, and authorised him "to use the same for the purposes of my defence in the criminal charge against me . . . as also to pay on my behalf any sum or sums that I may direct you." On 25th October A's estates were sequestered. The agent continued to make disbursements in connection with the defence, and further made other payments on A's directions, until 27th December, when A pleaded guilty and was sentenced. In an action of accounting at the instance of the trustee in the sequestration against the agent, held that the mandate to the agent was a revocable contract which fell by the sequestration, and that, therefore, the defender was bound to account to the trustee for all sums in his hands belonging to A at the date of the sequestration.

Bankruptcy—Arrestments within sixty days of sequestration—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 108.—Section 108 of the Bankruptcy Act, 1856, enacts that "no arrestment . . . of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual, and such funds or effects, or the proceeds of such effects if sold, shall be made forthcoming to the trustee."

Held that while arrestments used within the sixty days are ineffectual to create a preference in the arresting creditor, they are effectual to lay a *nezus* on the funds to the effect of preventing the arrestee from paying them away to the prejudice of the trustee on the estate, to whom they were transferred by the sequestration.

1ST DIVISION.
Lord Kin-
cairney.

IN November 1893 Robert Campbell M'Kenzie, trustee on the sequestered estates of Thomas James Fraser, corn-factor, Glasgow, raised an action in the Court of Session against James Murdoch Campbell, writer, Glasgow, concluding for an account of his intromissions with Fraser's estate, and for payment of £500, as the balance of his intromissions.

From the averments of parties the following facts appeared:—

On 11th October 1893 Fraser was apprehended on various charges of forgery.

On 12th October Fraser wrote to Mr Campbell, asking him to "act for me in the criminal charge presently against me."

On the same day Fraser handed to Campbell £285, 5s. 2d., and sent him the following letter:—"With reference to the money which I have instructed you to receive from Mr Howie, my cashier, and take possession of, I request and authorise you to use the same for the purposes of my defence in the criminal charge against me in such manner as you may think advisable, as also to pay on my behalf any sum or sums that I may direct you.—Yours truly."

In subsequent letters he directed Campbell to pay various sums for No. 174. clothing, &c., and "to pay for my maintenance in prison while awaiting trial."

On 14th October a creditor of Fraser used arrestments in Campbell's hands of all funds belonging to his debtor.

On 25th October Fraser's estates were sequestrated, and Mr M'Kenzie was appointed trustee thereon, and was confirmed on 13th November. The day after he was confirmed he called on Campbell to account for his intrusions with Fraser's estate.

On 27th December Fraser pleaded guilty, and was sentenced to a term of penal servitude.

Campbell lodged in process an account which more than exhausted the sum placed in his hands by Fraser. The account did not shew the dates on which the various payments in connection with preparing the defence and the prisoner's maintenance were made, but it was admitted that a considerable portion of the account had been incurred between the date of the arrestments and the date of the sequestration.

The pursuer averred;—"The whole intrusions took place within sixty days of Fraser's sequestration, and the said transaction under which they took place constituted an illegal preference in the defender's favour, which is null and void under the Act 1696, c. 5."

The defender averred, *inter alia*, that the arrestments of 14th October were invalid and ineffectual, in respect they were used in his hands within sixty days of Fraser's sequestration.

The pursuer pleaded, *inter alia*;—(4) The funds in the defender's hands having been validly arrested on 14th October 1893, the defender is bound to pay over to the pursuer the whole funds in his hands as at said 14th October, under deduction only of sums actually due to himself at that date; or otherwise, and in any view, the estates of the said Thomas James Fraser having been sequestrated on 25th October 1893, the defender is bound to pay over to the pursuer the whole funds in his hands as at said 25th October, under deduction only of sums actually due to him at said last-mentioned date.

The defender pleaded, *inter alia*;—(2) The money in the defender's hands having been specially appropriated to a special purpose under a new contract, the defender is not bound to count and reckon until that purpose is fulfilled, and then only for the balance. (7) The pretended arrestments referred to on record having been invalid and ineffectual, and not having attached anything in defender's hands, did not bar the defender from intruding with the funds in his hands.

On 22d March 1894 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"Finds that the defender is bound to pay to the pursuer the whole funds which belonged to the bankrupt, Thomas James Fraser, and were affected by the arrestment used in the defender's hands on 14th October 1893, under deduction of sums due to him by the bankrupt at that date; and also to pay any sums belonging to the bankrupt which came into the possession of the defender between the said date and 25th October 1893, and were in his possession at that date, being the date of sequestration: Therefore, to that extent and effect sustains the fourth plea in law for the pursuer, and to that extent and effect repels the pleas for the defender, and appoints the cause to be enrolled for further procedure."*

* "OPINION.—(After stating the facts his Lordship proceeded)—The chief question raised is whether, after Fraser's bankruptcy, the defender—his agent—was entitled, in the circumstances averred, to expend the bankrupt's funds in

No. 174. The defender reclaimed, and argued ;—The money was handed over to him by Fraser, under a distinct and separate contract, for a special purpose.

June 13, 1894.
M'Kenzie v.
Campbell.

his hands in defending Fraser against the criminal charge, and in providing for his aliment while in prison.

"The pursuer's plea on this point is,—'In any view the estates of the said Thomas James Fraser having been sequestered on 25th October 1893, the defender is bound to pay over to the pursuer the whole funds in his hands as at said 25th October, under deduction only of sums actually due to him at said last-mentioned date.'

"The defender's plea is,—'The money in the defender's hands having been specially appropriated to a special purpose under a new contract, the defender is not bound to count and reckon until that purpose is fulfilled, and then only for the balance.'

"There are subordinate questions which will be referred to afterwards. But the pursuer contends that this legal question, distinctly and sharply brought out by the pleas, should be decided as a question of law, and on the relevancy of the defence. He would not renounce probation, but held out the hope that the most of the subordinate questions might be adjusted, and submitted that, in any view, if that question were decided for him, any inquiry necessary would be greatly narrowed.

"It is not without some misgiving that I have entertained this suggestion. But I have come to the conclusion that a definite and important question of law is distinctly raised on the defender's averment and the pleas, and that it ought to be decided against him, assuming the truth of all his averments, about which, in fact, there is not much, if there is any, dispute.

"I assume, therefore, that the transaction said to have taken place on the 12th of October was unchallengeable, and that Fraser's money came unobjectionably into the defender's hands. There is in this view no question as to the Act 1696, cap. 5.

"It is necessary to see clearly what the defender's averment as to the footing on which he received Fraser's money amounts to. For it is not an averment of a contract between them that the defender should conduct Fraser's defence and aliment him for the sum of £250, 5s. 2d., to be paid to the defender irrevocably. It is no more than an averment that Fraser employed the defender as his agent to conduct his defence, and put money in his hands to enable him to fulfil that employment. It is an averment of a mandate in the defender's favour essentially revocable. There was no proposal to amend the averment, and no suggestion that such an interpretation of it was not in accordance with the defender's understanding and intention. That could hardly have been suggested, looking to the correspondence between Fraser and the defender, and especially to Fraser's letter of 12th October. That is one specialty of this transaction, viz., that the money was placed in the defender's hands on a revocable mandate. The other specialty is that the money was appropriated in the defender's hands for the benefit of the bankrupt himself.

"The question then is, whether money put in the hands of a law-agent on the footing explained was taken out of the bankrupt's estate, or was so appropriated as to defeat the title of the trustee?

"The pursuer contended that on the defender's averments the money put into the defender's hands remained under Fraser's control, and might have been reclaimed, so far as unexpended, whenever Fraser chose to recall the defender's mandate. It was therefore, he contended, money belonging to the bankrupt, which necessarily passed to his trustee,—there was no one else to whom it could be said to belong. Farther, that it could not be held to be so appropriated as to exclude the trustee, unless a *jus quæsitum* in it were vested in someone other than the bankrupt. It was maintained that that could not be the case here, because, under the contract of agency, the defender had no right to insist, against Fraser or anyone in his right, on retaining the funds put in his hands. The case, it was said, involved an attempt by the bankrupt to put his money beyond the reach of his creditors, while he retained his right to

pose, viz., for the expenses of the defence. If the carrying out of Fraser's mandate did not cost the full amount in his hands, he would be bound to

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it and to the beneficial use of it, which was impossible in law—*Learmonth v. Miller*, May 3, 1875, 2 R. (H. L.) 62.

"The defender contended that, the antecedent contract being *ex hypothesi* unchallengeable, the charges and payments as they fell due from day to day were merely the fulfilment of that antecedent contract, and were therefore not struck at by the sequestration; and further, that the money was so appropriated to a special purpose as to be protected from the effect of the sequestration—*M'Kenzie v. Finlay*, October 29, 1868, 7 Macph. 27; Bell's Commentaries, ii. 71.

"I am of opinion that this money was never taken out of the right of the bankrupt, and of necessity passed to the trustee; that the effect of the sequestration was to withdraw the defender's mandate, so far as it authorised the defender to expend the funds he placed in his hands; and that in order to let in the principle that money in the hands of a bankrupt or of his agent may be protected against the sequestration by special appropriation, it is necessary that the right to the funds be taken out of the bankrupt and vested in some other person. But in this case there was no such right vested in anyone. I think that so long as funds belonging to a bankrupt remain under his control they cannot be withheld from his trustee.

"The point under consideration was somewhat strikingly brought out by two cases recently decided in England—*Pollitt* [1892], 1 Q. B. 175, and [1893] 1 Q. B. 455, and *Re Charlwood ex parte Cripps* [1894], 1 Q. B. 643.

"In the case of *Pollitt* money had been paid to a solicitor in order to defray the expenses of pending legal proceedings. On the bankruptcy of the client it was held that the solicitor was bound to pay to the trustee the amount due by him to the client at the date of the bankruptcy, and was not entitled to apply it in the conduct of the cause after the bankruptcy.

"The case of *Charlwood* is perhaps still more to the point. Charlwood was charged with murder, and on 3d December he entered into an agreement with a solicitor (Cripps), whereby he agreed to pay Cripps £250, and Cripps agreed on his part to conduct the defence for that sum. The money was paid on the 10th December, and Charlwood became bankrupt on 20th December, and Cripps had notice of the bankruptcy on the 21st. The whole sum seems to have been required for the defence, but apart from that circumstance, it was held that Charlwood's trustee was not entitled to the amount or any part of it, and that Cripps was not bound to account for it. The judgment, however, was expressly rested on the ground that by the agreement Cripps was entitled to the sum paid, and to no more, and that whereas in *Pollitt's* case the right to the money placed in the hands of the agent remained in the bankrupt, in the case of *Charlwood* the money had before bankruptcy ceased to belong to the bankrupt, and had become the property of the solicitor Cripps.

"That case expresses the distinction—at least one of the distinctions—on which I consider that the question under consideration falls to be decided. If the effect of the contract averred by the defender had been to pass the right to the sum paid from the bankrupt to the defender, then the trustee could not have claimed it unless he could challenge the prior transaction; but if the money under the contract averred remained the property of the bankrupt, it of necessity passed to the trustee.

"There would have been, I think, no doubt on this point had the litigation in which the solicitor was employed been an ordinary action relating to the bankrupt's estate. But it is said that there was a difference in this case, because the defence of the bankrupt from a criminal charge was personal to himself, and was not a matter in which the trustee could interfere, and that the result of the pursuer's plea was that a bankrupt in such circumstances would not have been defended at all. I do not know whether the trustee might or might not have undertaken the defence. But if he did not, then Fraser would only have been in the position of a person charged with a crime who had no money to

No. 174. hand the balance to the trustee, but he was entitled to retain the money and repay himself for his outlays and his own services in doing his duty. Each charge and payment as it fell due day by day was part of the fulfilment of the contract to carry through the defence to the end, and that contract having been made prior to the sequestration was not affected by it. The case fell under the rule of *Charlwood's case*,¹ as the money here had ceased to belong to Fraser, and had become the property of the defender. In any event, the pursuer's claim for an accounting from the date of the arrestments was ill founded. The arrestments were used within sixty days of the sequestration, and were, therefore, totally ineffectual under the 108th section of the Bankruptcy Act, 1856, even in a question with the trustee.² The words of the Act were very general.*

Argued for the pursuer;—When Fraser handed this money to Campbell

pay for his defence, which was in point of fact his predicament,—a very disadvantageous predicament, but only that in which all persons charged with crime and not possessed of funds necessarily are.

"The sequestration here took place on 25th October, and the trustee was not confirmed until 13th November. In that interval a large part of the account now founded on by the defender was incurred. It is averred that the defender's instructions never were recalled, but it is not averred that the judicial factor or the trustee ever waived their right to claim the funds in the defender's hands, or acquiesced in his expenditure of them in the defence of the bankrupt. If there had been an averment to that effect, I would have allowed a proof, but as I read the record, there is no such averment.

"On the whole, I consider the pursuer's contention well founded, that the defender must account to him for the funds belonging to Fraser which were in his hands at the date of the sequestration.

"I do not decide whether the defender may have a claim against the trustee if he can shew that he made any payments which the trustee would have been bound to make, nor is it necessary for me to say anything as to the defender's right to claim and rank on the bankrupt's estate.

"But the pursuer's claim goes somewhat beyond a claim for the money due by the defender to Fraser at the date of the sequestration, and extends to the sum in the defender's hands on 14th October, when a creditor used arrestments. This claim is expressed in the first part of his fourth plea. It depends entirely on the 108th section of the Bankruptcy Act, 1856, which provides that no arrestments of the funds of a bankrupt executed on or after the sixtieth day prior to sequestration shall be effectual, 'and such funds or effects, or the proceeds of such effects if sold, shall be made forthcoming to the trustee.'

"The defender says that the effect of this clause and of the sequestration is that the arrestment was rendered invalid and wholly ineffectual, and that was the only ground on which the defender supported his seventh plea in law, and the averment as to the invalidity of the arrestments at the commencement of his answer 3. No authority on this point was quoted, but it appears to me that the contention for the pursuer is in accordance with the true construction of the section, and that the effect ascribed to the section by the defender would reduce it to an absurdity. I am therefore prepared to sustain the pursuer's plea, and to repel the seventh plea for the defender.

"My judgment does not determine either what the amount belonging to Fraser was which was in the possession of the defender at the date of the sequestration, nor what the sum was which was validly arrested. It is possible that funds may have come into the hands of the defender after the arrestment which may not have been covered by the arrestment, but which may be covered by the sequestration."

¹ *In re Charlwood ex parte Cripps*, L. R. [1894], 1 Q. B. 643; *In re Sinclair*, 1885, L. R., 15 Q. B. D. 616.

² *Wight's Trustees v. Allan*, Dec. 12, 1840, 3 D. 243.

* Quoted in the rubric.

he kept absolute control over it. He could have recalled the mandate in favour of Campbell at any moment, and got a new agent, to whom the money would have had to be handed. There was no case of specific appropriation of a specific fund for a specific purpose as in *Charlwood's* case. The contract was simply a contract for personal services, which fell with bankruptcy. The case fell within the rule of *Pollitt's* case,¹ which was decided on the ground that the property of the money handed to the solicitor remained in the bankrupt. As regarded the question of the arrestments, the effect of the 108th section of the Bankruptcy Act was to lay a *nexus* on the funds in Campbell's hands to the effect of preventing him paying it away either to himself or to anyone else. The statute meant that arrestments within the sixty days were not to compete with the trustee, not that they were to be utterly ineffectual to impose a *nexus* on the funds.

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LORD PRESIDENT.—On 11th October 1893 Thomas Fraser was apprehended on certain charges of forgery. When he was taken to prison he bethought himself of the necessity of looking after his affairs, and accordingly wrote to Mr Campbell asking that gentleman to act for him, and he authorised him “to take any steps you may think necessary to preserve my estate.” Immediately afterwards, with a view to carrying out the same purpose, he wrote, on 12th October 1893, the following letter:—“With reference to the money which I have instructed you to receive from Mr Howie, my cashier, and take possession of, I request and authorise you to use the same for the purposes of my defence in the criminal charge against me in such manner as you may think advisable, as also to pay on my behalf any sum or sums that I may direct you.—Yours truly.” Acting under this authority Mr Campbell took possession of the sum of £285, and thus became a depository for Fraser.

Now, the letter just quoted ends with a request that Mr Campbell should pay “any sum or sums that I may direct you.” That just means “hold the money to my order,” and the subsequent letters contain special directions for carrying that out. Mr Campbell thereafter began to make preparations for the defence, but ultimately Fraser pled guilty, and was sentenced to a term of penal servitude. Mr Campbell thus acted in precise accordance with his instructions, assuming those instructions to have retained validity. Unfortunately, however, on 25th October, about a fortnight after the apprehension, Fraser's estates were sequestrated. There is no doubt that from the date of the sequestration the money in Mr Campbell's hands became the money of Fraser's creditors, as opposed to Fraser himself, and from that time it was Mr Campbell's duty to look not to the bankrupt but to the trustee for instructions as to its disposal. It cannot be said that the mandate to Mr Campbell was not revocable, for it was admitted in argument that there was nothing to prevent Fraser from changing his agent and directing that the money should be handed over to his new adviser. On these grounds I think that there is no good defence to the claim of the trustee.

The words of Mr Justice Wright in describing the case of *Pollitt* exactly apply to the present case,—“The money of the debtor was handed to the solicitor, who was to apply it to meet future costs. On the occurrence of the bankruptcy the authority ceased, and the money went to the trustee.” On the other hand, the case of *Charlwood* is distinguishable on the facts, precisely (as pointed

¹ *Pollitt*, L. R. [1892], 1 Q. B. 175, and [1893] 1 Q. B. 455.

No. 174. out by Mr Justice Wright) because before the bankruptcy occurred the money no longer belonged to Charlwood. This case is precisely the case of *Pollitt*, and June 13, 1894. *M'Kenzie v. Campbell*. is not the case of *Charlwood*.

Up to this point I have taken the case as if the date of the sequestration was the only date requiring attention. It appears, however, that on 14th October a creditor of Fraser used arrestments in Mr Campbell's hands, and it is said that the supervening sequestration rendered the arrestments wholly invalid and ineffectual. I do not so read section 108 of the Bankruptcy Act. That section I think only cuts down the rights of the arresting creditor as an individual, and expressly provides that the arrested funds "shall be made forthcoming to the trustee." The effect of the arrestments then is that a *nexus* was laid on the money in Mr Campbell's hands, which prevented him from paying it away to anyone, and the sequestration merely transferred the right of enforcing these arrestments from the arresting creditor to the trustee. On that ground I am of opinion that the trustee is entitled to say that the date of the arrestments is the date from which Mr Campbell was disabled from carrying out Fraser's mandate. I think, therefore, that we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM.—It is clear in this case that the money in question remained at the absolute disposal of Fraser. There is no contract set forth in the correspondence that Fraser was to employ Mr Campbell to the end of the criminal prosecution, and there is no obligation on Mr Campbell to continue acting as agent. Further, the last words of the letter of 12th October are quite general, "to pay on my behalf any sum or sums that I may direct you," and special instructions as to the sums to be paid are given in the later letters.

Now, if that be so, the result in law is that the sequestration put an end to the mandate, and Mr Campbell had no longer any right to dispose of what was not Fraser's money but the trustee's. It may be hard that a man who has no money should have to defend himself, but it is harder that his creditors should have to pay for their debtor's defence. We were referred to two English cases, but I entirely agree that this case falls under the rule of *Pollitt*, and not under that of *Charlwood*. In the latter case there was a distinct contract that the solicitor would see the accused defended for a certain sum. It made no difference what the defence cost; the work was to be done for a certain price, which was paid over to the solicitor. That is not the case here, where we have just the facts of *Pollitt's* case. The agent there, as here, might withdraw at any time.

I further agree as to the effect of the arrestments. The 108th section means that the arrestments shall be ineffectual in a competition with the trustee, but not otherwise; and the effect here is that the money, held at the order of Fraser, could not be parted with except to the trustee. The Act says that the money "shall be forthcoming to the trustee," and that being so, to the trustee it must go. On both questions I therefore concur with your Lordship.

LORD M'LAREN.—In considering whether a client may make a bargain of the kind alleged here, which shall entitle an agent to go on working to the end of the piece of business even in competition with creditors, it must be kept in mind that a law-agent cannot stipulate for a benefit to himself in excess of the professional charges allowed by law, but there is no rule of law or expediency which debars a solicitor from bargaining to perform a certain business for a definite sum, being within the limits imposed by the table of fees. If such a

bargain is made, and if the price or the money stipulated for is yet not paid, it is the right of the trustee in bankruptcy to put an end to the contract, and pay damages for breach of it. But I apprehend that if the price has been paid and the agent is in course of performing his part of the contract it would be impossible for the trustee to intervene and put a stop to the employment, for then the solicitor would say, "I have already been paid, and I am willing to complete my part of the contract." That is just the case of *Charlwood*, where the Court in England held that the trustee was not entitled to repayment. But the case here is not of that description. The employment was on the ordinary professional footing. The money was in the agent's hands, no doubt, but simply as a deposit, with an authority from the depositor to apply it in payment of services rendered and advances made *de die in diem*. Bankruptcy intervened, and the trustee quite rightly, and immediately after his appointment was confirmed, called upon Mr Campbell for an accounting, thus terminating Mr Campbell's employment as a law-agent. Thereafter the right of Mr Campbell was only to retain the money for payment of his account up to date. Subject to this qualified right of retention, he was accountable to the trustee.

On the question as to the effect of the arrestments, I see no reason why the arrestment should not receive full effect so as to attach the deposited money in Mr Campbell's hands, so far as not already applied to the purposes of the deposit. The *nexus* which resulted would prevent Campbell from paying to himself or others any further sum. The pursuer's claim on this point is answered by the 108th section, which says that the funds shall be forthcoming to the trustee. As the trustee for the creditors is vested in the bankrupt's whole estate, he therefore gets the whole of the arrested fund, and the purpose for which it is to be handed over to him excludes a preference alike in favour of the arrestee and of the arresting creditor. I therefore think that the interlocutor of the Lord Ordinary is right.

LORD KINNEAR was absent.

THE COURT adhered.

ROBERT D. KER, W.S.—WYLIE, ROBERTSON, & RANKIN, W.S.—Agents.

ALFRED JOHN LIVESSEY, Pursuer (Reclaimer).—*Johnston—Cullen*. No. 175.
THOMAS PURDOM & SONS, Defenders (Respondents).—*W. Campbell—Cook*.

Agent and principal—Liability for disclosed principal—Agent and Client—Foreign—Custom—English custom applicable to solicitors.—In an action by an English solicitor against a law-agent in Scotland for payment of an account for professional services, the pursuer averred that he had been employed by the defender to conduct a litigation in England for a client, and that by the custom of England a solicitor employing another for a client was personally liable to the solicitor employed for costs. June 15, 1894.
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After a proof, held that the pursuer had failed to prove that the custom extended to the case of an English solicitor employed by a Scots law-agent.

ON 22d June 1893 Alfred John Livesey, the successor in business and assignee of the firm of J. McKeever & Son, solicitors in Carlisle, raised an action against Messrs Thomas Purdom & Sons, solicitors, Hawick, for £604, 15s. 7d., as the balance of an account incurred by the pursuer and his authors in connection with an action which the pursuer had brought to a conclusion in the English Courts on behalf of James A. McDonald, contractor in Hawick, a client of the defenders. 2d DIVISION.
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The pursuer averred that on 10th August 1891 the defenders instructed John M'Keever, then sole partner of the firm of John M'Keever & Son, to raise the action at M'Donald's instance; that the pursuer and his firm accepted these instructions, and raised and carried through the action in accordance with instructions from the defenders, and on their responsibility and credit. (Cond. 5) "By the law of England, a solicitor employing another solicitor in the conduct of an action for a client, as in the present case, is held to employ him as his own agent in the matter, and is personally responsible to him for all costs and charges incurred. The contract of employment between the defenders and the said John M'Keever, and J. M'Keever, Son, & Livesey, and the pursuer, is an English contract, and the rights and liabilities of parties thereunder fall to be determined by the law of England, according to which the defenders are liable in payment of the account sued on."

The defenders denied that the pursuer or his authors had conducted the litigation on their employment, and their answer to cond. 5 was "Denied."

The pursuer pleaded, *inter alia*;—(3) In the circumstances condescended on, the contract of employment libelled is an English contract, and the liability of the defenders falls to be determined by the law of England. (4) The defenders being liable for the sum sued for by the law of England, *et separatim*, being liable therefor by the law of Scotland, decree should be granted as craved.

The defenders pleaded, *inter alia*;—(4) *Separatim*, Assuming that the work charged for was done, and the outlays stated in the pursuer's account were made on the instructions of the defenders, they acted as agents for a disclosed principal, and are not themselves responsible to the pursuer or his alleged authors.

A proof before answer was allowed.

The evidence shewed that the defenders had introduced M'Donald to M'Keever & Son. In the opinion of the Lord Ordinary and the Court the evidence did not shew that the defenders, assuming them to have employed the pursuer or his authors, did so on terms other than those which the law would imply. It was admitted that by the common law of England an agent contracting on behalf of a disclosed principal binds his principal and not himself. With respect to the custom averred by the pursuer, it was proved by the evidence of English counsel that in England a custom judicially recognised prevails to the effect that an English solicitor employing another English solicitor on behalf of a client becomes personally liable to the solicitor employed for his costs, unless he expressly stipulate to the contrary. None of the members of the defenders' firm were qualified to practise in England.

The defenders admitted that they were liable to pay the pursuer £75.

On 6th April 1894 the Lord Ordinary pronounced this interlocutor:—"Finds that the defenders, who are writers in Hawick, in August 1891 employed the authors of the pursuer, who were solicitors in Carlisle, to raise and conduct on behalf of James Alexander M'Donald, contractor in Hawick, a certain suit in the English Courts: Finds that the said James Alexander M'Donald was a client of the defenders, and that they were duly authorised by him in the said matter, and that they duly disclosed to the pursuer's authors that they were acting on his behalf: Finds also that there was no agreement beyond what the law implied as to the defenders' responsibility for the costs of the suit: Finds that the sum sued for is the balance of the account incurred to the pursuer's authors for professional services rendered by them and their London

agents in connection with the said suit: Finds that the contract of employment, being to be performed in England, its construction and effect falls to be determined by the law of England: Finds that by the law of England an agent duly authorised, contracting on behalf of a disclosed principal, does not pledge his personal credit: Finds that by custom, judicially recognised, there is an exception to this rule in the case of contracts of employment between country solicitors in England and also between country solicitors in England and London solicitors, but that the pursuer has failed to prove that the said exception applies where, as in the present case, one of the parties to the employment is not a solicitor practising, or entitled to practise, in England: Finds, therefore, that the defenders are not personally liable to the pursuer for the balance of the account sued for; and assoilzies them from the conclusions of the action, and decerns.*

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The pursuer reclaimed, and argued;—The contract was to be performed in England, and therefore its construction and effect must be decided according to English law. It was proved that in England there prevailed a general custom, judicially recognised, the effect of which was that a

* "OPINION.— . . . The matter to be decided is whether the defenders, notwithstanding that they acted for a disclosed principal, are personally liable, in respect of an alleged rule of the law of England to the effect, as stated by the pursuer, 'that a solicitor employing another solicitor in the conduct of an action for a client as in the present case is held to employ him as his own agent in the matter, and is personally responsible to him for all costs and charges incurred.'

"There has been a long proof in the case, but I do not think there is any doubt about the material facts. . . . There was also a good deal of evidence as to the communications between the parties during the progress of the suit, but the result seems only to be that, beyond what the law implied, there was no special agreement or course of conduct from which such agreement can be inferred, with respect to the defenders' responsibility. The employment was constituted by correspondence, and the question really is what the correspondence imports.

"It is not disputed that the contract being to be performed in England its construction and effect must be determined according to English law; and as to that law English counsel have been examined on both sides. There does not, however, appear to be any real controversy as to what the law of England is. It is, on the one hand, admitted that by the general law of England an agent contracting on behalf of a disclosed principal binds his principal and not himself. On the other hand, it is also admitted that to this rule there is in England an exception established by custom, and judicially recognised, to the effect that an English country solicitor employing a London solicitor on behalf of a client becomes personally liable for the latter's costs, and that the result is the same as between English country solicitors when they employ one another. The point to be decided is whether the present case falls within the rule or within the exception.

"It appears to me that the parties here must be held to have contracted with reference not to the exception but to the general rule. In other words, I do not think it is proved that the exception in question extends beyond the case of solicitors practising and entitled to practise in England. It is clear upon the evidence that the exception depends not upon any general principle of jurisprudence, but upon what seems properly described as a custom judicially recognised; and I do not, I confess, see how that custom can be extended so as to include a case which can never come within it. The defenders here are no doubt solicitors,—that is to say, they practise the profession of the law; but they are not qualified to practise as solicitors in England, and in any question with English solicitors they are, I apprehend, simply laymen.

"On the whole, therefore, I have come to the conclusion that, according to the law of England, the defenders are not liable, and are entitled to absolvitor."

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solicitor employing another solicitor on behalf of a client was liable for the costs of the action, unless he expressly stipulated to the contrary. Here it was proved that the defenders employed the pursuer to conduct the litigation in question, and accordingly they were liable for the costs, no special stipulation having been proved. The law of England was really just the same as the law of Scotland in the matter prior to the passing of the Law-Agents Act, 1873 (36 and 37 Vict. cap. 63), sec. 1.

Argued for the defenders;—Assuming that employment was proved, the custom founded on in England was only applicable to English solicitors *inter se*, and did not apply to a Scots solicitor employing an English solicitor to conduct a litigation in the English Courts on behalf of a client. The contract was for a disclosed principal, who consequently alone was liable.

LORD JUSTICE-CLERK.—I have gone over the correspondence and evidence carefully, and the result is that I do not find evidence to shew that the defenders were ever placed in the position of being the pursuer's employers so as to make them liable for the costs of the English action.

A great deal has been said as to an alleged custom in England to the effect that where an English solicitor employs another solicitor in a litigation on behalf of a client, the first solicitor becomes liable for the costs incurred by the second solicitor, there being another term of the contract that the solicitor so liable is entitled to one-half the profits. An attempt was made to shew that this custom applied to the case of a Scottish solicitor who was the means of an English solicitor being employed. I see no ground whatever for that. That custom applies to a defined class, viz., English solicitors *inter se*. There is no such custom between law-agents in Scotland and solicitors in England. We cannot, therefore, in my opinion, give effect to this argument, which, however, could only apply if the employment averred were proved. I think that the result arrived at by the Lord Ordinary is the correct one.

LORD YOUNG.—There are two grounds upon which it is sought in this action to make the defenders liable.

It is said, in the first place, that a certain custom has grown up, and now prevails among solicitors in England, and is applicable to the facts of this case. That custom happens to be—there are customs like it in trade, and in that of shipbuilding especially—that if one solicitor introduces a client to another solicitor in order that a specific piece of business should be carried out, there shall be understood to have arisen a certain relationship between the two solicitors; the first solicitor shall be held, unless he expresses himself to the contrary, to guarantee that the client he has introduced is a good and paying client, and in return he is to receive for his services in effecting the introduction one-half of the profits of the business to be performed.

Now, I am of opinion that that custom, which I assume has grown up and reigns among English solicitors, has no application to the facts of this case, which is not one between English solicitors. If the solicitors in Carlisle intended to hold Messrs Purdom & Sons liable to them for the account, they should have taken a guarantee from the latter to that effect.

The law of Scotland recognises established customs provided they are honest and expedient, and will enforce them as furnishing the terms of a contract in regard to matters where nothing is expressed. But custom is matter of fact which requires to be established to the satisfaction of the Court, although when

the custom is of such a nature as is here alleged the Courts come to recognise and apply it without evidence. But the idea that the custom upon which the pursuer here founds has been shewn to apply to the facts of this case cannot in my opinion be entertained.

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The second and other ground upon which liability is sought to be established against the defenders is that they so communicated with the pursuers as to justify them in taking up and conducting the piece of business under the belief that they were to look to the defenders for payment of the account.

I am of opinion that here also the pursuers must fail, because I think the parole evidence and the correspondence do not establish any such case.

LORD RUTHERFURD CLARK.—I have come to the same result. I think that the custom does not apply to the present case.

LORD TRAYNER.—I agree with the views which your Lordships have expressed.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Find that the defenders admit that a sum of £75 is due by them to the pursuer: Find that the defenders are not due to the pursuer any further sum, whether as having employed the pursuer on their responsibility to conduct the litigation for James Alexander Macdonald against the Workington Corporation or otherwise: Decern against the defenders for the said sum of £75: *Quoad ultra* assoilzie the defenders from the conclusions of the summons."

W. KINNIBURGH MORTON, S.S.C.—FYFE, IRELAND, & DANGERFIELD, S.S.C.—Agents.

CHARLES STRACHAN, Pursuer (Appellant).—*Salvesen—Clyde.*
ABERDEEN DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF
ABERDEENSHIRE, Defenders (Respondents).—*Dickson—Brown.*

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June 19, 1894.
Strachan v. Aberdeen District Committee of the County Council of Aberdeenshire.

Reparation—County Council—Neglect of duty—Road.—Held that a claim of damages is competent against a county council for injuries arising from their neglect of duty in failing to keep a road sufficiently fenced.

IN June 1893 Charles Strachan, baker, Aberdeen, raised an action in the Sheriff Court at Aberdeen against the Aberdeen District Committee of the County Council of Aberdeenshire, concluding for payment of £63, 12s. damages for injuries to a horse and van which fell into a burn by the side of a road, which was under the management of the defenders.

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The pursuer averred that there was no fence or protection of any kind on the side of the road next the burn,—(Cond. 6) "The defenders are responsible for the condition of said road, and were in fault in respect said road is at the part in question dangerous, and they were bound both at common law and under the Statute 1 and 2 William IV. cap. 43, to have it properly fenced and protected. The said road was known to be dangerous and unsafe, and prior to the management of the said road being transferred to the said County Council, complaints had been made of the unsafe condition of the said road at the part in question. The defenders did nothing to put the said road into a safe condition until after the accident libelled. They have since erected a fence at the part in question."

The defenders pleaded contributory negligence on the part of the pursuer's servant who was driving.

Proof was led, and on 17th February 1894 the Sheriff-substitute (Brown)

No. 176. pronounced an interlocutor finding that contributory negligence had been proved on the part of the pursuer's servant, and that the defenders were therefore not liable.

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On appeal the Sheriff (Guthrie Smith), on 29th March, pronounced this interlocutor:—"Finds in law that no action is maintainable against the County Council or its District Committee for suffering a road to be out of repair and in a dangerous condition: Therefore assolizies the defenders from the conclusions of the action."*

* "NOTE.— . . . The case raises a question which does not seem to have been submitted to the Sheriff-substitute, and on which there is very little Scottish authority, which is, in my opinion, quite clear in point of principle. The pursuer seeks damages from the County Council, or, in other words, the public. We are all familiar with actions of damages against a road authority for endangering the public safety by leaving a heap of stones on the highway unguarded, or digging a pit and leaving it unfenced and unlighted. In operations like these there is nothing wrong, they are a necessity of road administration, provided they are done with reasonable care, but when done without this care they are justly held actionable. It is obvious, however, that between doing something wrong in itself, or wrong because done in a wrongful manner, and doing nothing, there is the widest possible difference, and it does not follow that a mere failure to keep in repair a road in a state of disrepair necessarily entitles the individual injured to redress. Yet the present action is laid entirely on this last ground, as very clearly appears from the condescendence. It is there said,—'Although at one time there existed (between the road and the burn) a stone and lime fence it has been allowed to fall into a ruinous and dilapidated condition'—Cond. 2. Yet, nevertheless, the defenders, the District Committee, 'did nothing to put the road into a safe condition until after the accident'—Cond. 6. As was said in the House of Lords in the *Mersey Docks* case, in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. When the county roads were brought under the operation of the Act of 1878, the system of administration contemplated was this, the district surveyor was bound once a-year to make up a report on the condition of the highways within his district, and containing a specification of the works and repairs to be executed thereon, and an estimate of the sums required for the purposes of the highways within the district (sec. 49). These reports were to be passed on by the District Committee with their recommendations to the General Board, which was then 'to consider and review the same, and give such orders as may seem necessary, and their decision shall be final' (sec. 50). I do not know whether this particular road was ever reported on or not. If it was not the fault, if any, lay with the surveyor, and the case of *Kinloch v. Clark*, 4 Macph. 107, decides that for such fault no action lies at the instance of the person injured. A surveyor exercises only a delegated authority. In most things he must first communicate with the committee, and if he fails in a pressing case to make such communication, he may be open to censure or dismissal by the committee, but he cannot be answerable to any member of the public for his breach of duty. If, on the other hand, the surveyor has done his duty in the matter, by bringing it before the District Committee, which decides to do nothing, I do not see how a Court of law can review a decision which the Act of Parliament expressly declares shall be final.

"In a different but equally effective way the old Turnpike Act, 1 and 2 Will. IV. c. 43, clearly excludes any such claims as the present. Sec. 117 prescribes the proceedings which are to be taken in case the trustees suffer the roads to fall into disrepair. In effect the remedy provided is the old common law appeal to the Court of Session in the form of petition and complaint against a public body, and no one is to be at liberty 'to present any complaint, or to institute any proceedings on any of the grounds above mentioned, before any other Court, or in any other manner than as aforesaid.' This follows sec. 94, prescribing a similar course of proceeding in the Sheriff Court, in such a case

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The question of competency was not raised on the pleadings.

The pursuer appealed, and argued ;—On the evidence there was no contributory negligence. *On the competency.*—The County Council were liable in damages for neglect of duty in failing to fence a road at a dangerous part. The obligation to fence roads was imposed on road trustees by section 94 of the Turnpike Act, 1831.* That section was incorporated with the Roads and Bridges Act, 1878, and the County Council were liable to perform all the duties and obligations of the road trustees whom they succeeded. The view of the Sheriff was quite novel

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as the present, namely, neglect to raise a parapet, or provide other adequate means of security at dangerous parts of the road. Reading these two sections together, as I think we are bound to do, they seem to prove that, down at least to 1878, an action of damages against road trustees for suffering a road to fall into disrepair was clearly incompetent.

“No doubt while section 94 is incorporated in the Act of 1878 section 117 is omitted, but that does not warrant the inference that thereby a new liability was intended to be created. The statute simply transfers the management of the roads to a new body, and in such a case the rights and liabilities are presumed to be transferred as they existed at the time of the transfer, unless in so far as they are expressly varied. It was on this ground that the Court of Queen's Bench in the case of *Gibson v. Mayor of Preston*, L. R., 5 Q. B. 218, decided that an action for personal injuries, sustained by one of the public through the non-repair of a highway, does not lie against a local board constituted under the Local Health Act of 1848, a doctrine repeated by the Court of Appeal in *Glossop v. Heston*, 12 Ch. Div. 102, and recently affirmed by the House of Lords in *Cowley v. The Newmarket Local Board* [1892], App. Ca. 345.

“There is an apparent contradiction between this view and the *Rothsay* case recently before the First Division, but in that case it was admitted that if in the opinion of the Court the road was dangerous, the defenders, both at common law and under the statute, were bound to fence. In the only similar case of neglect (as far as I can find) where the pursuer succeeded in getting damages (*Aitken v. Duncan*, 14 S. 204), the verdict went by consent, and, with one exception, in every case which has occurred since the reinstatement of *Duncan v. Findlater* as an authority in this branch of the law, the cause of actions has arisen, as they say in England, not from nonfeasance but malfeasance. The exception is *Greer v. The Stirling Road Trustees*, 9 R. 1069, where the Second Division, against the advice of Lord Young, differed from the Local Authority as to the sufficiency of a paling, but no question of competency was raised. Indeed, if this action were sustained I do not see where it would end. If a claim of damages is relevant against an administrative body for neglect of duty resulting in personal injury, it must be equally so where the complaint is that they failed to take up and timeously carry through some improvement scheme relating to drainage, lighting, or water, for which legislative sanction had been obtained, whereby great advantages would have accrued to the complainer or his property. For all this the ratepayers of the county would have to pay, which, in the words of Lord Justice James, would be ‘a very serious matter indeed for the community at large,’ and subject our system of local representative government in towns and counties to a form of judicial control which the Local Government Acts certainly never contemplated.”

* The Turnpike Act, 1 and 2 Will. IV. c. 43, sec. 94, enacts “That the trustees of every turnpike road shall erect sufficient . . . fences along the sides of all bridges, embankments, or other dangerous parts of the said roads, and if they shall fail therein it shall be lawful for the Procurator-fiscal or any commissioner of supply . . . to prosecute the trustees of any such turnpike road, before the Sheriff of the shire in which such road is situated, who shall judge and determine therein in a summary manner, and upon finding the complaint well founded may compel the said trustees to remedy the matter complained of. . . .”

No. 176. to the law of Scotland, and was contrary to a long series of decisions. The case of *Duncan v. Findlater*¹ had been practically overturned by the decision of the House of Lords in the case of the *Mersey Docks*,² where the liability of public bodies in the general case was recognised, and the Court in Scotland at once returned to what had been the law before *Duncan v. Findlater*, in their decision in the case of *Virtue*.³ Since that case there was an unbroken series of cases in which the liability of public authorities was recognised; in fact, since then no one had ventured to question it.⁴ The Sheriff said that in England public authorities were not liable for nonfeasance, only for malfeasance. That was a distinction not known to the law of Scotland. The English law on the matter was decided in the case of the *Men of Devon*,⁵ and the later cases of *Gibson*,⁶ *Glossop*,⁷ and *Cowley*,⁸ only decided that there was nothing in the local Acts under consideration to take the cases from under the rule of the *Men of Devon*. But the law of the *Men of Devon* was not the common law of Scotland; there was no trace of any such doctrine to be found in our books. The action was competent.

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Argued for the defenders;—The action was incompetent on the ground stated by the Sheriff. There was no doctrine of the common law of Scotland recognising the liability of public authorities for damage for failure to do their duty in such a matter as this. When a member of the public raised an action of damages against such a public body as the County Council it simply came to be an action of damages by a member of the public against himself. There being no authority in the common law for the competency of the action, the Court ought not to run counter to the long train of decision in England from the *Men of Devon* down to *Cowley's* case, to the effect that such an action was incompetent.⁹ It could not be disputed that a practice had grown up in Scotland under which public bodies had been found liable for such neglect of duty as was alleged here, but there had been no solemn decision on the point; in all the cases the competency had simply been assumed. Section 94 of the Turnpike Act pointed to the remedy which the Legislature thought the appropriate one, viz., an action to have the trustees, or here the County Council, ordained to fence the road, and though the 117th section of that statute was repealed by the Roads and Bridges Act, it shewed that the Legislature did not contemplate any such form of action being taken as was done here.

LORD PRESIDENT.—We have first to deal with the judgment of the Sheriff-depute, in which he has found in law that no action is maintainable against the

¹ *Duncan v. Findlater*, 1839, M'L. and Rob. 911.

² *Mersey Docks and Harbour Board v. Gibbs*, 1864, L. R., 1 E. and I. App. 93.

³ *Virtue v. Police Commissioners of Alloa*, Dec. 12, 1873, 1 R. 285.

⁴ *Stephen v. Thurso Police Commissioners*, March 3, 1876, 3 R. 535; *Harris v. Magistrates of Leith*, March 11, 1881, 8 R. 613; *Greer v. Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069; *Murray v. Middle Ward of Lanark Road Trustees*, June 12, 1888, 15 R. 737; *M'Fee v. Police Commissioners of Broughty-Ferry*, May 16, 1890, 17 R. 764; *Campbell v. County Council of Peeblesshire*, Jan. 17, 1893, 30 S. L. R. 252; *Nelson v. County Council of Lower Ward of Lanark*, Dec. 11, 1891, 19 R. 311; *Fraser v. Magistrates of Rothesay*, May 31, 1892, 19 R. 817.

⁵ *Russell v. Men of Devon*, 1788, 2 Durn. and East. 667.

⁶ *Gibson v. Mayor of Preston*, 1870, L. R., 5 Q. B. 218.

⁷ *Glossop v. Heston Local Board*, 1870, L. R., 12 Chanc. Div. 102.

⁸ *Cowley v. Newmarket Local Board*, L. R. [1892], A. C. 345.

⁹ *Municipality of Pictou v. Geldert*, L. R. [1893], A. C. 524.

County Council or its District Committee for suffering a road to be out of repair, No. 176. and in a dangerous condition. Now, that is a very important general proposition of law, and it is observable that it never occurred to the Aberdeenshire County Council to put forward this plea, which, if it were sound, ought to have been stated *in limine*. So far as it goes, the attitude of the County Council is in accordance with the impression which one's recollection of practice has formed, —that this theory of the Sheriff,—whether it may ultimately be justifiable on reason or not,—is foreign to our practice.

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The subject is, no doubt, an interesting one, but I cannot help thinking that the reasoning of the Sheriff proceeds upon an assumption regarding the common law of Scotland which is unsupported by authority. It seems clear enough that the cases which he refers to as decided in the English Courts rest upon the following statement which is given in the latest case in the Privy Council (*Municipality of Pictou v. Geldert* [1893] A. C. 524) of the common law of England,—“Public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.” Now, against that, so far as Scotland is concerned, we have the fact that there is a whole series of cases in which public bodies of road trustees, including County Councils, which are the latest development of road trusts, have not questioned their liability to answer in damages where negligence is proved, and have been found liable in damages for failure to keep roads in repair. I think, also, that the cases which relate to municipal bodies, viz., Police Commissioners, are quite in point on the question of the common law view of their liability to third parties, because the case of *Virtue* and the other cases which Mr Dickson pointed out involve the general underlying doctrine that bodies of road trustees, whether in town or country, are liable to third parties for damage arising from their negligence. Now, it has been attempted by the Sheriff to support his view by reference to sec. 94 of the Turnpike Act, which is incorporated in the Roads and Bridges Act of 1878. That section, however, merely obliquely and incidentally supports his general view of the common law immunity of such bodies, for in its terms it purports merely to limit the modes of action by which a person demanding of the trustees the execution of certain works as in fulfilment of their statutory obligations shall obtain such execution of the works. But that is manifestly a remedy of a different kind from the one now in question, which is an action of damages by a person complaining that he has suffered special damage in his own person or property from breach of the statutory duty. Again, the 117th sec. of the Turnpike Act stands in this position, that it is not incorporated in the Act of 1878, and accordingly, so far as the existing law is concerned, it does not afford an argument. It might do so if it reflected any light upon the common law of Scotland, and supported the view taken by the Sheriff, but, there again, I think the same answer applies, that sec. 117, like sec. 94, is dealing with a different matter,—that is, the remedy of a person who claims more facilities for travelling than the road trustees will allow him. Accordingly, I do not think that these sections, either the one standing in the existing statute or the one which historically relates to this question, really give any support to the view of the Sheriff. But apart from these sections, the view seems to be unsupported by anything in the text writers or decisions, and is certainly diametrically opposed

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to the current practice in regard to bodies litigating in this Court, there being a whole series of cases where that liability has been recognised. Therefore, I think it is impossible for us to give countenance to this doctrine of the Sheriff, because we should be running counter to what must now be regarded as the existing common law, and the sound construction of the statutes bearing on the liabilities of road trustees. Therefore, in my opinion, the Sheriff's interlocutor must be recalled. (His Lordship then proceeded to deal with the merits of the cause.)

LORD ADAM.—The judgment of the Sheriff-depute in this case proceeds upon the ground that the action is not maintainable against the District Committee of the County Council. Now, it appears to me, that if we were to affirm that ground of judgment, we should necessarily recognise this, that we and our predecessors for many years have been going on an entirely wrong course, and that this Court, which has for years held road trustees liable for negligence and fault has been quite wrong in doing so. It may be so, but I am afraid that we must be put right in that matter by another Court. I think that it is unnecessary to say more on the subject, because the practice has been so invariable that we must, like our predecessors, follow it now. I have, therefore, no hesitation in thinking that the Sheriff's interlocutor must be recalled.

LORD M'LAREN.—According to the law of Scotland as hitherto understood and administered, parliamentary trustees and Local Authorities constituted by Act of Parliament, although performing their duties without remuneration and without any view to profit, are responsible for negligence in the same manner as railway companies or other corporations who carry on public undertakings for profit. It is true that this principle suffered a temporary eclipse in consequence of the judgment in *Duncan v. Findlater* which was founded on what seems to be a somewhat paradoxical application of the doctrine of *ultra vires*. It was held that when Parliament had authorised the levying of rates by a public body for public purposes this involved a practical immunity on the part of the administrators of those rates from civil responsibility for wrong, because the application of the rates to payment of damages would not be within the purposes of the trust. Now the decision of the House of Lords in the celebrated litigation arising out of the responsibility of the Mersey Docks Commissioners restored the law to what, in Scotland at least, had been understood to be the sound principle of civil responsibility, and, acting upon the views finally taken in the highest Court, this Court in the case of *Virtue* re-established the principle of civil liability on the part of Local Authorities. I come, therefore, to the opinion that according to that decision, which is binding on us, if the Aberdeenshire County Council have done wrong to the pursuer they are bound to make reparation for that wrong. The cases cited to us in support of the Sheriff's interlocutor seem to shew that in England there is an exception to the general rule of the responsibility of public bodies in the case of road authorities; but I am unable to gather from the terms of the judgment in the last case—the *Newmarket* case—whether this is a universal exemption applicable to all public bodies charged with the administration of roads, or whether it depends upon the terms of each individual Act of Parliament. I rather collect from the judicial opinions, and especially from that of Lord Herschell, that the English Courts were in a manner bound by the decision in the ancient case of the *Men of Devon*, and that unless there was something in the terms of the local Act of Parliament which took

the case out of the rule laid down in that decision and laid upon the Local Authority certain duties subject to the sanction of the responsibility for negligence, no action against them would lie. But it could not be seriously maintained that the decision in the *Men of Devon* had any relation to the Scots law of reparation. It was an action depending upon peculiarities in the English system of law, and I see nothing in this decision which ought to induce us to reconsider the principle and practice of the law of reparation as hitherto administered by our Courts.

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LORD KINNEAR was absent.

THE COURT recalled the interlocutor of the Sheriff, and reverted to that of the Sheriff-substitute.

R. J. GIBSON, S.S.C.—HAGART & BURN MURDOCH, W.S.—Agents.

WILLIAM FERGUSON MILLAR (Morrison's Executor), First Party.—
John Wilson.

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MISS JANET MOYES MILLAR, Second Party,—*John Wilson.*

June 21, 1894.
Millar v. Morrison.

WILLIAM MORRISON AND OTHERS, Third Parties.—*C. J. Guthrie—Grainger Stewart.*

Succession—Testament—Construction—"Residue."—The presumption is that the word "residue" occurring in a testamentary writing carries the residue of the testator's whole estates and not merely the balance of a particular fund.

A lady by holograph testamentary paper left legacies amounting in all to £1000 including one of £100 "to my old and valued friend J. M." under the declaration that these legacies were to be paid free of legacy-duty; and then concluded as follows:—"The £1000 so bequeathed is in the hands of my brother . . .—also £200 which latter if not expended by me before my decease & still in his hands will be—to be taken for all just and lawful debts to give mournings to J. my servant to the extent of £2—also mournings to" the wife of a nephew "to the extent of £5—Any residue to be given to J. M." By later testamentary papers the testator nominated an executor and left a number of legacies of specific articles. Her whole testamentary papers were found after her death in an envelope, on which were the words, holograph of her, "My will" and her subscription. She left property amounting to £1514 without deducting debts, which were of small amount.

In a competition between J. M. and the testator's next of kin claiming *ab intestato*, held that the words "any residue" in the first testamentary paper carried the residue of the testator's general estate to J. M. and not merely the balance of the sum of £200 mentioned in the immediately preceding clause of the paper.

MISS JANET SCOTT MORRISON, residing at Glenleith, Colinton, died on 2D DIVISION. 7th October 1893, leaving several holograph testamentary writings. By the first of these writings, which was dated 31st August 1893, Miss Morrison began by bequeathing certain pecuniary legacies amounting in all to £1000, and including one of £100 "to my old and valued friend Janet M. Millar, residing at Castle Douglas." The writing then proceeded:—"All the above Legacies to be paid free of legacy-duty—The Thousand pounds so bequeathed is in the hands of my Brother William, merchant Leith—also Two hundred pounds, which latter if *not* expended by me *before* my decease & still in his hands will be—to be taken for all just and lawful debts to give mournings to Jessie my servant to the extent of Two pounds—also mournings to Nephew John Morrison's wife to the extent of Five Pounds—Any Residue to be given to Janet

No. 177. Millar residing at Castle Douglas—signed Janet S. Morrison. Witness —Jessie Robertson.”

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By the second testamentary writing, styled by the deceased “Codicil No. 1,” and undated, she increased the sums left for mournings to £4 and £10 respectively, and nominated Mr William F. Millar, merchant, Leith, to be her sole executor, leaving him £20 for his services as executor.

The remaining testamentary writings contained only specific bequests of articles of furniture, &c.

These writings were found enclosed in an envelope on which were written these words, holograph of Miss Morrison “My will Janet S. Morrison.”

After Miss Morrison’s death questions arose as to the extent of the bequest of “residue” to Miss Janet M. Millar, and a special case was presented, the parties to which were (1) Miss Morrison’s executor, (2) Miss Janet M. Millar, (3) William Morrison and others, Miss Morrison’s next of kin.

The case set forth the foregoing facts, and stated further that the estate of the deceased consisted of personal property amounting to £1514, 19s. 6d. without deducting debts, which were of small amount.

The first question in law was,—“(1) Do the words, ‘Any Residue to be given to Janet Millar,’ occurring in the first holograph testamentary writing referred to, give right to the said Janet Millar only to any balance remaining of the £200 mentioned in the said writing, after deduction of debts and the sums for mournings left by the testatrix; or, Are these words sufficient to carry any free moveable estate belonging to the deceased at the date of her death, after providing for the specific legacies and bequests left by the testatrix, and the debts and expenses of the executry?” Then followed a question (to be answered in the event of its being held that the word residue carried only the balance of the £200) as to what debts were a burden on the £200.

Upon the first question the second party maintained that the bequest of residue gave her the testator’s whole estate not otherwise disposed of;¹ the third parties, that by “residue” was meant only the balance of the £200, and that the residue of the general estate fell to them *ab intestato*, there being no other clause in the will disposing of residue.²

LORD JUSTICE-CLERK.—It is plain that the document the terms of which we are asked to construe in this case was left by this lady, Miss Millar, as a settlement of her whole affairs; indeed, the envelope in which the document is enclosed has written upon it, in her own handwriting, the words, “My will.” In that document we find, in the place at which we would naturally expect to find them in a settlement disposing of the lady’s whole estate, words which seem to be a direction as to what is to be done with the residue of her estate after giving effect to the particular directions settling what shall be done with the greater part of it. These words are, “Any residue to be given to Janet Millar,” and so on. I think we must read these words as meaning that she gives the residue of her whole estate, after providing for special legacies, to Janet Millar, unless the other parties to the case can shew some circumstances weighty enough to lead us to a contrary conclusion.

Now, it was urged as a reason for coming to a contrary conclusion that the

¹ Jull v. Jacobs, 1876, L. R., 3 Chan. Div. 703; Jarman on Wills, 5th edit., vol. i. p. 723; Williams on Executors, 7th edit., vol. ii. p. 1317.

² Hastings v. Hane, 1833, 6 Simon, 67; Ommaney v. Butcher, 1823, 1 Turn. and Russ. 260.

word "residue" occurs in immediate collocation with a clause disposing of a sum of £200 in the hands of the testator's brother, with reference to which she directs that if it is not expended before her death it is "to be taken for all just and lawful debts, to give mournings to Jessie my servant to the extent of £2, also mournings to nephew John Morrison's wife to the extent of £5," and then follow the words in question, "any residue," &c. It is contended by the testator's next of kin that looking to the mention of this sum of £200, and to the way in which the testator says it is to be applied, and also to the position of the clause as to residue, we must hold that that clause refers merely to what may remain of the £200 after applying it as the testator has directed. I can see no necessity for so reading that clause, and as there is a presumption that the word "residue" was intended to carry the residue of the whole estate, I think the word should here receive its ordinary effect.

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It is true, as was said by counsel for the next of kin, that in an earlier part of the settlement Miss Millar does receive a considerable sum of money as a legacy, which it was contended was unnecessary if she was also to be residuary legatee. I do not think that that shews more than that the testatrix was not aware of the amount of estate she had to dispose of, and imagining that it was less than it really was, directed that the balance, if any, should go to her friend. On the whole, I think we must read these words as giving to Janet Millar a right to the residue of the whole estate after paying the legacies provided for by Miss Morrison.

LORD RUTHERFURD CLARK.—I think that the words which we have to construe here must be read according to their ordinary meaning, unless there is anything in the context which would lead us to take a different view. I cannot see anything in the language of this will to lead me to think that the testatrix intended that the words should mean anything different from their ordinary signification.

LORD TRAYNER concurred.

LORD YOUNG was absent.

THE COURT answered the second alternative of the first question in the affirmative, and found it unnecessary to answer the other question.

R. CUNNINGHAM, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

JOHN HOUSTON, Pursuer (Respondent).—*Macfarlane—Graham Stewart*. No. 178.

JAMES ALEXANDER PLAYFAIR M'LAREN and ANOTHER, Defenders

(Appellants).—*R. V. Campbell—R. L. Orr*.

June 22, 1894.
Houston v.
M'Laren.

Property—House—Gable—Boundary—Prescription—Possession—Presumption.—The titles of two adjoining properties in a burgh described the properties (in so far as coterminous) as being each bounded by the other. About the year 1770 there was erected on the westmost of these properties a house, the scarcement stones of whose east gable extended about nine inches beyond the line of the gable. Some years after the building of this house there was erected on the other property a building which came to be used as a byre. This byre had no west gable of its own, the east gable of the other house being used as its west gable, and the north and south walls of the byre rested upon the scarcement stones of the gable of the other house, and were built against that gable.

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In 1892 the proprietor of the house on the westmost property proposed to project the roof of his house (which was higher than the byre), about seven inches to the east of his east gable, and, in an action by the proprietor of the byre for interdict against this proposed projection, maintained that the boundary of his property was the east line of the scarcement stones and not the east line of the gable of his house, contending that the presumption was that his author had built his house entirely within his own property.

A proof shewed that the proprietor of the byre, and his authors, had, for more than the prescriptive period, possessed as belonging to the byre the entire area within the walls of the byre to the east of the defender's gable.

Held that the pursuer's titles, coupled with the possession that had followed upon them, shewed that the boundary between the two properties was the east line of the gable and not the east line of the scarcement stones, and consequently that the pursuer was entitled to interdict against the defender projecting his roof as proposed.

2D DIVISION.
Sheriff of
Perthshire.

IN September 1892 William Houston, dairyman, Coupar-Angus, the proprietor of a byre in Hill Street there, brought an action in the Sheriff Court at Perth against James Alexander Playfair M'Laren, the proprietor of the subjects immediately to the west of the pursuer's property, and also against David Reid, builder, Coupar-Angus, in which the pursuer prayed that the defenders should be interdicted from building or continuing to build the roof of a house on the defender M'Laren's property so as to project over the side walls and roof-eaves of the pursuer's byre, alleging that in so building the roof of the defender M'Laren's house the defenders were encroaching on the pursuer's property. In answer, the defender M'Laren denied that in so building the roof he was encroaching on the pursuer's property, and the defender Reid stated that he was the builder merely, and had nothing to do with the question raised.

The question arose in the following circumstances, as disclosed by a proof, and by the titles produced: The pursuer and the defender M'Laren held their respective properties of the same superior, M'Laren's feu having been given off about 1770, and that of the pursuer at a later date. Each property was merely described as bounded by the other in so far as they adjoined each other. About 1770 a house was built on M'Laren's feu, the scarcement stones of the east gable of which projected about nine inches eastward of the line of the gable itself. The pursuer's byre was built after the house on M'Laren's feu. It had no west gable of its own, M'Laren's east gable being used instead, and the north and south walls of the pursuer's byre rested upon the scarcement stones of M'Laren's gable, and the ends of these walls were built against that gable. The whole of the area thus enclosed by the three walls of the pursuer's byre and M'Laren's gable (including the portion upon which the scarcement stones rested) had been possessed by the pursuer and his authors as a byre or otherwise for more than the prescriptive period. The top of the scarcement stones was somewhat above the level of the rest of the floor of the byre.

Shortly before the raising of the present action M'Laren took down his house, and proposed to rebuild it somewhat higher, with a roof which extended about seven inches eastward of the line of his east gable. The roof so built would thus have been wholly within the east line of the scarcement stones of the east gable, and M'Laren maintained that he was entitled so to build the roof on the ground that the presumption was that his predecessor in building the original house in 1770 kept not merely the east gable, but the scarcement stones upon which it rested, wholly within his own property. The pursuer denied that there was any such presumption, and maintained that his titles, coupled with the possession that had followed upon them for more than the prescriptive period, gave

him a right of property in the whole area of the byre from the line of the defender M'Laren's east gable eastward, and consequently that the proposed projection of the roof beyond that line was an invasion of that right.

No. 178.

June 22, 1894.
Houston v.
M'Laren.

On 11th January 1894 the Sheriff-substitute (Grahame) pronounced this interlocutor:—(After findings in fact)—“Find that it is not proved that the defender, in his said building operations, has threatened, or at the date of this action was threatening, to project his roof beyond the boundary of his own property, or to infringe upon the pursuer's rights of property in his adjoining subjects: Therefore refuses to grant the interdict craved: Finds the pursuer liable in expenses,” &c.

On appeal the Sheriff (Jameson) pronounced this interlocutor:—“Recalls the Sheriff-substitute's interlocutor of 11th January 1894: Finds (1) That the pursuer and defender M'Laren are conterminous proprietors of certain subjects in Coupar-Angus, situated to the west of Hill Street; (2) that in 1892, and for forty years previous, the state of the subjects was as follows:—There was an old two-storey house on the defender's property, with its east gable immediately adjoining the pursuer's property, while on the pursuer's property there was erected a building, latterly used as a byre, the walls and roof of which were built close up to and rested on the said east gable of the defender's house; the scarcements of the foundations of said gable projected about 9 inches beyond the east face of the gable; (3) that the title-deeds of the parties merely describe the properties as bounded by each other; (4) that at the date of raising the present action, the defender M'Laren, whose property lies immediately to the west of the subjects occupied by the pursuer, was carrying on certain building operations in connection with the rebuilding of his house; (5) that the roof of the defender M'Laren's new house projects 7 inches or thereby beyond the line of the east face of the east gable of the defender's old house: Finds in point of law (1) that the titles of the parties fall to be interpreted by the possession had twenty years prior to the raising of this action; (2) that the possession had by the pursuer and his predecessors, as above described, was sufficient in law to constitute possession of the ground up to the line of the east face of the east gable of the defender's old house, notwithstanding the projection of the foundations of said gable beyond said line, and that said line must therefore be held to be the boundary between the property of the pursuer and that of the defender M'Laren; (3) that the defender M'Laren's building operations, so far as they consist of projections of the roof or other portions of the new house beyond the line of the east face of the east gable of the old house, constitute an invasion of the pursuer's rights of property, and that the pursuer is entitled to interdict against said proceedings: Therefore interdicts the defenders, and all others acting for them, or under the instructions of any of them, from encroaching upon the pursuer's property on the west boundary thereof, and specially from building, or continuing to build, a roof projecting over the roof-eaves and side walls of the pursuer's byre,” &c.*

* “NOTE.— . . . It was not without difficulty that I arrived at the conclusion I have done. I am of opinion that the projection of the scarcements of the foundation of the defender's old house, beyond the line of the gable wall, does not raise a presumption that these scarcements were within the original boundary of the defender's property. On the contrary, I think the presumption rather is that the defender's predecessors desired to take full advantage of their property by building the gable up to their boundary line, and this necessarily involved some projection of the scarcements into the adjoining property.

No. 178. John Houston, was sisted as pursuer in room of his father, the original pursuer, who had died.¹

June 22, 1894.
Houston v.
M'Laren.

The defenders appealed.

LORD JUSTICE-CLERK.—This case is very unfortunate for all parties, as the matter in dispute is of trifling value. The facts of the case are that the defender, who owns a small property in Coupar-Angus upon which a house or cottage is built, has recently raised the height of the house, and in doing so has endeavoured to put the roof of his house a few inches further out than the wall which supports it. Neither party has any title to his property which specifies the boundaries of it except by describing it as bounded by the other, and while the defender and his predecessors have had his house for fifty years, the pursuer and his predecessors have had right to and have occupied a byre next to it for more than forty years. The two side walls of the byre rest upon the scarcement stones of the foundation of the house, but the byre has no end wall of its own, the defender's wall being used as the end wall of the byre.

The defender says that there is a presumption that in taking the scarcement of his gable wall outside the line of the wall itself, he put the scarcement upon his own property, and that in fact the line of the scarcement is the extremity of his property on that side.

I agree with the Sheriff that there is no presumption of that kind. The fact is that for fifty years or so the pursuer or his authors have been in possession of all the ground that lies outside the gable wall itself, as it stands above the ground. The Sheriff has therefore found that the defenders have no right to project their roof beyond the line of the gable wall over any part of the byre which has been possessed by the pursuer. I think that the Sheriff is right, and that we must find to the same effect.

LORD RUTHERFURD CLARK.—The facts of this case are plain enough. The pursuer has a byre which is enclosed by four walls, of which the defender's gable is one, and the pursuer and his authors have possessed the whole area within this enclosure for more than the prescriptive period upon a sufficient title. In these circumstances it is, I think, impossible to doubt that the pursuer is the proprietor of all that area.

The scarcement stones of the defender's gable are within the area of the byre, and the defender relies on this fact as proving that the line of these stones is the boundary. At the best, there is a mere presumption which, in

I believe this to be a common practice, and I may refer to the case of *Leonard and Others v. Lindsay & Benzie*, 13 R. 959, as an illustration of it. This view of what was the boundary between the properties is further confirmed by the fact, that when the pursuer's predecessors came to build, they built close up to the east face of the defender's east gable, and in fact rested their house upon that gable, and that has been the state of matters for more than forty years, and I think it constitutes possession by the pursuer and his authors of the ground up to the line of the east face of the east gable of the defender's old house for that period, and as the titles fall to be interpreted by possession, I hold that the boundary line between the two properties is the line of the east face of the east gable of the defender's old house. There is no dispute that the defender's proposed roof will project over the line, and I have granted interdict against the operations to that effect. . . ."

¹ *Pursuer's Authority*.—*Leonard v. Lindsay*, June 11, 1886, 13 R. 959. *Defender's Authority*.—*Gariochs v. Kennedy*, March 7, 1769, M. 13,178.

my opinion, must yield to the clear proof by which the ownership of the pursuer is established. No. 178.

June 22, 1894.
Houston v.
M'Laren.

LORD TRAYNER.—I am of the same opinion. The question is whether the projection of the defender's roof from his gable wall over the roof of the pursuer's byre is an invasion of the pursuer's property. The defender justifies his action on the ground that the projection complained of is not carried beyond the line of the scarcement stones which he says is the boundary of his property. He asks us to assume that there is a presumption that when he built his house he kept his gable within the line of his feu. In my opinion there is no such presumption. I cannot say whether the defender, in building his house, went to the verge of his property or not, but it is certain that the pursuer's byre, which extends eastwards from the gable of the defender's house, has been in the occupation of the pursuer and his authors on a habile title for fifty years. In these circumstances I think he must be regarded as the proprietor of the solum east of the gable, including the ground on which the scarcement stands. I think there has been an infringement of the pursuer's right, and that he is entitled to our judgment.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties in the appeal against the interlocutor of the Sheriff of Perth, dated 16th April 1894, find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore dismiss the appeal and affirm the interlocutor appealed against, and of new interdict the defenders and all others acting for them or under their instructions in terms of the interdict in the said interlocutors, and decern," &c.

JOHN DOBIE, Solicitor—MILLER & MURRAY, S.S.C.—Agents.

COLIN CAMPBELL AND OTHERS (Douglas Ross's Trustees), First Parties.— No. 179.
D. Dundas—Crabb Watt.

WILLIAM ROSS AND OTHERS, Second Parties.—*John Wilson—Guy.*

ANNIE M'NAUGHT ROSS AND OTHERS, Third Parties.—*Younger.*

June 28, 1894.
Ross's Trustees v. Ross.

Succession—Vesting—Effect of widow's repudiation of testamentary annuity.
—A testator by his settlement left his widow an annuity of £50, to continue so long as she remained unmarried and to be in full satisfaction of her legal rights, and further directed his trustees "on the death or second marriage of my said wife" to realise the residue of the estate and to pay it over to certain relatives in certain proportions, with a conditional institution of issue and a clause of survivorship, it being expressly declared that "the interests of the residuary legatees shall vest in them at and only upon the arrival of the period when the residue of my estate falls to be realised and divided."

The widow repudiated the settlement and took her legal rights.

The institutes under the residue clause having thereupon called on the trustees to denude of the residue in their favour, or at all events to pay them the income thereof as it accrued, *held (dub. Lord Young)* that the widow's repudiation of the settlement did not accelerate the period of vesting of the residue, and consequently that the trustees were not entitled under the residue clause to pay over either the capital or the income until the death or the second marriage of the widow.

Muirhead v. Muirhead, May 12, 1890, 17 R. (H. L.) 45, followed.

No. 179.

June 28, 1894.
Ross's Trustees
v. Ross.

2D DIVISION.

DOUGLAS ROSS, feuar, Ranton, died on 23d March 1892, leaving a trust-disposition and settlement dated 2d October 1889. By this deed the testator conveyed his whole estates, heritable and moveable, to trustees, and after providing for payment of debts, and leaving certain legacies payable within six months of his death, he in the third place directed his trustees to pay to his widow "an annuity of £50 sterling per annum during all the years of her life so long as she continues to remain my widow, which sum of £50 sterling per annum . . . shall be held to be in full satisfaction to her of all claims she may have against my estate: And in the event of my said wife marrying again, said annuity of £50 sterling shall be discontinued." The testator then in the fourth place provided,—“Fourthly, on the death or second marriage of my said wife, I direct and appoint my trustees to realise the whole residue and remainder of my estate, heritable and moveable, real and personal, and to pay and divide the same between my nephew William Ross, son of my late brother William Ross, designer, who resided in Bridgeton, Glasgow, who shall be entitled to one half, and the other half shall be equally divided among the said Charles Ross, John Ross, and Jessie Ross, the children of my late brother John Ross [to whom legacies of £50 each had been given], and in the event of the said William Ross dying before the period of payment, which shall be the period of vesting, not leaving lawful issue, then the whole residue of my estate shall fall to and be divided equally among the said Charles Ross, John Ross, and Jessie Ross, and the survivors or survivor of them and their respective issue, the issue in each case being entitled to the share which their parent would have been entitled to on survivance: And I provide and declare that the interests of the residuary legatees shall vest in them at and only upon the arrival of the period when the residue of my estate falls to be realised and divided.”

The testator was survived by his widow, and by William Ross, John Ross, and Jessie Ross (Mrs Stoney), mentioned in the fourth purpose. Charles Ross, the other nephew there mentioned, predeceased the testator without issue.

Mrs Ross, the widow, repudiated her husband's settlement and claimed her legal rights, and the amount to which she was legally entitled was paid to her. William Ross, John Ross, and Mrs Stoney then called on the trustees to denude in their favour of the estate remaining after satisfying the other purposes of the trust and the widow's legal claims. The trustees having declined to do this without the sanction of the Court, a special case was presented. The parties were (1) the trustees, and (2) William Ross, John Ross, and Mrs Stoney.

The questions in law were,—“1. Are the second parties, in respect that the testator's widow has claimed her legal rights, entitled now, and without waiting till the death or second marriage of the testator's said widow, to have the residue of the testator's estate divided and paid to them in the proportions provided by his said trust-disposition and settlement? 2. If the trustees are bound to hold until the death or second marriage of the truster's widow, are the said residuary legatees entitled to periodical payment of the income thereof until the occurrence of such death or second marriage, or must it be accumulated?”

At the date of the case the widow was still alive and had not married a second time.

The first parties maintained that they were bound to hold the residue, and to accumulate the income thereof, for the benefit of such of the residuary legatees as might be alive at the period of division fixed by

the testator, viz., until either the death or the second marriage of his widow.¹ No. 179.

The second parties maintained that as the testator's widow had claimed, and had been paid, her legal rights, the residue vested in them *a morte testatoris*, or at anyrate that the period of vesting and payment arrived when the widow claimed her legal rights. Alternatively, the second parties maintained that if not entitled to payment of the capital they were at all events entitled to payment of the income periodically as it accrued.

After a hearing the case was, on the suggestion of the Court, amended so as to include the children of William Ross and of Mrs Jessie Ross or Stoney as parties of the third part, and a curator ad litem was appointed to them.

LORD JUSTICE-CLERK.—In view of the case of *Muirhead*, 17 R. (H. L.) 45, I do not think that we can dispose of the first question otherwise than by deciding that the term of payment has not arrived.

As to the second question, I am of opinion that the income must be held to be in the same position as the capital. The first alternative of the question must be answered in the negative, and the second in the affirmative.

LORD YOUNG.—I do not think that the case is by any means unattended with difficulty. I should rather have been disposed, irrespective of the authority of the cases of *Muirhead*, 17 R. (H. L.) 45, and *Hughes*, 19 R. (H. L.) 33, to think that the payment was postponed till the death or the second marriage of the widow, only because the death and the second marriage of the widow were contemplated by the testator as the only possible events which would terminate her annuity in the event of her surviving him. These two dates could not have been fixed upon by the testator with any intelligent purpose of determining the particular relatives who were to take the capital, because the two events have no connection with the determination of such a matter. The only intelligible explanation of these periods having been taken as fixing the terms of payment to the residuary legatees, is, that the testator knew that on either of them his estate would be available for division, and unburdened of the annuity which exhausted the income. But there was a third possible event which would leave the estate free for division—and it is the event which has actually occurred,—viz., the repudiation of the provision by the widow, and her acceptance of her legal rights; and the question which we have to consider is, whether that event has not the same effect in fixing the period of payment as the death or second marriage of the widow would have had.

It is suggested that the amount required to satisfy the legal rights of the wife will make a hole in the estate which might be filled up by accumulating the income during her lifetime. But the amount of filling up would depend upon whether the widow married a second husband or not, as the moment she married again the period of distribution would have arrived. I therefore think that it is impossible to suppose that the testator in fixing the death or second marriage of his widow as the period of distribution intended thereby to determine who were to be the objects of his bounty. I should have been disposed to think that it was clear to ordinary understanding that the postponement of the division of the estate to the two periods named was made in order to secure the payment of the annuity and for no other purpose. I can conceive no other. If, therefore,

¹ *Muirhead v. Muirhead*, May 12, 1890, 17 R. (H. L.) 45; *Hughes v. Edwardes*, July 25, 1892, 19 R. (H. L.) 33.

No. 179. the only purpose which the testator had in view in naming these two periods was to leave the estate in the hands of the trustees so long as the annuity was to be paid, then I should have thought that as soon as that purpose was satisfied the estate ought to be distributed. That is, I think, the good sense of the thing, and for my part I should also be disposed to hold that it is the law, the law generally being supposed to be in accordance with good sense. But your Lordships think that the case is ruled by prior decisions, and if that be so I think that we must follow these authorities.

June 28, 1894.
Ross's Trustees v. Ross.

LORD RUTHERFURD CLARK.—I think that the case of *Muirhead* is an absolute rule, and we must follow it.

I am not at all sure that the testator did not mean to make the period of distribution depend upon the second marriage of his widow. It is evident that if she took her annuity there could be no vesting during her lifetime so long as she remained unmarried, but the moment she married a second time the term of payment arrived. So by the very form of the deed the period of distribution depends on the second marriage of the widow.

LORD TRAYNER was absent.

THE COURT answered the first question in the negative, and the first alternative of the second question in the negative, and the second alternative in the affirmative.

MACKENZIE & BLACK, W.S.—**CLARK & MACDONALD, Solicitors**—Agents.

No. 180. **EDINBURGH NORTHERN TRAMWAYS COMPANY, Pursuers (Reclaimers).—**
Salvesen.
GEORGE VILLIERS MANN AND ANOTHER, Defenders (Respondents).—
Johnston.

June 28, 1894.
Edinburgh
Northern
Tramways Co.
v. Mann.

Process—Interlocutory judgment—Reclaiming Note—Court of Session Ad, 1868 (31 and 32 Vict. cap. 100), secs. 27, 28, and 54.—In an action of accounting the Lord Ordinary pronounced an interlocutor closing the record and allowing a proof. Thereafter an interlocutor was pronounced by the Lord Ordinary making a remit to a man of skill to report on certain objections to the account lodged by the defenders. Held that this interlocutor was not an interlocutor pronounced under sec. 27 of the Court of Session Act, 1868, and could not be reclaimed against without leave of the Lord Ordinary.

1ST DIVISION.
Lord Kin-
cairney.

IN 1889 the Edinburgh Northern Tramways Company raised an action of count, reckoning, and payment against George Villiers Mann, S.S.C., and William Hamilton Beattie, architect, and on 9th July 1889 the Lord Ordinary pronounced an interlocutor closing the record and allowing parties a proof. After sundry procedure the pursuers lodged objections to certain accounts which had been stated by the defenders, and on 20th March 1894 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Of consent, remits to John Wilson Brodie, C.A., Edinburgh, to report on objections, 3 . . . with power to him to call for further production, and to examine havers so far as necessary; and remits also to C. W. Campion, taxing-master of the House of Commons, to report on objection 11, with instructions to distinguish, in the latter case, any charges not incident to the promotion of the pursuers' Act."*

The pursuers, within six days of the date when the interlocutor was

* "NOTE.—The parties agreed that the remit to report on objection 11 should be to Mr Campion."

signed, but without leave of the Lord Ordinary, presented a reclaiming No. 180. note.

The defenders objected to the competency of the reclaiming note, and argued;—The leave of the Lord Ordinary should have been obtained. The interlocutor reclaimed against was not within the scope of sec. 27 of the Court of Session Act, 1868.* The reclaiming note, therefore, was not under sec. 28, and being without leave was incompetent by sec. 54.

Argued for the pursuers;—The interlocutor in question was virtually an interlocutor allowing proof, and against such an interlocutor a reclaiming note was competent without leave of the Lord Ordinary.¹ The Lord Ordinary by a previous interlocutor had fixed that the remit should be to an engineer, and consent had been given to the remit to Mr Campion inadvertently.

June 28, 1894.
Edinburgh
Northern
Tramways Co.
v. Mann.

LORD PRESIDENT.—In the Single Bills notice was taken by the counsel for the respondents in the reclaiming note that this reclaiming note was in his judgment incompetent, and we sent the case to the Roll, reserving that objection. That objection falls now to be disposed of. In my opinion it is well founded. The reclaiming note is presented without leave of the Lord Ordinary, and that raises the question whether it is a reclaiming note falling under the 28th section of the Court of Session Act, 1868; because, if it is not, then it is excluded by the 54th section of that Act as being without leave.

Now, the question whether it is a reclaiming note under section 28 seems to me to be very easily decided. Section 28 provides that any interlocutor pronounced by the Lord Ordinary under the 27th section shall be reclaimable without leave within six days of its date. I have stated it shortly, but that is the substance of the provision. Accordingly, unless this interlocutor is an interlocutor pronounced under section 27, this reclaiming note against it is not competent under section 28. Now, the broad facts of this case seem to preclude the idea that this is an interlocutor under section 27. Section 27 is dealing with that stage of the case at which the record is being closed, and the future procedure in the case determined. At that stage parties are allowed to reclaim against an interlocutor of the Lord Ordinary without leave. But then we find that, in the present case, so long ago as 1889, the closing of the record

* Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 27,—“The Lord Ordinary shall, at the time of closing the record, require the parties then to state whether they are ready to renounce further probation. . . . If the parties shall not agree to renounce farther probation the Lord Ordinary shall appoint the cause to be debated, . . . and the Lord Ordinary, after hearing parties, shall . . . determine whether farther probation should be allowed.” The section then enumerates the various interlocutors which the Lord Ordinary may pronounce at this stage with reference to probation.

Sec. 28.—“Any interlocutor pronounced by the Lord Ordinary, as provided for in the preceding section, . . . shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it. . . .”

Sec. 54.—“Except in so far as otherwise provided by the 28th section hereof, until the whole cause has been decided in the Outer-House, it shall not be competent to present a reclaiming note against any interlocutor of the Lord Ordinary without his leave first had and obtained, but where such leave has been obtained, a reclaiming note presented before the whole cause has been decided in the Outer-House may be lodged within ten days from the date of the interlocutor granting leave. . . .”

¹ Quin v. Gardner & Sons, Limited, June 22, 1888, 15 R. 776.

No. 180.

June 28, 1894.
Edinburgh
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stage of the case was reached and passed, and the Lord Ordinary in actually closing the record pronounced an interlocutor sending the whole cause to probation. It seems to me that that was the first, the last, and only interlocutor reclaimable under section 28 of the Court of Session Act in this case. It is true that the interlocutor reclaimed against is about the mode of ascertaining certain facts, but it may very well happen that, in the incidental stages of a case, which has gone to proof and been judged of after proof, there will arise certain matters of detail to be ascertained, and that is just the kind of occasion when it seems very proper that the leave of the Lord Ordinary should be required before another appeal is taken to the Inner-House. But while the reason of the Act, applied to cases which have somewhat detailed procedure, is entirely sound, the direct and conclusive ground for refusing this reclaiming note is that, on the terms of sections 28 and 27 compared with section 54 of the Act, this is not a reclaiming note under section 28.

LORD ADAM.—I am of the same opinion.

LORD M'LAREN.—If I had been considering the question of practice which the Lord Ordinary has disposed of, I should not have hesitated as to making a remit to Mr Campion,—if I believed him to be the most suitable person,—without asking the consent of parties, because in the previous interlocutor the direction to remit to an engineer is merely administrative, and a proposal to remit to an unnamed person can never fetter the discretion of the Court when the actual remit comes to be made. But I agree with your Lordship that this reclaiming note is not competent, because the leave of the Lord Ordinary has not been obtained as required by the statute. I mention my impression about the authority of the Lord Ordinary, in order that the pursuers may not think that they have suffered any prejudice by the circumstance that their agent had not taken the necessary step to obtain the leave of the Lord Ordinary.

LORD KINNEAR.—I agree with your Lordship.

THE COURT sustained the objection, and refused the reclaiming note.

GRAHAM, JOHNSTON, & FLEMING, W.S.—A. & G. V. MANN, S.S.C.—Agents.

No. 181.

June 30, 1894.
Drummond's
Judicial
Factor.

DRUMMOND'S JUDICIAL FACTOR, Petitioner.—*Sym.*
WILLIAM INMAN, Compeerer.—*Dickson—Clyde.*

Judicial Factor—Powers—Sale of heritage not in accordance with authority of Court—Petition for approval of sale—Nobile officium.—A judicial factor having obtained power from the Court to expose certain heritable subjects for sale by public roup at the upset price of £9750, and if not sold, to re-expose the subjects at a reduced upset price, or to sell the same by private bargain at a price not less than the sum at which they had been publicly exposed for sale, sold the subjects before exposing them by public roup to a private purchaser for £9800. The property was bonded much above its value, and the postponed bondholders approved of the sale. Petition for approval of the sale *refused*.

Opinions that it was competent for the Court to approve of such a sale.

1ST DIVISION.
Lord Low.

By trust-disposition, dated 13th January 1891, the firm of Drummond Brothers and the late George Drummond, sole partner of the firm at that date, conveyed to James Martin, C.A., as trustee for behoof of creditors, their whole estates, heritable and moveable, with power to him to sell the same either by public roup or private bargain, as he might think fit. Mr Martin died in January 1893, and at that date the estate consisted of,

inter alia, heritable property situated in George Street and Wardie Road, No. 181. Edinburgh.

On 14th April 1893 a judicial factor was appointed, and he having petitioned the Court for authority to sell the heritable subjects, the Lord Ordinary remitted to the Accountant of Court to report. The Accountant of Court having remitted to Mr H. J. Blanc, architect, Edinburgh, to value and report upon the said properties, Mr Blanc valued the subjects in George Street at £9750, and those in Wardie Road at £35.

June 30, 1894.
Drummond's
Judicial
Factor.

On 19th October 1893 the Lord Ordinary (Low) pronounced the following interlocutor:—"Grants warrant to and authorises the judicial factor to expose for sale by public roup, after due advertisement, the subjects and others specified and described first and second in the prayer of the petition, at the upset price of £9750 for the subjects first described, and at the upset price of £35 for the subjects second described in the prayer of the petition; and if not sold at or above said upset prices, to re-expose the same for sale by public roup, after due advertisement, at such reduced upset price or prices as the Accountant of Court may fix, or to sell same by private bargain at prices not less than those at which they had been publicly exposed for sale."

The subjects were afterwards duly advertised, but before they were exposed for sale by public roup the judicial factor received and accepted a private offer, and sold the property in George Street at the price of £9800 to William Inman.

Difficulties having arisen as to the purchaser's title, the judicial factor applied to the Court for approval of the sale. He produced an opinion of the Accountant of Court, which bore,—“The property was bonded much above its value, and the postponed bondholders approved of the sale. Mr Blanc, by letter dated 11th May 1894—and produced—states that the factor acted judiciously in accepting the private offer. The Accountant is of opinion that the factor's acting in selling by private bargain may be approved of.” He also produced letters from the postponed heritable creditors approving of the sale, and a letter from Mr Blanc stating that he had acted judiciously in accepting the private offer. The Lord Ordinary reported the case to the Inner-House.*

* “OPINION.—The petitioner is judicial factor upon a trust-estate. In May 1893 he obtained authority from the Court to sell certain house property in George Street, Edinburgh, belonging to the trust, by public roup, at the upset price of £9750; and if the property was not sold at or above that price to re-expose it for sale at such reduced upset price as the Accountant might fix, or to sell the property by private bargain at a price not less than that at which it had previously been publicly exposed.

“The petitioner, before he had exposed the property for sale by public roup, received a private offer to purchase it at the price of £9800. He accepted the offer, and has now presented the present application for approval of the sale. The Accountant of Court reports in favour of the application being granted.

“The purchaser appeared, and referred to a judgment of the First Division in petition *Clyne*, 5th June 1894, 21 R. 849, in which it was held that although trustees might obtain authority from the Court to sell, they could not first conclude a contract of sale and then ask the approval of the Court. The purchaser in this case is quite willing to implement his contract, but he contended that, in view of the decision referred to, it was doubtful whether the Court had power to confirm the sale, and he naturally desires to have an unimpeachable title.

“The parties asked that the case should be reported to the Inner-House, and as it raises a question of importance not only to the parties, but in regard to the administration of trust-estates in the hands of judicial factors, the Lord Ordinary has thought it right to do so.

“There is this distinction between the present case and that of *Clyne*, that

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Drummond's
Judicial
Factor.

Argued for the judicial factor;—The sale, though not in conformity with the order of the Lord Ordinary, being at a price higher than the authorised upset price was a judicious transaction for the benefit of the estate, and might be confirmed by the Court. In the case of *Clyne*,¹ the petitioner had no powers of sale, and the power of the Court was limited by the statute. Here there was no statutory difficulty, and it was within the common law powers of the Court to grant the authority asked.²

William Inman appeared and argued;—The powers granted to the petitioner were limited and conditional; the conditions having been disregarded, the state of matters was the same as if there had been no powers of sale at all. In these circumstances it was incompetent for the Court to grant the petition, and give the purchaser a good title. The case of *Clyne* applied.

LORD PRESIDENT.—This application raises a point of general importance in the administration of property by a judicial factor. This judicial factor, vested in the heritable property in question, came to the Court and asked for authority to sell the subjects either by public roup or private bargain. Now, the Lord Ordinary, exercising the power of the Court, considered the question whether power to sell should be given, and the further question by what mode that power ought to be exercised in the interest of the estate. The Lord Ordinary had before him all the facts of the case, and on these he came to the decision that public roup was the proper method, and not private sale, at least until the state of the market had been tested by a public exposure. Now, we find that the factor, who had taken this power, did not exercise it, but on the contrary, without ever exposing the subjects for public sale, sold them by private bargain for £9800, a £50 note above the upset price. I cannot say that the difference of price is very impressive, or much distinguishes the sale from one at the upset price. The factor in so acting took upon himself a very grave responsibility. One of the merits of our law with regard to estates under judicial management is that, not merely formally but in fact, no important or extraordinary step can be taken by the factor on his own responsibility, the Court having first to consider the expediency of what is proposed. I regard it as a grave error and a grave departure from proper practice for any officer of the Court to take upon himself to exercise powers which the Court has refused to him.

The next question is, what are we to do now? Is it competent for us to grant the authority which the petitioner asks? I am prepared to assume, and I believe, that this would be within our competency. But then we must first be satisfied that it would be for the interest of the estate that we should take this step. The Lord Ordinary has decided that it was best for the interest of the estate to test the market by a public roup. I have heard nothing to indicate that the Lord Ordinary was wrong, or that a different course would now be right. Nothing has been said to reconcile me to the idea that people wanting to buy this George Street property are too shy to go to an auction. The guarded expressions of the Accountant of Court do not suggest this, and

there the trustees had not, before entering into the contract of sale, obtained any authority to sell, while here authority was granted to the judicial factor to sell, and the present application has only been rendered necessary because he did not proceed precisely in terms of the powers which were conferred upon him."

¹ June 5, 1894, *supra*, p. 849.

² Gilray, March 18, 1876, 3 R. 619.

proceed upon the same meagre information which we have now had before us. I see no ground, therefore, in the interests of the estate, for supposing that they will be injured by our adhering to the ordinary and salutary course, and I am for refusing the prayer.

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LORD ADAM.—I agree with your Lordship. I do not doubt that it would be competent for us to authorise this sale if special circumstances had been presented to us to make that course desirable. We have heard of no such special circumstances here, and I think that we should not grant the authority asked for. The Court thinks that the proper way to test the market is by public competition. There might be special circumstances, such as the subjects being situated at a distance from any market, in which the Court might in the first instance authorise a sale by private bargain. Here the proper method seems to me to be that which the Court usually orders. We have nothing to justify the course taken in this case, except the authority of Mr Blanc. I do not doubt the competency of Mr Blanc, but his authority does not seem to me to be conclusive. It has not been brought out that the estate will suffer by the ordinary course being followed, but whether that should happen or not, I think that the matter ought to be tested in the usual way.

LORD KINNEAR concurred.

LORD M'LAREN was absent on Circuit.

THE COURT pronounced this interlocutor:—"The Lords, upon the report of Lord Low, having considered the petition, with the interlocutor and opinion of his Lordship, No. 22 of process, and heard counsel for the factor and for the purchaser of the heritable property belonging to the factory estate mentioned in the petition, remit to Lord Low to refuse the prayer of the petition in so far as it craves approval of the sale of the property, 82 George Street, Edinburgh, mentioned in the petition, and to decern."

MURRAY, BEITH, & MURRAY, W.S., Agents for Petitioner.

GEORGE REID, Pursuer (Appellant).—*Graham Stewart—Hunter.*
DAVID GRAHAM, Defender (Respondent).—*Craigie.*

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July 3, 1894.

Cessio—Diligence—Diligence of prior creditors against property acquired by debtor after decree of cessio—Debtors (Scotland) Act, 1880 (44 and 45 Vict. cap. 34), sec. 9, subsec. 5.—Held (by a Court of seven Judges) that although, in a process of cessio, a debtor has been decreed to execute a disposition omnium bonorum in favour of a trustee for behoof of his creditors, individual creditors are entitled to do diligence for the recovery of their debts against property acquired by the debtor after the date of the decree.

Reid v. M'Bain, 17 R. 757, and *Calderhead v. Freer and Dobbie*, 17 R. 1098, commented on.

ON 7th December 1888, in a petition for *cessio bonorum* at the instance of George W. Rae, a creditor of the debtor, a decree was pronounced, in the Sheriff Court at Edinburgh, ordaining the debtor, George Reid, grocer in Loanhead, to execute a disposition *omnium bonorum* in favour of C. J. Munro, C.A., as trustee for behoof of his creditors.

In 1893 David Graham, baker, Penicuik, who held a Debts Recovery Act decree against Reid for £14, 19s. 4d., and dated 1st October 1888, used arrestments on that decree in the hands of Reid's employers, viz.,

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with three con-
sulted Judges.
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the Shotts Iron Company, Limited, by whom Reid was employed at a weekly wage of £1, 4s., and the treasurer of the Free Church at Loanhead, where Reid was church-officer at a salary of £6 a-year.

Reid then, on 14th September, brought an action in the Sheriff Court at Edinburgh for recall of the arrestments, and for decree for £100 as damages for the illegal use of diligence.

At the date of the action the pursuer had not obtained his discharge under the Cessio Acts; and it further appeared from the statements of the parties that the trustee named in the decree of cessio had declined to accept office, that the decree had not been extracted, and that no procedure had taken place in the cessio.

The pursuer pleaded, *inter alia*;—(2) The arrestments complained of being directed against wages and earnings of the pursuer due to him subsequent to the date of the said decree of *cessio bonorum*, and which are therefore protected from diligence for debt incurred by the pursuer prior thereto, are wrongful and illegal, and should be recalled, as craved.

The defender pleaded, *inter alia*;—(5) The process of cessio not being like sequestration, a universal diligence does not protect *acquirenda* by the debtor from the diligence of his prior creditors, and the arrestments complained of having been used for the purpose of attaching subsequent earnings of the pursuer, legally attachable, the same ought not to be recalled.

On 24th November 1893 the Sheriff-substitute (Rutherford) pronounced this interlocutor:—"Finds that the pursuer's earnings and emoluments subsequent to the date of the decree of *cessio bonorum*, referred to on record, are not by the said decree protected from the diligence of creditors whose debts were incurred prior thereto; therefore repels the pursuer's second plea in law, and, to the effect mentioned, sustains the defender's fifth plea in law," &c.

On appeal, the Sheriff (Blair), on 20th December, recalled that interlocutor, in effect sustained a plea stated by the defender that the decree of cessio not having been extracted was no bar to the arrestments; and assoilzied the defender.

The pursuer appealed.

After a hearing on the appeal the Court (THE LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER) appointed the cause to be heard before the Judges of the Division, along with three Judges of the First Division.

The question argued before the seven Judges was the general question raised by the pleas in law for the parties above quoted.

Argued for the pursuer;—Under the former law of *cessio bonorum*, it was not disputed that individual creditors might use diligence against their debtor so as to attach *acquirenda*, although their debts were contracted prior to the date of the cessio, but the effect of the Acts of 1880 and 1881 * was to put a decree of cessio into the same position in this

* The statutory provisions were:—

The Act regulating the process of Cessio Bonorum, &c., 1836 (6 and 7 Will. IV. cap. 56), enacts, sec. 16,—“And be it enacted that the decree pronounced by the Inner-House or by the Lord Ordinary on the Bills, or by the Sheriff, granting the benefit of *cessio bonorum*, shall operate as an assignation of the debtor's moveables in favour of any trustee mentioned in the decree for behoof of the creditors, provided always that it shall be optional to the creditors to require the debtor to execute a disposition *omnium bonorum*, as has been hitherto granted in processes of cessio before the Court of Session in favour of the trustee, the expense of which deed shall be paid out of the readiest of the funds thereby conveyed.”

The Debtors Act, 1880 (44 and 45 Vict. cap. 34), enacts, sec. 7,—“Any

matter as a sequestration, so that individual creditors whose debts were earlier in date than the decree of *cessio* could no longer use diligence. Only the trustee in the *cessio* could attach *acquirenda* of the debtor. That was the opinion of the late Lord President and of Lord Shand. [LORD RUTHERFURD CLARK.—What is the title of the trustee to attach *acquirenda*? The Act says that the decree shall operate as an assignation of the debtor's moveables. Does not that mean only the moveables belonging to him at the date of the decree?] If that was so, the trustee could petition for a second *cessio*, and thereby attach *acquirenda* of the debtor.² The decree of *cessio* did not discharge the debts of prior creditors, it merely took away from the creditors the right to use separate diligence. The defender's arrestments ought therefore to be recalled.

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Argued for the defender;—It being admitted that under the old law of *cessio acquirenda* of the debtor were not protected from the diligence of individual creditors, the question was whether that state of the law had been altered by the recent Acts of 1880 and 1881. Now, these Acts did not expressly take away the right of individual creditors to do diligence against *acquirenda*, nor was there any enactment similar to sec. 103 of the Bankruptcy Act of 1856, giving the trustee a title to recover

debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856 [19 and 20 Vict. c. 79], or of this Act, may present a petition for decree of *cessio bonorum*, in the same manner and subject to the same provisions and conditions, as nearly as may be, in and subject to which a person now entitled to apply for decree of *cessio bonorum* may do so under the Acts of Parliament enumerated in the schedule hereto annexed, hereinafter called the Cessio Acts [6 and 7 Will. IV. c. 56; 39 and 40 Vict. c. 70, sec. 26], and the provisions of the Cessio Acts shall apply, as nearly as may be, to such petition and the procedure thereunder, subject to the provisions hereinafter contained."

Sec. 8.—"Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, or of this Act, may present a petition to the Sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate for such behoof, and such process shall be taken and deemed to be a process of *cessio*. . . ."

Sec. 9.—"On such petition being presented the following provisions shall have effect:— . . . 5. Until the debtor shall execute a disposition *omnium bonorum* for behoof of his creditors, any decree decerning him to do so shall operate as an assignation of his moveables in favour of any trustee mentioned in the decree for behoof of such creditors. . . ."

The Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. cap. 22), enacts, sec. 5,—"A debtor with respect to whom decree of *cessio bonorum* has been pronounced shall be entitled, on the expiration of six months from the date of such decree, to apply to the Sheriff to be finally discharged of all debts contracted by him before the date of such decree, and the provisions of the 146th section of the Bankruptcy (Scotland) Act, 1856, with regard to the conditions on which a bankrupt shall be entitled to obtain his discharge on the expiration of six months, twelve months, eighteen months, and two years respectively, from the date of sequestration shall apply to debtors with respect to whom decree of *cessio bonorum* has been pronounced. A deliverance by the Sheriff granting, postponing, or refusing a discharge under this section shall be final, and not subject to review."

¹ Reid v. M'Bain, May 16, 1890, 17 R. 757, per Lord Shand, at p. 758; Calderhead v. Freer and Dobbie, July 9, 1890, 17 R. 1098, per Lord President, at p. 1099; also Stewart v. Robertson, June 6, 1891 (Outer-House), per Lord Low, not reported; Ross v. Hairstens, Nov. 16, 1885, 13 R. 207.

² Christie v. Loudon, Dec. 19, 1835, 14 S. 191.

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acquirenda. The only enactment bearing on the point was sec. 9, subsec. 5 of the Act of 1880, which declared that the decree of cessio should operate as an assignation of the debtor's moveables in favour of the trustee; but in that enactment, according to its natural construction, "moveables" meant only moveables belonging to the debtor at the date of the decree; and further, the enactment was in its terms practically identical with sec. 16 of the Act of 1836, which latter section, the pursuer conceded, did not give the trustee a title to *acquirenda*. If, therefore, neither the trustee nor individual creditors had a title to attach *acquirenda* the practical effect of a decree of cessio was to discharge the debtor of all debts existing at its date, and the provisions of sec. 16 of the Act of 1881, giving the debtor a right to obtain discharge on certain conditions, would be rendered nugatory. The opinions of the Lord President and Lord Shand in the cases cited by the pursuer were *obiter*, and were adverse to an opinion expressed by the late Lord President in *Simpson v. Jack*.¹

At advising,—

LORD YOUNG.—The question which has been argued before us is a general one, and it is this,—Whether a decree in a petition for cessio in the terms of the Sheriff-substitute's interlocutor of 7th December 1888 protects the estate of the debtor,—that is to say, estate which he has acquired subsequent to the decree,—from the diligence of creditors to whom he had incurred debts before the date of the decree in the application for cessio.

The estate before us in this case is a simple enough one; it amounts only to the earnings of the petitioner, some 24s. weekly, and in addition a small wage which he has as church-officer in a dissenting church, but the general question which was argued before us is altogether irrespective of the nature or extent of the estate, and it is as I have stated.

Both Sheriffs have decided that it is not so protected, but a doubt as to the correctness of this decision has arisen by reason of certain *obiter dicta* by the late Lord President and Lord Shand in two cases—*Calderhead v. Freer and Dobbie*, July 9, 1890, 17 R. 1098; *Reid v. M'Bain*, May 16, 1890, 17 R. 757. But giving all respect and weight to these *dicta*, I have come without any doubt or difficulty to be of opinion that a decree granting cessio affords no such protection as the pursuer in this action has contended for.

As far as I know, it has never been held that diligence used against a debtor's estate prior to his application for cessio becomes bad when he makes that application, and I know of no authority or principle for holding that it does so. Under our old law,—and the old law still exists, with, as I think, a single unimportant change,—unimportant at least with reference to the present question,—the process of cessio existed solely for the personal protection of the debtor, and proceeded upon this perfectly intelligible view, that where an honest man was prepared to hand over, and did actually hand over, his whole estate to his creditors, his person ought to be protected against incarceration, and if he was in prison that he ought to be liberated. But the decree of cessio gave him no discharge of his debts against his creditors. His creditors remained in just the same position as if no decree of cessio had been applied for or granted. They took all the estates which he surrendered to them, but in so far as their debts were unpaid they retained all the rights which they ever had against all his

¹ *Simpson v. Jack*, Nov. 23, 1888, 16 R. 131, per Lord President Inglis at p. 135; also Bell's Comm. ii. p. 485.

estate, whether it had existed before his application or had been acquired afterwards. No. 182.

Now, by a change in the law introduced by a recent statute, standing upon a very intelligible and convenient consideration, a debtor who has given up his whole estate for the benefit of his creditors may apply to the Sheriff for his discharge, and very large discretion is given to the Sheriff in considering whether he shall grant or refuse the discharge, or delay it or allow it in modified terms. If it appears that the debtor has given up his whole estate, and that it has been realised and distributed among his creditors, the Sheriff may grant the debtor his discharge in the *cessio* process, and the expense and delay necessary to obtain a discharge in a proper sequestration is thereby avoided in this small class of cases. The debtor is discharged as effectually as if he had been discharged in a sequestration, and is thus enabled to begin business again. That is the only change that has been made in the law of *cessio*, and it does not seem to me to be pertinent to the question before us.

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If the pursuer here is in a position to present an application to the Sheriff, and to say that according to the true meaning and spirit of the change which has been wrought by the Statute of 1881 he is entitled to get his discharge, he may do so, and if he is able to persuade the Sheriff to give him his discharge, then those persons who were his creditors before he applied for *cessio* will not be able to do diligence against any estate he may acquire after obtaining his discharge. But it seems that he is not in a position to make such an application, and he argues that it is not necessary for him to make it, because he says that the law as it has existed since the Act of 1881 protects from the diligence of creditors property which a debtor may acquire after the date of the decree granting *cessio*. That is not, in my view, the true meaning of the Act. I know of no authority or principle upon which the proposition for which the pursuer contends can be maintained, and accordingly I am of opinion that the defender should be assolizied.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD M'LAREN.—The question argued to us really comes to this, whether a decree of *cessio bonorum* when pronounced by the Sheriff operates as a perpetual restraint upon diligence at the instance of prior creditors, because if creditors are to be restrained in this way during the subsistence of the process of *cessio*, and until the debtor is discharged, it is evident that the right to use diligence for debts preceding the *cessio bonorum* can never be revived. The proposition, in fact, comes to this, that the pronouncing of the decree of *cessio* and the surrender by the debtor of his whole means and estate *eo ipso* discharges the debts which the debtor had incurred up to that time, and puts it out of the power of the creditors to recover the unpaid part of their claims out of his future acquisitions.

It was conceded that no rule of law preventing creditors from using diligence existed prior to the passing of the Debtors Act of 1881.

A process of *cessio bonorum* was merely a mode of obtaining protection for the person of the debtor from imprisonment for debt. The only legitimate reason for putting the debtor in prison was to compel him to make over his estate to his creditors, and therefore if the debtor were willing to make a surrender, and if the creditors were satisfied that he had handed over his whole estate, and came forward and said so, it was thought right that the power of

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the creditors to imprison their debtor should cease. It was never intended that the action of the debtor in giving up his present estate should debar his creditors from using diligence for the unpaid part of their claims against future acquisitions.

If I am right in my view of the effect of the process of *cessio*, it is clear that the Acts of 1880 and 1881 made no change in the process, except that it gave creditors a title to petition. The effect of the decree of *cessio* remained unaltered, because by the 5th and 6th clauses of the Bankruptcy and *Cessio* Act, 1881, it is provided that a debtor may within six months after the date of the decree apply to the Sheriff to be discharged of all debts contracted by him before the date of the decree. But if the effect of the decree of *cessio* were to put an end to the right of a prior creditor to use diligence against estate of the debtor subsequently acquired, this discharge would, to say the least, be a very useless proceeding.

It was said that the proper person to do diligence against any estate of the debtor for debts incurred before the decree was the trustee. I doubt very much if the trustee in a *cessio* has any right to attach estate which has come into the hands of the debtor after the decree of *cessio*. I think his duty is solely to ingather and distribute the estate of the debtor which he takes under the disposition *omnium bonorum*.

LORD TRAYNER concurred.

LORD JUSTICE-CLERK.—I entirely agree. I do not think that I or either of my brethren who were sitting in this Division of the Court when the case was first heard had any doubt about the decision which ought to be pronounced, but sitting as we then were, a Court of three Judges, and having in view the opinions expressed in former cases by the late Lord President and Lord Shand, we did not think it right to decide the present question without the assistance of your Lordships.

The LORD PRESIDENT concurred.

THE COURT pronounced the following interlocutor:—"The Lords having, along with three Judges of the First Division of the Court, heard counsel for the parties on the appeal, do, in terms of the opinions of the Judges present, recall the interlocutor of the Sheriff appealed against, assoilzie the defender from the conclusions of the petition, and decern: Find the defender entitled to expenses," &c.

CHARLES GARROW, Solicitor—MILLER & MURRAY, S.S.C.—Agents.

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THOMAS MILNE AND OTHERS, Pursuers (Respondents).—*Rankine—Wilton.*

July 4, 1894.
Milne v. Commissioners of
Lockerbie.

COMMISSIONERS OF THE BURGH OF LOCKERBIE, Defenders (Reclaimers).—*D. Anderson.*

Statute—Police Commissioners—Gas—Burgh Gas Supply (Scotland) Act, 1876 (39 and 40 Vict. cap. 49), secs. 38 and 41.—The Burgh Gas Supply (Scotland) Act, 1876, sec. 41, enacts,—“The commissioners shall from time to time fix the price to be paid for gas to be supplied during any succeeding year . . . provided that the price shall be such as will, as nearly as can be estimated, raise sufficient income to discharge all the costs . . . incident to the manufacture

and distribution of the gas made, together with the interest on all money borrowed in respect of the works” No. 183.

Sec. 38 enacts that the commissioners may levy such a rate, to be termed the “Gas Contingent Guarantee Rate,” as may be required to pay any annuities and the interest of money borrowed under the provisions and for the purposes of the Act. July 4, 1894.
Milne v. Commissioners of
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Held (rev. judgment of Lord Low) that gas commissioners are entitled (1) in fixing the price of gas to consider whether a higher or lower rate of charge will yield the greater return, and to adopt such rate as in their judgment will yield the greatest return from gas consumers, if that is necessary to prevent a deficit, and (2) at the same time to impose a guarantee rate to meet an anticipated deficit on the gas account.

In 1891 the Police Commissioners of the burgh of Lockerbie, in virtue of the powers conferred by the Burgh Gas Supply (Scotland) Act, 1876 (39 and 40 Vict. c. 49), acquired by purchase the whole undertaking of the Lockerbie Gas-Light Company, Limited, and, in connection with the purchase, borrowed on mortgage as provided by the Act. On 9th October 1893, in estimating the price of gas for the current year to 15th May 1894, as provided by section 41 of the Act,* the Commissioners resolved to fix the price at 6s. 3d. per cubic foot, and at the same time to impose a gas contingent guarantee rate of 5d. per £1.† 1st Division.
Lord Low.

On 30th January 1894 Thomas Milne, grain-merchant, along with three other inhabitants of and ratepayers in the burgh of Lockerbie, raised an action against the Commissioners concluding for declarator,—“*Primo*, that the defenders, in fixing the price of gas to be supplied by them to consumers thereof during any succeeding year or half year, are bound to fix the price of such gas at such a rate as will, as nearly as can be estimated, raise sufficient income to discharge all the costs and expenses of, and incident to, the manufacture and distribution of the gas made,

* The Burgh Gas Supply (Scotland) Act, 1876 (39 and 40 Vict. c. 49), sec. 41, enacts,—“The commissioners shall from time to time fix the price to be paid for gas to be supplied during any succeeding year or half year, and, until such price be altered by the commissioners, the price so fixed shall remain in force, provided that the price shall be such as will, as nearly as can be estimated, raise sufficient income to discharge all the costs and expenses of and incident to the manufacture and distribution of the gas made, together with the interest on all money borrowed in respect of the works, and to provide the sinking fund required by this Act, and to provide for a depreciation and renewal fund sufficient to maintain the works in perpetuity, and for all charges incident to the occupation of such works, and the moneys received in respect of and incident to the manufacture and distribution of gas shall be applied to such purposes only, and any balance at the termination of any year shall be carried to the debit or credit of the succeeding year. . . .”

† Section 38 of the statute is in the following terms:—“It shall be lawful for the commissioners, and they are hereby required from time to time to fix, impose, and levy such a rate, to be termed ‘The Gas Contingent Guarantee Rate,’ as may be required to pay any annuities and any interest due thereon, and the interest of money borrowed or to be borrowed under the provisions and for the purposes of this Act.”

Section 39.—“The Gas Contingent Guarantee Rate shall be imposed, levied, and collected on property situated within the burgh, on the requisition of the commissioners, by the authority in the burgh empowered by law to levy any assessment for police purposes therein, along with and in the same manner in all respects and from the same descriptions of persons and property as such assessment for police purposes, and the amount of such rate, when imposed, levied, and collected by such authority, shall be paid over to the commissioners for the purposes of this Act. . . .”

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Lockerbie.

together with the interest on all money borrowed in respect of the works, and to provide the sinking fund and other charges specified in section 41 of the said Act; and further, and in particular, in such a way, as nearly as can be estimated, as will prevent them, when fixing the price of gas as aforesaid, from designedly fixing the price so as to create a deficiency in such income, to be provided for out of the Gas Contingent Guarantee Rate under said statute, or otherwise than out of the price of gas to be estimated as aforesaid: *Secundo*, That it is illegal and *ultra vires* of the defenders to fix, impose, and levy upon and from the pursuers and all others, ratepayers in the burgh of Lockerbie, 'the Gas Contingent Guarantee Rate' specified in the 38th section of the said Act, unless the same is or may be required by the defenders to pay annuities and interest thereon, and interest on money borrowed by them in terms thereof by reason of a deficiency arising during any year or half year succeeding their estimate, after the price of gas has been fixed, as nearly as can be estimated, at such a figure as will pay all the annual charge as aforesaid." They also concluded for reduction of the resolution of 9th October 1893, and for interdict against the defenders collecting the Gas Contingent Guarantee Rate.

The pursuers, after narrating the course of administration followed by the defenders, averred,—(Cond. 15) "The defenders, in estimating the price of gas for the current year to 15th May 1894, which they had under consideration at their meeting held on 9th October 1893, have again informally fixed the price of gas at 6s. 3d. per 1000 cubic feet (being 5d. less than their price for the former years), and as the result of such a reduced price there will be a deficiency on the year's working of at least £320, 16s. 6d. . . . With the ostensible object of providing for the said apparent deficiency of £320, 16s. 6d. estimated in their said statement for the current year, the defenders at their said meeting on 9th October 1893, instead of performing their statutory duty of adjusting the price of gas to meet such apparent deficiency, resolved to impose, for the third time, a Gas Contingent Guarantee Rate, on this occasion of 5d. per £, representing a return upon a rental of £8830, according to the Burgh Valuation-Roll for the current year, of £183, 19s. 2d. Such a sum, the pursuers are led to believe and aver, is, however, intended by the defenders to pay the year's interest upon the said mortgage of £5400, which amounts (less tax) for the current year to £197, 7s. 11d., although they are aware that the moneys received by them from the sale of gas are primarily liable under the statute to meet the same."

The pursuers pleaded, *inter alia*;—(2) The defenders, upon a sound construction of the statute libelled, being bound in their yearly estimate to fix the price of gas at such a rate as will discharge all the costs and expenses of and incident to the manufacture and distribution of the gas made, together with the interest due by them on money borrowed in respect of the works, without creating any apparent deficiency, the pursuers are entitled to decree of declarator to that effect, as craved. (3) The defenders not being entitled to impose the said Gas Contingent Guarantee Rate unless in the event of a deficiency arising after the price of gas has been fixed by them as aforesaid, decree of declarator ought to be pronounced to that effect, as craved.

The defenders pleaded, *inter alia*;—(1) The pursuers' averments are irrelevant. (3) On a sound construction of the statute libelled, the defenders, in fixing the gas rate as above condescended on, have acted strictly within the meaning of the statute, and the pursuers are not entitled to decree in terms of the declaratory conclusions of the summons. (4) The defenders being entitled, by the powers conferred upon them by the said

statute, to levy the said "Gas Contingent Guarantee Rate," and having levied the same in terms thereof, the pursuers are not entitled to decree in terms of the declaratory conclusions of the summons. No. 183.

On 7th June 1894 the Lord Ordinary (Low) sustained the second and third pleas in law for the pursuers, and decerned in terms of the first and second conclusions of the summons, and granted leave to reclaim.*

July 4, 1894.
Milne v. Commissioners of
Lockerbie.

* "OPINION.—The first question in this case is as to the true construction of the 41st section of the Burghs Gas Supply (Scotland) Act, 1876. Reading that section alone, I do not think that it is ambiguous. It makes it imperative upon the Gas Commissioners to fix the price to be paid for gas at such an amount as will, as nearly as can be estimated, raise sufficient income to discharge all the charges mentioned in the section, including the interest on all money borrowed in respect of the works.

"*Prima facie*, the defenders have not adhered to the provisions of the section, because they have deliberately and intentionally fixed the price at an amount not capable of raising a sufficient income to pay the interest upon money which they have borrowed, as well as the other charges specified in the section.

"The position taken up the defenders is this: They say that the price which they have fixed is that which is calculated to bring in the largest possible income, because, if they made the price higher, many people would not use gas, and the income would fall. They have, they contend, a discretion in the matter, and the words, 'as nearly as can be estimated,' must be read as meaning 'as nearly as can be estimated consistently with the prudent and profitable management of the undertaking.' That construction, they argue, must be put upon the 41st section, when it is read in connection with the 38th section.

"When read alone, it does not appear to me that the 41st section gives any discretion to the Commissioners, or that the words 'as nearly as can be estimated,' admit of the construction for which the defenders contend. It is therefore necessary to consider the terms of the 38th section.

"That section occurs in the part of the statute (from the 27th to the 40th sections, both inclusive) which deals with the 'borrowing powers of Commissioners.' The 27th section authorises the Commissioners to borrow on mortgage any money which may be necessary for the purchase or erection of gas works, and to grant mortgages of any rates or charges leviable by them under the provisions of the Act, in security of the payment of the money so borrowed and interest thereon. Provision is then made by sections 28th to 37th for the form of mortgages and interest warrants, for the appointment of a judicial factor in the event of annuities or interest on borrowed money falling into arrear, for the application of borrowed money and kindred matters. Then the 38th section provides,—'It shall be lawful for the Commissioners, and they are hereby required from time to time to fix, impose, and levy, such a rate, to be termed "The Gas Contingent Guarantee Rate," as may be required to pay any annuities, and any interest due thereon, and the interest of money borrowed or to be borrowed under the provisions, and for the purposes of this Act.'

"That section appears to me to be designed for the security of mortgagees and annuitants. If the price of the gas fixed in terms of the provisions of the 41st section does not produce a sufficient income to meet the interest of borrowed money, as well as the other charges laid upon the income, then, and not till then, the Commissioners are authorised and required to levy the Gas Contingent Guarantee Rate. I arrive at that conclusion because, in the first place, the provisions of the 41st section as to the basis upon which the price of gas is to be fixed are imperative; and, in the second place, the terms in which the 38th section is expressed, and the rate thereby authorised described, appears to me to shew that the rate was only to be levied when required to meet a contingency, the contingency, namely, of the income derived from the sale of the gas not being sufficient to meet the interest upon money borrowed.

"I am therefore of opinion that the defenders in designedly fixing the price

No. 183.

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 Lockerbie.*

The defenders reclaimed, and argued;—Section 41 was not imperative in its terms, but left with the Commissioners a discretion in fixing the price of gas from time to time, so as to obtain the largest yield possible from the consumers. Merely to raise the price might lead to its becoming prohibitive, and so defeat the object of the increase. It was the duty of the Commissioners to consider probable results with a view to the most profitable management of the undertaking. It was not said that they had not carefully considered the matter.

Argued for the respondents;—The Commissioners had no right to levy a guarantee rate to meet a probable deficit. The Act intended that the deficiency should first have arisen. Any apparent or threatened deficit should be met by an increase in the price, otherwise the gas consumer was relieved at the expense of the ratepayer. It was not stated that an increase in the price of the gas would have resulted in a smaller return.

LORD PRESIDENT.—In this case it is perhaps best first to consider what is the due and statutory administration by the Commissioners of the system set up in the Act of 1876. I take it that it is perfectly clear that the Commissioners are bound, before imposing a guarantee rate, to exhaust the yielding power of their price clause,—that is to say, that they have no right, without making the most they can out of the sale of gas, by raising the price if necessary, to impose a rate. To put it in another way, they have no right to impose the burden of the establishment partly on the consumers and partly on the ratepayers. They must make the most they can out of the concern before they resort to a rate.

But then, while the statute is very imperative, as the Lord Ordinary has said, in the terms of section 41, there is underlying section 41 an element of conjecture or estimate, because, read in a condensed form, section 41 bids the Commissioners, as their first duty, make up their minds what price is likely to yield the largest sum. Now, I take it that this may be a higher price or a lower price, according to the position of the purchasers. If you could count upon every man who pays sixpence continuing to pay a shilling, then it would be a very simple process just to raise the rate, and then you are sure of your return. But the contrary notoriously is the fact, and the word “estimate,” and the duty of estimating imposed upon the Commissioners, seem to me to make it necessary that they should make up their minds not on the mere question whether sixpence or a shilling is the larger sum, but whether a sixpence or a shilling price will bring in the most money.

Now, they may be right or they may be wrong, but they say that they could not raise their price without reducing the yield, because their purchasers would not pay the enhanced price. As I have said, they may be right or they may be wrong upon that, it is not a matter we have anything to do with. The duty we have to see that they have performed is, that they estimate and that they fix the price with reference to the object to be attained, namely, paying the expenses of the establishment out of the price.

Now, when I turn from the consideration of the duty of the Commissioners to what is said on record, I cannot discover a relevant case laid against their administration. If you assume that their duty is the mechanical one of raising the price as often as they find a deficiency, then it is plain sailing—they have

of gas from year to year at an amount lower than that which they estimated would be required to provide an income sufficient to meet all the charges specified in section 41 acted illegally, and that the pursuers are entitled to have decree in terms of the leading declaratory conclusions of the summons.”

done quite wrong. But the pursuer's case seems to leave out of account that there are two factors in the computation of how much will be brought in by the price, and these are not merely the price, but the future number of payers of the price, and in this action, looking at the record from beginning to end, I do not find that these Commissioners are said to have omitted this duty of making up their minds as to the best way of exhausting the yielding power of the price clause.

Now, the practical question is whether the laying on of this guarantee rate is to be set aside or not, and it seems to me we could only set it aside if it were either admitted or proved that the price clause had not been worked according to the meaning which I have described. There is no such averment here. On the contrary, Mr Rankine has frankly admitted—he is not in a position to deny—that the Commissioners have fixed the price at what they consider the highest figure to bring in the largest yield. That being so, it seems to me that the case falls to the ground. I think I made it sufficiently clear that, in my opinion, the Commissioners are not entitled to resort to a guarantee rate until the price has produced the largest amount obtainable under the clause.

Having said that, I only desire to add that I think the Lord Ordinary's judgment proceeds upon an omission to observe the defect in the pursuer's case to which I have adverted. His Lordship treats it as if it were to be assumed in this case that the Commissioners had only to raise the price in order to enhance the yield. It seems to me that his Lordship's judgment, while stating a perfectly sound view of the working of the statute, is not maintainable, because he does not bear in view, or his attention was not called to the fact, that the Commissioners here, for all that appears, have applied their minds to the question of how much they can get from the consumers of Lockerbie taken as a whole.

I am therefore for recalling the Lord Ordinary's interlocutor, and I think the action should be dismissed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Sustain the first plea in law for the defender: Dismiss the action as irrelevant, and decern," &c.

ALEXANDER STEWART, S.S.C.—MARCUS J. BROWN, S.S.C.—Agents.

MARY C. HALLPENNY, Pursuer (Appellant).—*Strachan—Watt.*
JAMES HOWDEN (Graham Stirling's Judicial Factor), Defender
(Respondent).—*Sym.*

No. 184.

July 4, 1894.
Hallpenny v.
Howden.

Proof—Onus—Jurisdiction—Sheriff—Judicial Factor.—A, a domestic servant, on the death of her mistress claimed certain pieces of furniture in the house as given to her by her mistress. In a reference made to an arbiter by A and by the judicial factor on the deceased's estate, the former produced a list of furniture in her mistress's handwriting in support of her claim. The arbiter having decided the case against A, the judicial factor refused to return to her the list of furniture. In an action brought by A in the Sheriff Court against the judicial factor for delivery of the writing the Sheriff assoilzied the defender.

In an appeal the Court affirmed the judgment, the Lord Justice-Clerk, Lord Young, and Lord Trayner holding that the pursuer had not proved her right to

No. 184. the document, Lord Rutherford Clark holding that the defender had proved that the document was his property.

July 4, 1894. *Question*, whether it is competent to sue in the Sheriff Court a judicial factor appointed by the Court of Session.

Opinion (per Lord Young) that it is not.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

IN August 1893 Mary C. Hallpenny, residing at 18 Broughton Place, Edinburgh, brought an action in the Sheriff Court at Edinburgh against James Howden, C.A., judicial factor appointed by the Court of Session on the estate of the deceased Miss Sarah Graham Stirling, 27 Queen Street, Edinburgh, in which she prayed the Court for decree against the defender, ordaining him to deliver to her "(first) a writing or document bearing to be a 'list of personal property belonging to Miss Sarah Graham or Graham Stirling, of 27 Queen Street, Edinburgh, and which I now commence 17th May 1878. For Mary Hallpenny or Hall'; and (second) sixteen parchment luggage labels, each having a writing thereon to the effect that the particular article thereon specified was given in gift by the said Miss Sarah Graham or Graham Stirling to the pursuer, and which writing and labels were delivered to the defender as judicial factor foresaid, or to his agents on his behalf, in or about the month of March 1889, to be submitted along with a memorial to the Right Honourable John Blair Balfour, then Dean of Faculty, for his opinion in reference thereto."

The case arose in the following circumstances, as disclosed by the admissions of the parties and by a proof:—The pursuer had for many years prior to Miss Graham Stirling's death been in her service as housekeeper at 27 Queen Street. The furniture in that house, when Miss Graham Stirling came to reside there, was possessed by her in life-tenant merely, but she afterwards, from time to time, bought articles of furniture, and added them to the furniture of the house. Of the furniture so bought Miss Graham Stirling made a list, being the document first described in the prayer of the petition. The heading of the list was in Miss Graham Stirling's own handwriting. Whenever she bought a new article she obtained the list from the pursuer (in whose custody the list usually was), wrote the name of the article in the list, and then returned the list to the pursuer. The labels second referred to in the prayer of the petition were alleged by the pursuer to have been bought for the purpose of being attached to the articles of furniture which had been purchased by Miss Stirling, but they were never so attached.* The labels were not subscribed, and the parties were at issue as to whether the writing on them was Miss Stirling's. The furniture purchased by Miss Stirling was in her use and possession at the time of her death.

After Miss Stirling's death the pursuer, founding upon the documents in question, which were in her possession, claimed the articles of furniture bought by Miss Stirling on the ground that they had been gifted or bequeathed to her. The defender, as judicial factor, declined to admit this claim, and the parties referred the matter to the Dean of Faculty (Mr J. B. Balfour), who determined that the pursuer's claim was untenable. The documents in question were submitted to the Dean of Faculty, along with the memorial, and were returned, along with the Dean's opinion, to the defender, who declined to give them back to the pursuer.

The pursuer pleaded ;—(1) The said writing and labels being the pro-

* The following was a sample of these labels :—" My own property, October 30th /83, I, Miss Sarah Graham Stirling, give in gift to Mary Hallpenny, my attendant, my greenish sofa, with cover and pillow cushion, 27 Queen Street."

perty of the pursuer, she is entitled to delivery thereof. (2) The defender having no right to the said documents or to retain possession thereof, the pursuer is entitled to decree in terms of the petition, with expenses. No. 184.
July 4, 1894.
Hallpenny v.
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The defender pleaded, *inter alia*;—(1) Pursuer's statements are irrelevant. (2) The pursuer has no right, title, or interest.

On 14th May 1894 the Sheriff-substitute (Rutherford) pronounced this interlocutor, after five findings in fact:—"Finds in fact and in law, assuming the documents mentioned in the prayer of the petition to be (as the pursuer alleges) in the handwriting of the late Miss Graham Stirling (1) that the pursuer has failed to shew that she has any right, title, or interest to obtain delivery thereof; and (2) that the defender, as judicial factor on Miss Graham Stirling's estate, is their proper custodian: Therefore assails the defender from the conclusions of the libel, and decerns."

The pursuer appealed, and argued;—The pursuer was entitled to recover these documents on the ground that they were her property. They were in her possession at the time of Miss Stirling's death. That raised a presumption that they were the pursuer's property. The mere circumstance that the pursuer had laid them before the arbiter in support of her claim did not entitle the defender to retain them as part of the estate.¹

Argued for the defender;—Looking to the character of these documents, there was no presumption that they belonged to the pursuer. The presumption was that they belonged to the estate of the deceased, and the defender as judicial factor was entitled to retain them unless the pursuer proved that they were her property, which she had failed to do.

LORD JUSTICE-CLERK.—The claim of the pursuer here is that the defender should be ordained to deliver up to her sixteen parchment luggage labels, and a list of furniture, which had belonged to Miss Graham Stirling, and had been made up by her. The pursuer claims that these writings should be given up to her as being her property.

Upon a careful consideration of the proof I have come to be of opinion that the pursuer has not established that she ever had any right of property in the writings in question. This lady wrote out a list of the furniture which she bought and gave it into the custody of the pursuer, her servant, and when she bought anything new she used to get the list from the pursuer and write down what she had got, but the list, in my opinion, never became the pursuer's property. Then, as regards the labels, if written by the deceased, they are not in my opinion proved to have been made the property of the pursuer. I think that we must decide the case to the same effect as the Sheriff-substitute has done.

LORD YOUNG.—I am disposed to agree with your Lordship on the question of fact, that the pursuer has not shewn that she has any right of property in the writings which she claims should be delivered up to her, but according to my opinion it is my duty to state that I consider the pursuer's whole proceedings in this case to be incompetent upon general considerations which do not seem to have been raised in the Sheriff Court.

When we appoint a judicial factor upon an estate, we take that estate into our own management, and appoint him as our officer to do all that is necessary for the ingathering and distribution of the estate among the parties having

¹ Maiklem v. M'Gruther, March 20, 1842, 4 D. 1182; M'Aslan v. Glen, Feb. 17, 1859, 21 D. 511, 31 Scot. Jur. 274.

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right thereto, he having regard to the rights of all parties who are interested in it. We put this estate into the hands of the defender as judicial factor, and he proceeded to do what he considered to be his duty in ingathering Miss Stirling's estate. Assuming it to be true that he got possession of these articles from the pursuer—who was a servant in the house where all the factorial estate was situated—for the purpose of having it decided whether she was entitled to the furniture, he is nevertheless of opinion—and I agree with him—that he got them into his possession as judicial factor for the purpose of doing his duty as such, and in no other capacity, and that he is entitled to retain them.

There is no doubt that a judicial factor may recover writings or property from others in such circumstances as to make it his duty to restore them to the persons from whom he got them when his purpose was served, but that would be a matter for him to determine in the first instance, and upon his own responsibility, and if there were grounds for saying that the circumstances under which he had acquired them did not warrant him in keeping them as judicial factor, that would be a question for our judgment, as he is an officer of our Court, and for the judgment of no other. We might have come to the conclusion that it was his duty as our officer not to retain them, but to hand them back to the person from whom he got them, or we might have arrived at a contrary result, but at anyrate it would be for anyone desiring the return of such writings to appeal to us as his master and superior in the matter to give him instructions how to act. Therefore an action like this in the Sheriff Court against an officer of Court to compel him to give up documents which he thinks it according to his duty as judicial factor to retain, is, in my opinion, utterly incompetent.

There is another ground upon which I think we ought to dismiss this case which I think I ought to state, and it is this, that where, as in the present case, there is manifestly no interest in the property sought to be recovered, the labels with writing on them being of no use whatever as property, although no doubt they might be of use as evidence in some other action, I do not think it is reasonable that we should be called upon to adjudicate upon the question whether they are property or not. The documents sought to be recovered in this action are safe in the possession of the judicial factor, and he thinks perhaps they might not be so safe elsewhere.

I am of opinion upon all these grounds that the pursuer in this action has taken up a most untenable position, and that the action ought to be dismissed.

LORD RUTHERFURD CLARK.—The documents in question were given by the pursuer to the judicial factor in support of a claim she made for certain articles which belonged to the late Miss Graham Stirling. They were given for the determination of that question alone. After that question was settled, it was, I think, the duty of the factor to return them to the pursuer, unless he was able to shew that he had a right to retain them.

I think, therefore, that this case is to be determined as if it were an action by the judicial factor against the present pursuer for recovery of the documents. I am satisfied that the judicial factor is entitled to retain them. There is no proof that they belong to the pursuer. They were in the house of the deceased at her death, and I think that they belonged to her.

LORD TRAYNER.—This case is based upon the allegation that the articles sought to be recovered are the property of the pursuer, and the defence is that

they are not her property, and that she has no right, title, or interest in them. No. 184.
I agree in thinking that the pursuer has failed to establish her alleged right of
property, and am prepared to sustain the defence to which I have referred, and July 4, 1894.
therefore to assoilzie the defender. Hallpenny v.
Howden.

I desire to reserve my opinion on the question raised as to the competency of the action.

THE COURT recalled the Sheriff-substitute's interlocutor, and after findings in fact in terms of the first five findings in that interlocutor, found "that the pursuer has not established any right of property in the documents libelled: Therefore sustain the second plea in law for the defender, and assoilzie him from the conclusions of the petition," &c.

W. T. SUTHERLAND, S.S.C.—ROBERT BROATCH, L.A.—Agents.

ROBERT HENRY SWINTON AND OTHERS (W. F. Hunter's Trustees),
First Parties.—*W. Campbell.*

No. 185.

MRS KATHARINE CHRISTINA HUNTER, Second Party.—*Clyde.*

July 6, 1894.
Hunter's
Trustees v.
Hunter.

Succession—Trust—Testamentary annuity to widow less Government annuity and increase in latter after death of testator—Bona fide percepta et consumpta.—In an antenuptial contract of marriage the husband bound himself to make such contributions as were necessary to secure to his widow the usual annuity from the Bombay Civil Fund, and in the event of his widow not being entitled from any cause to such annuity he bound himself and his heirs to pay to her an annuity of £300.

The husband predeceased his wife, and left a trust-disposition and settlement by which he, *inter alia*, directed his trustees to pay to his widow an annuity of £300 "in addition to what she is entitled to under" the contract of marriage, "my intention being that the said" widow "shall have a free annuity of £600 under the said marriage-contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof"; under the declaration that in the event of his widow "from any cause losing or not receiving from the Bombay Civil Fund the usual annuity of Indian civil servants, she shall only be entitled to a free annuity of £500 from my own proper funds, to which sum her annuity under said marriage-contract and these presents shall in that event be restricted."

The amount of the annuity payable from the Bombay Civil Fund to the widow at her husband's death in 1876 was £300, and she accordingly received £300 a-year more from her husband's testamentary trustees. In 1882 the Bombay Civil Fund annuity was by Act of Parliament increased by a pension of £60 a-year. The husband's representatives continued to pay to the widow an additional £300 a-year until 1894, when the question arose whether the additional sum ought to be £240 a-year only in respect that she was receiving the additional pension of £60 a-year.

A special case was presented by the widow and her husband's representatives, in which it was admitted that they had paid and she had received the full £300 a year from her husband's estates in *bona fide* ignorance of any doubt as to her right to do so.

Held (1) that from the time the widow became entitled to the additional annuity of £60 she was only entitled to receive an annuity of £240 from her husband's estate, but (2) that she was not bound to repay the over-payments.

MR JAMES HUNTER, of the Indian Civil Service, was married to Miss 2ND DIVISION.
Katharine Christina Meiklejohn in 1864. By antenuptial contract of marriage, dated 3d March 1864, between him and his intended wife, Mr Hunter, *inter alia*, bound himself "to pay or allow to be retained from his civil service salary such annual or other contributions to the Bombay

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Civil Fund as will secure to his widow the usual annuity or other benefits of said Bombay Civil Fund after his death : And in the event of the said Katharine Christina Meiklejohn surviving her said husband, and not being on his death entitled to the annuity or other benefits of the said Bombay Civil Fund by reason of the retirement from the service of the said James Hunter, non-payment of the annual or other contributions to said fund during his life, or from any other cause, then and in that event the said James Hunter, in lieu of such annuity or other benefits of Bombay Civil Fund so lost to his widow by reason of his failure to secure the same, binds and obliges himself and his heirs and representatives whomsoever to pay to the said Katharine Christina Meiklejohn, in the event of her surviving him, a free yearly annuity of £300 sterling during all the days of her lifetime." Then followed certain minor provisions in favour of Mrs Hunter; and the contract bore that she accepted the provisions in her favour as in full satisfaction of her legal rights.

Mr Hunter, who had retired from the Indian Civil Service shortly after his marriage, on his succession to the estate of Hafton in Argyllshire, died without issue on 20th April 1876 survived by his widow and leaving a trust-disposition and settlement dated 27th July 1865. He had during his life made the contributions necessary to secure the usual annuity to his widow from the Bombay Civil Fund.

By his settlement Mr Hunter conveyed his whole estates, heritable and moveable, to trustees for, *inter alia*, the following purposes:— "That my trustees shall implement the obligations undertaken by me in regard to the annuity and other provisions settled upon my wife, the said Mrs Katharine Christina Meiklejohn or Hunter, by the contract of marriage entered into between me and her, . . . and I direct my trustees to make payment to the said Mrs Katharine Christina Meiklejohn or Hunter, in the event of her surviving me, of a free yearly annuity of £300 sterling during all the days of her life, in addition to what she is entitled to under said contract of marriage . . . my intention being that the said Mrs Katharine Christina Meiklejohn or Hunter, should she survive me, shall have a free annuity of £600 under said marriage-contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof: But declaring that in the event of the said Mrs Katharine Christina Meiklejohn or Hunter from any cause losing or not receiving from said Bombay Civil Fund the usual annuity of widows of Indian civil servants, she shall only be entitled to a free annuity of £500 from my own proper funds, to which sum her annuity under said marriage-contract and these presents shall in that event be restricted."

The trustees were further directed, in the events which had happened, to convey the residue of the testator's means and estates to his brother, Mr William Frederick Hunter.

Mr W. F. Hunter having made up his title to the estate of Hafton, on 15th May 1878, executed a bond of annuity in favour of his brother's widow, by which he bound himself to pay to her furth of the estate of Hafton a free annuity of £600, under similar conditions to those in the settlement as to imputing to account of payment of the annuity whatever sums she might receive from the Bombay Civil Fund, and also as to the restriction of the annuity to £500 in the event of the failure of that fund. Mr W. F. Hunter further undertook to fulfil all the purposes of his brother's settlement, and executed a discharge and bond of indemnification in favour of his brother's trustees.

The amount of the provision payable to Mrs Hunter at her husband's death from the Bombay Civil Fund was £300 a-year, and in implement

of the arrangement just narrated, Mr W. F. Hunter, and after his death in 1880 his trustees, paid an additional sum of £300 a-year to Mrs Hunter. This payment continued until 1894, when a special case was presented for determination of the question whether Mr W. F. Hunter's estates were burdened with an additional payment to Mrs Hunter at the rate of £300 a-year, or whether the additional payment should be reduced to £240. The parties to the special case were (1) Mr W. F. Hunter's trustees and (2) Mrs Hunter.

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The case set forth the facts already narrated, and stated further that in 1882 by Act of Parliament (45 and 46 Vict. cap. 45) the assets and liabilities of the Bombay Civil Fund were transferred to the Government of India, it being by sec. 2 of the Act, *inter alia*, enacted that the widows of civil servants being incumbents of an annuity from the fund should receive the amount of such an annuity from the revenues of India with the additional benefits of a "pension of £60 per annum, such additional benefit to take effect as from the 1st of April 1882." The case then stated;—"Under the provisions of this Act the second party has, since 1st April 1882, been in receipt of the pension of £60 thereby granted, in addition to the annuity of £300 formerly received by her from the said fund, and to the annuity of £300 paid her by the first parties as above mentioned. The first parties were not in point of fact aware, until recently, of the passing of the said Act, or of the additional pension received under it by the second party; who, on the other hand, has all along received and expended the whole of the said annuities and pension *in bona fide*, and without knowing that there was, or could be, any doubt of her right to receive the whole, although amounting together to more than £600."

In these circumstances the first parties maintained that they were bound for the future to make an additional payment of £240 a-year only to the second party on the ground that the testator intended that the total provision to his widow should in no event exceed £600 a-year, and consequently that the pension of £60 a-year, as well as the original £300 a-year from the Bombay Fund, should be imputed to account of that provision; and, on the assumption that this contention was well founded, the first parties further maintained that they were entitled to repayment with interest of the sums received by the second party since 1st April 1882 in excess of £600 a-year.

The second party maintained that the pension of £60 a-year ought not to be imputed to account of her provision, and that even if it ought to be so imputed for the future, she was not bound to repay sums received by her in excess, such sums having been received and consumed by her in *bona fide* ignorance of her legal rights.

The questions in law were:—" (1) Is the second party entitled to receive from the first parties an annuity of £300 per annum in addition to her annuity and pension of £360 from the Indian Government as in place of the Bombay Civil Fund? or (2) Is the second party entitled to receive in each year from the first parties only such a sum as will, together with the said annuity and pension of £360, give her a total annuity of not more than £600? (3) In the event of the second question being answered in the affirmative, is the second party bound to repay to the first parties the sums received by her in excess of £600 per annum; and if so, is she liable for interest on such over-payments, and at what rate?"

At advising,—

LORD JUSTICE-CLERK.—The late James Hunter bound himself by his ante-

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nuptial contract of marriage to pay or allow to be retained from his salary as an Indian civil servant the contribution necessary to secure the usual annuity to his widow from the Bombay Civil Fund, and he undertook, if his widow should not get the benefit of the fund through his failure, that she should receive an annuity of £300 after his death. He did secure the Bombay Civil Service Fund annuity to her by contribution, and on his death she became entitled to it. He succeeded to the estate of Hafton shortly after his marriage, and executed a settlement by which he provided to his widow an annuity of £300 a-year over and above what she was entitled to under the marriage-contract, expressing it to be his intention that she should have a free income of £600 under the contract and the settlement, any annuity coming from the Bombay Fund to be imputed to account of it. There was a subsequent declaration that if the Bombay Fund annuity should fail, then £500 a-year only was to be paid out of his estate.

On James' death without issue he was succeeded in the estate by his brother William, to whom he directed his trustees to convey the residue of his means and estate. William having made up his title to the estate executed a bond of annuity, by which he bound himself to pay to his brother's widow the annuity of £600 a-year, under the same conditions as to the imputing to the annuity what she might receive from the Bombay Fund, and the restriction to £500 in the event of failure of that fund.

Accordingly from that time forward the widow received £300 a-year under the bond of annuity. At first the Bombay Fund yielded only £300 a-year, but the fund having been taken over by the Government of India, widows' annuities were from April 1882 increased by £60. Of this fact William's trustees were ignorant, and accordingly the widow has been receiving £660 annually since that date.

In these circumstances the first question is whether the widow is entitled still to receive £300 under William's obligation? I am of opinion that she is not. The intention of her husband in his settlement is, I think, clearly expressed to be that she shall have a free annuity of £600, and that any annuity she might receive from the Bombay Fund was to be imputed to account of the £600. The Bombay Fund annuity took full effect from his having fulfilled his obligation to pay the contributions necessary, the annuity at that time was £300 a-year, and therefore to make up £600 an additional £300 was necessary, but the intention being definitely and in terms expressed that he desires her to receive £600, and that what comes from the Bombay Fund is to be imputed to that sum, she cannot in my opinion have right to more than £600, and is not in a position to decline to have any part of what comes from the fund imputed towards the £600. I therefore propose that the first question should be answered in the negative, and as following upon that to answer the second question in the affirmative.

The third question is, whether the widow is bound to refund to the trustees the sum of £60 for each year during which she has received the additional £60 from the Bombay Fund, it being held that only the difference between £360 and £600 should have been paid to her. According to the special case the sum was paid to her in good faith, and received by her in good faith, and we must deal with the matter upon that footing. I have felt that there is much difficulty as to how this question should be answered, but have ultimately come to be of opinion that in the circumstances it may be answered in the negative. The

trustees were in error in making the payment, but it must be held to have been an error of view as to the widow's legal right, on a question of construction of documents, the view they took being one for which much may be forcibly urged. And the widow was entitled to assume that she was paid only what she was entitled to. It is equitable therefore that she should not be called upon to repay the amount.

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LORD YOUNG.—I think that there is a great deal to be said for the plea of the widow that she is entitled under her husband's settlement to £300 a-year without reference to the pension of £60 given by statute in addition to the annuity previously given to her from the Bombay Civil Fund of £300. Two views have been put before us on this question, the one view being that if from the Bombay Fund annuity and the Government pension together she receives a sum of £360 per annum, then that whole sum is to be imputed to the annuity of £600 to which she is entitled under the settlement. The other view is that the pension of £60 is to be altogether disregarded, and only the original annuity of £300 is to be taken as part of the clear annuity of £600. There is, as I have said, a good deal to be said for that latter view, which is that of the widow, but upon the whole I have come to the conclusion that the other view is the sound one, and that the obligation upon the estate is simply to make up her annual income to £600, so that if she receives £60 more from the Bombay Civil Fund, the contribution from her husband's estate will be so much less. But I do not think that it is at all a clear case, although I am of opinion with your Lordship that the widow is entitled to receive £240 only from the estate as matters stand at present. If anything should happen which would diminish the amount paid from the Bombay Civil Fund then her claim against the estate would revive.

Then there is this other question, whether it is the duty of the trustees to recover, and of the widow to repay, this £60 per annum which she has received and spent for so many years. I am of opinion that there is no such duty. It is said—and I see no reason to doubt it—that both the trustees and the widow acted in ignorance of their true position, and without making any inquiry. I think that all concerned acted in good faith, and I have come to the conclusion that the reasonable view is that the widow is entitled to receive £240 from the estate for the future, without making any deduction in respect of overpayments in the past. I think that the case falls within the equitable rule or principle of property received and consumed in good faith. Any other rule might lead to great hardship, even absolute ruin. I do not say that it would do so here. But the hardship and the possible ruin which might result from requiring repayment from one who has received property to which he was not entitled, and which he has consumed in good faith, is the foundation of the equitable rule or doctrine.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—The leading question to be here decided is, what is the amount which Mrs James Hunter is entitled to claim annually under the provisions in her favour contained in her marriage-contract and in her deceased husband's deed of settlement. There is no doubt as to the nature of her right under the marriage-contract. Under it she is entitled to the annuity or other benefits payable to her as her husband's widow out of the Bombay Civil Fund,

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or in the event of such annuity or benefits being lost to her from whatever cause, then, in lieu thereof, to a sum of £300 a-year out of her husband's estate. By his deed of settlement Mr Hunter directed his trustees to make payment to his widow of an annuity of £300 per annum, in addition to what she was entitled to under her contract of marriage, but adding these words—"My intention being that the said Mrs Katharine Christina Meiklejohn or Hunter should she survive me, shall have a free annuity of £600 under said marriage-contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof." It is contended for Mrs Hunter that under this provision in her husband's settlement she is entitled to an annual payment of £300 in addition to the sum received by her from the Bombay Civil Fund, whatever that sum may be. This contention appears to me to be distinctly at variance with the expressed will of the trustor. It is clearly stated to be his desire and intention that his widow should have an annual income of £600 under the combined provisions of the marriage-contract and the trust-settlement, and it is just as clearly stated that whatever benefit Mrs Hunter may receive from the Bombay Civil Fund is to be imputed as part of that annual income. The amount payable to Mrs Hunter by her husband's trustees out of Mr Hunter's estate is just so much as, and no more than, in addition to the sum received by her from the fund, will make up a sum of £600 per annum. I think this result is necessarily reached from a consideration of the provisions of the settlement to which I have referred.

Had this result been in any degree doubtful, I think the doubt would have been removed by a consideration of what Mr Hunter has done by way of provision for his wife in the event (which has not happened) of her losing the benefit of the fund. In that event he has provided that she shall receive out of his estate an annuity of £500 "to which sum her annuity under said marriage-contract and these presents, shall in that event be restricted." This is inconsistent with the idea that under the settlement Mrs Hunter was provided with an annuity of £300 absolutely, that is irrespective of any benefit received by her from the fund, for if so, then the husband's restriction of her right would have been unavailing. If Mr Hunter under his settlement gave his widow absolutely an annuity of £300, then she is entitled to that in any case. But if the benefit of the fund ceased from any cause, then by the marriage-contract, in lieu of such benefit, Mr Hunter bound himself to make payment to his widow of £300 a-year. Accordingly, on the cessation of the benefit from the fund there would be due to Mrs Hunter in respect of her husband's marriage-contract obligation £300 per annum, which, with the £300 absolutely hers under the settlement would give her an annuity of £600; although Mr Hunter expressly provides that on the cessation of the benefit from the fund his estate is only to be burdened in favour of his widow to the extent of £500. As he could not restrict his obligation under the marriage-contract, it is plain that he intended the burden on his estate to depend on whether his widow received any benefit from the fund, and the amount, if any, which she so received. In short, as I have already said, Mr Hunter desired that his widow should have an income of £600 a-year, to consist (1) of whatever annuity or benefit she might receive from the fund, and (2) so much but no more from his estate as added to the amount received from the fund would make up the £600. I am therefore of opinion that the first question should be answered in the negative, and the second question in the affirmative.

The third question presents more difficulty. In regard to it I assume that the trustees paid Mrs Hunter £300 a-year irrespective of what she was receiving from the fund, in the view that this was her right under the deed of settlement. Although I think that view erroneous, I cannot say that the trustees were in any way to blame for so construing that deed. It was a view that might very reasonably be entertained. In these circumstances, as both the trustees and Mrs Hunter were in error as to the legal effect of the settlement, I think there is no claim for repetition of what has been already paid to Mrs Hunter. I would therefore answer the third question in the negative.

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THE COURT answered the first question in the negative, the second in the affirmative, and the third in the negative.

SKENE, EDWARDS, & GARSON, W.S.—STUART & STUART, W.S.—Agents.

DAME HANNAH GRISSSELL ELIOTT, Pursuer (Reclaimer).—*Ure—Cullen*. No. 186.
ROBERT PURDOM (Sir William F. A. Elliott's Trustee), Defender
(Respondent).—*Rankine—Maconochie*.

July 7, 1894.
Elliott v.
Elliott's Trustee.

Husband and Wife—Marriage-contract—Trust—Provision for wife or wife trustee for husband.—By antenuptial bond of annuity A provided to his wife an annuity of £1000 per annum, "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life, . . . moreover, I do hereby renounce and discharge my *jus mariti* and right of administration of and in relation to" his wife's estate, "including the fore-said annuity payable to her during my lifetime, declaring that the same shall be and remain a separate estate in her person, free of any right or claim on my part whatsoever." Some years after the marriage A executed a trust-disposition of his whole estate for behoof of creditors. *Held* that the annuity fell to be applied by the wife for her husband's behoof, and that therefore the bond was ineffectual in a question with his creditors.

SIR WILLIAM FRANCIS AUGUSTUS ELIOTT of Stobs, Baronet, was married 1st DIVISION. to Mrs Kelsall on 22d April 1879. By bond of annuity, dated 24th March 1879, which proceeded on the narrative that the marriage had been arranged, Sir William bound and obliged himself and his heirs, "executors, and representatives whomsoever, . . . to pay to the said Mrs Hannah Grissell Birkett or Kelsall, to be applied by her towards the expenses of my household and establishment, and that during all the days of my life, an annuity or yearly sum of £1000 sterling, . . . and in security of the personal obligation before written, I dispoise to and in favour of the said Mrs Hannah Grissell Birkett or Kelsall heritably All and Whole the lands and barony of Stobs and others, . . . And further I . . . bind and oblige myself immediately after the celebration of our marriage, to grant and deliver to the said Mrs Hannah Grissell Birkett or Kelsall a bond and disposition, or other legal obligation, providing and securing to her, in case she shall survive me, out of the said entailed lands and barony of Stobs and others, during all the days of her life after my decease, a yearly annuity of £2000 sterling: . . . Moreover, I, . . . do hereby renounce and discharge my *jus mariti* and right of administration of and in relation to the estate and effects now belonging or which may pertain and belong to the said Mrs Hannah Grissell Birkett or Kelsall, including the foresaid annuity payable to her during my lifetime, declaring that the same shall be and remain a separate estate in her person, free of any right or claim on my part whatsoever: In respect whereof, I, the said Mrs Hannah Grissell Birkett or Kelsall hereby accept of the said provision or annuity

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of £1000 sterling to be secured to me as aforesaid as in full satisfaction to me of all terce of lands, legal share of moveables, and every other thing that I, *jure relicte* or otherwise, could ask, claim, or demand from the said Sir William . . . in case I should survive him . . .”

In May 1886 Sir William executed a trust-deed for behoof of his creditors. Down to Martinmas 1887 the trustees thereunder made payment to Lady Elliott of the annuity of £1000. Thereafter they paid her each year only a portion until 1889, when they stopped payment altogether, on the ground that the income of Sir William's whole means and estate was insufficient to pay his creditors.

In June 1893 Lady Elliott, with the consent of her husband, raised an action against Robert Purdom, solicitor, Hawick, the then sole trustee acting under the trust-deed, for payment of the arrears of the annuity and interest thereon.

The defender pleaded;—(2) The said bond of annuity being ineffectual to give the pursuer a preference in a question with her husband's creditors, the defender should be assoilzied.

On 14th March 1894 the Lord Ordinary (Kyllachy) assoilzied the defender.*

* “OPINION.—The question in this case is whether Lady Elliott is a creditor under the antenuptial contract between her and Sir William for an annuity of £1000 per annum, which is provided to her during Sir William's life. There is no dispute as to the annuity provided to her in the event of her widowhood. The question is whether she can rank as a creditor for £1000 per annum, which Sir William undertook to pay to her, ‘to be applied by her towards the expenses of my household and establishment, and that during all the days of my life.’

“The defender, who is trustee for Sir William's creditors, contends that this is not a proper marriage-contract provision conferring upon Lady Elliott an individual and independent right, but is on the contrary truly a trust for Sir William's own behoof. The express purpose of the provision, he says, makes that clear. The pursuer, on the other hand, contends that the purpose expressed does not qualify her (Lady Elliott's) right, but merely expresses the motive of the trust, Lady Elliott being no doubt expected to apply the money in the way mentioned, but not being bound to do so, and this being, it is said, made clear by the subsequent clause in the contract by which Sir William renounces his *jus mariti* and right of administration, *inter alia*, over the fore-said annuity, ‘declaring that the same shall be and remain a separate estate in her (Lady Elliott's) person, free of any right or claim on my part whatsoever.’

“Now, I do not doubt that if this annuity had been granted to Lady Elliott simply for her separate use, she would have been a creditor for its amount. That, I understood, was conceded. Neither am I prepared to say that the result would have been different if the annuity had been granted for her separate use to be applied by her for the upkeep of the joint establishment of the spouses, while they both survived and lived together. It may be (I have not considered the question) that there would thereby have been constituted an independent interest in the pursuer's person which, as one of the conditions of the marriage, she might have been entitled to vindicate. But the difficulty is that the application in fact prescribed is not even in terms an application for the lady's benefit. She might come to live apart from her husband, and yet the annuity would, I suppose, still be applicable to the upkeep of the husband's establishment. Moreover, the upkeep of the husband's establishment is after all simply payment of the husband's debts, and therefore if the application expressed is obligatory, I do not, I confess, understand how the pursuer's position is to be maintained. Accordingly the pursuer's proposition really comes to be as I have said, that the purpose or application of the annuity is not expressed as part of the contract, but only mentioned by way

The pursuer reclaimed, and argued ;—The contract secured Lady Elliott No. 186. in a right to the annuity as her separate estate. The purpose expressed in the deed was not a condition of the gift, but only an expression of motive or of desire as to its application. That was made clear by the subsequent clause, which excluded all participation by the husband in the money, and left the spending of it absolutely under the control of the wife. July 7, 1894.
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Argued for the defender ;—The contract really constituted a trust for Sir William's own benefit by locking up a part of his estate so as to defeat, if possible, the diligence of creditors. The annuity was to be devoted entirely to the payment of the husband's own expenses, the purpose expressed in the deed being an imperative condition of the gift. The wife here was in no more favourable position than any other trustee for the husband.¹

LORD PRESIDENT.—I think that the interlocutor of the Lord Ordinary is right, and ought to be sustained. We have to consider what is the substance and effect of the provision to Lady Elliott in the bond of annuity. Now, I take it that the purpose to which this annuity of £1000 was to be appropriated being set out on the face of the engagement to pay, that is the only purpose to which it can lawfully be applied. That being so, the purpose is clearly said to be that it shall be applied towards the expenses of the husband's household and establishment. If that be the condition on which alone the pursuer is entitled to receive this £1000 a-year, does the fact that she makes herself the distributor and apportioner of the money make the case different? Would the position have been different had the arrangement been for payment to any other person, —a steward or housekeeper,—to defray the household expenses? I think not. The counsel for the reclamer referred to the passage at the end of the deed, where it is declared that the annuity shall be and remain a separate estate in the wife's person, free of any right or claim whatsoever on the part of the husband. But as Mr Rankine justly answered, this declaration must be read along with the description of the annuity to which this clause is relative. So read, the deed only constitutes a trust for a particular purpose, the purpose, that is, which is specified in the opening part of the deed, and gives to the wife no right or claim to have anything done with the sum other than what is set out at the beginning. Though she may have a discretion as to the mode in which she appropriates the sum, the purpose for which it is granted remains the same. The plain sense of the matter is this—a lady marries, and in order to ensure that her husband shall keep up what she deems a proper establishment, she binds him to set aside a certain annual sum for household expenses, and she

of expressing the grantor's motive and expectation. Now, I am not able to so read the contract. I think the words used must, if possible, be read as operative, and as expressing part of the contract. And that being so, I think the result is that the pursuer has no independent right which can compete with that of her husband's creditors. I think the arrangement in question comes in fact merely to this,—that Lady Elliott should receive during the marriage a fixed allowance for housekeeping, and should also be free from her husband's control in its disposal. Now, that may have been a quite good agreement between husband and wife, but it is not an agreement which, in my opinion, is good against the husband's creditors. I must, therefore, assoilzie the defender from the conclusions of the summons, with expenses."

¹ Ker's Trustee v. Justice, Nov. 7, 1866, 5 Macph. 4, 39 Scot. Jur. 11; Wood v. Begbie, June 7, 1850, 12 D. 963; Learmonth v. Miller, May 3, 1875, 2 R. (H. L.) 62.

No. 186. makes herself the apportioner and disbursing officer of this allowance. It is impossible to say that she can insist that her husband's household shall be kept up in this style while the creditors remain unpaid.

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LORD M'LAREN.—I concur, and I do so on the grounds stated by your Lordship and by the Lord Ordinary. Under this bond of annuity Lady Elliott virtually became the trustee of her husband for the sum agreed to be paid. Such a deed, though obligatory between husband and wife, can have no other force whatever. The reason for this is, that no one is entitled to put his funds into a position in which they are not available for his ordinary debts, or to set aside a part of his income from his creditors. Under this bond of annuity Sir William Elliott gave no separate interest to his wife,—separate and distinct, that is, from the interest he himself had in the object proposed.

LORD KINNAR CONCURRED.

LORD ADAM WAS ABSENT.

THE COURT REFUSED THE RECLAIMING NOTE.

DUNDAS & WILSON, C.S.—MACONOCHE & HARE, W.S.—AGENTS.

No. 187. JOHN HOGG, Petitioner (Appellant).—*Clyde.*
 THE LORD PROVOST AND MAGISTRATES OF EDINBURGH, Respondents
 (Respondents).—*Boyd.*

July 7, 1894.
Hogg v. Magistrates of Edinburgh.

Burgh—Height of houses—Dean of Guild—Edinburgh Municipal and Police (Amendment) Act, 1891 (54 and 55 Vict. cap. cxxxvi.), sec. 44.—The Edinburgh Municipal and Police (Amendment) Act, 1891, sec. 44, enacts that "houses or buildings in any existing street or court shall not, without the sanction of the magistrates and council, be increased in height above" a certain height.

Held that this enactment applied to houses which it was proposed to erect on ground hitherto unbuilt on fronting an existing street.

2D DIVISION.
 Dean of Guild Court, Edinburgh.

ON 6th April 1894 John Hogg, builder, Leith, presented a petition in the Dean of Guild Court, Edinburgh, for warrant to erect two tenements of dwelling-houses upon a vacant piece of ground, hitherto unbuilt upon, fronting Maryfield Place, Edinburgh.

On 14th June the Dean of Guild pronounced this interlocutor:—"In respect that the height of the petitioner's proposed tenements exceeds the height prescribed by section 44 of the Edinburgh Municipal and Police Amendment Act, 1891, as amended by section 34, subsection 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act, 1893,* and that the petitioner has not obtained the consent of the Town-council to such increased height, refuses the prayer of the petition *in hoc statu*, and decerns."

* The Edinburgh Municipal and Police (Amendment) Act, 1891 (54 and 55 Vict. cap. cxxxvi.), sec. 44, enacts,—“Houses or buildings in any existing street or court shall not, without the sanction of the magistrates and council, be increased in height above the height of one and a quarter times the width of the street or court in which such houses or buildings are situate, measuring from the level of the pavement to the ceiling of the highest habitable room. Provided always that any existing house or building in any existing street if taken down may be rebuilt to its existing height.”

The Edinburgh Improvement and Municipal Police (Amendment) Act, 1893, (56 and 57 Vict. cap. cliv.), sec. 34, enacts,—“Sections 42 and 44 (i.e., of the 1891 Act) shall be read as if the word ‘habitable’ occurring therein respectively were omitted therefrom.”

The petitioner appealed on the ground that the provisions of the Edinburgh Police Act founded on by the Dean of Guild did not apply to houses which it was proposed to build on ground hitherto unbuilt upon. No. 187.
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The Lord Provost and Magistrates of Edinburgh appeared as respondents in support of the Dean of Guild's judgment.

The parties lodged a joint minute from which the following facts appeared:—

The average height of the petitioner's proposed tenements was 42 feet from the level of the pavement to the ceiling of the highest room. Maryfield Place, by which access would be obtained to the tenements, was an existing public paved street, 24 feet in width. Consequently one and a quarter times the width of the street was 30 feet, which, if the statutory provisions founded on by the Dean of Guild applied, was the maximum height allowed for the tenements without the sanction of the Magistrates and Council, and was exceeded by the height of the petitioner's proposed tenements to the extent of 12 feet.

Argued for the petitioner;—The 44th section of the Act of 1891 did not apply to houses proposed to be erected on ground previously unbuilt upon. The language of the section shewed that. A non-existent house could not be "increased" in height. An analogous section in the Edinburgh Municipal and Police Act of 1879 had received this construction.¹ If section 44 was intended to apply to non-existent houses the word "exceed" in height would have been used, as in section 42 of the Act. The judgment of the Dean of Guild ought therefore to be reversed.

Argued for the respondents;—If the construction for which the petitioner contended was sound, it would in part defeat the policy of the section, which was to enable the Magistrates and Council to regulate the height of houses in the city. There was no reason why the height of houses to be erected on ground hitherto unbuilt upon should not be so regulated. "Increased in height" meant "exceed in height." The language of the section might not be very happy, but even on a strict construction "increased" was not wrong. For the section applied not only to "houses" but also to "buildings," and if an unfinished building could not be accurately called a "house" it certainly was a "building," and what the section provided was that after a building had reached a certain height it should not be raised higher unless the sanction of the Magistrates and Council had been obtained. Further, the proviso at the end of the section shewed that houses to be erected in place of houses which had been taken down would, but for the proviso, have been within the general rule, but if it was incorrect to speak of "increasing" the height of a non-existent house to be built on ground hitherto unbuilt on, it was equally incorrect so to speak of a non-existent house to be built in place of one that had been taken down.

At advising,—

LORD RUTHERFURD CLARK.—The question is whether the 44th section of the Edinburgh Police Act of 1891 applies to a house built on a site on which a house had never been erected. It provides that houses in an existing street shall not be "increased in height" beyond a limit therein specified. The appellant contends that these words are applicable to existing houses only, because it is a solecism in language to speak of a non-existent house being increased in height.

The respondents admit the inaccuracy of the expression, but they maintain

¹ Pitman's Trustees v. Magistrates of Edinburgh, Jan. 26, 1882, 9 R. 444, per Lord President Inglis, at p. 449.

No. 187. that it means "shall not be raised higher," or "shall not exceed in height." If so, it is unfortunate that neither phrase is used, and that the appropriate correction was not made when the section was amended in 1893.

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It seems to be certain that the section applies to houses which are taken down and rebuilt. A similar section in a previous Act was so construed by the Lord President in the case of *Pitman*, 9 R. 444. The proviso, however, removes all doubt. It declares that any existing house in any existing street, if taken down, may be rebuilt to its existing height. Perhaps there may be difficulty in finding the existing height of a house that has ceased to exist. I daresay that it may be overcome by legitimate construction. But in declaring that a house which is rebuilt may be exceptionally dealt with, the proviso shews that if the benefit of the exception cannot be claimed, the house must be within the rule. In that case the house cannot be raised higher than the height specified in the statute. It follows that in regard to a new house of this kind the words which we are considering must have the meaning which is attributed to them by the respondents.

When this result is reached all difficulty ceases. The same construction which is necessary in one class of new houses must be adopted for all. The words of the section are very general. They comprehend all the houses and buildings in any existing street, and, subject to the proviso, put all under the same limitations as to height. There is no reason why all should not be under the same regulations, or why any should be under none. We must, if it is possible, construe the statute so as not to limit its generality, and in holding that the words "shall not be increased in height" are to be read as equivalent to "shall not exceed in height," I do not offend against the ordinary rules of construction. I am giving them a meaning that they are capable of bearing, and which is in consonance with the purpose of the Act. I have shewn that in one case they are used in that sense. I think that they are used in the same sense in all cases.

LORD TRAYNER.—The decision of this case depends upon the construction which is put upon the 44th section of the Edinburgh Police Act of 1891. That section is certainly not happily expressed, but the construction put upon it by the appellant, and which he asks us to adopt, is a construction which is practically destructive of the section. This, in my view, is not an admissible construction, if any other can be reasonably given to the section which will preserve it and make it of avail, and this, in my opinion, can be done. The word "increased," on which the question turns, may be read, no doubt, as having reference to existing houses; and the observation made by the appellant was quite a fair one, that you cannot "increase" what does not already exist. But "increase" may also be read as equivalent to "made greater." And so read, it will apply to houses already built or to be built. That is the construction I adopt, and I therefore agree with the decision of the Dean of Guild appealed against.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT affirmed the judgment of the Dean of Guild.

STRATHERN & BLAIR, W.S.—MILLAR, ROBSON, & M'LEAN, W.S.—Agents.

DONALD GROAT, Pursuer (Appellant).—*C. J. Guthrie—C. K. Mackenzie.* No. 188.
KENNETH STEWART, Defender (Respondent).—*D. Dundas—Fleming.*

July 7, 1894.

Groat v.
Stewart's
Trustees.

Succession—Vesting—No gift except in direction to convey.—A testator by trust-disposition and settlement directed his trustees to give to his wife the life-rent of his whole estates, and then directed them, as soon as convenient after her death, to convey a specific heritable property to his daughter M, "but in the event of her marrying and having no issue alive at the time of her death, the same shall revert to and belong to my surviving children, share and share alike."

The truster was survived by his wife, by his daughter M, and by other children.

Held that no fee vested in M at the testator's death.

JOHN STEWART, farmer, Westend, Dingwall, died in 1893, leaving a trust-disposition and settlement dated 11th September 1889, by which he conveyed his whole estates, heritable and moveable, to his son, Kenneth Stewart, his wife, Mrs Grace Macdonald or Stewart, and his daughter Margaret Stewart, as trustees, directing them, *inter alia*, in the second place, to give his wife the life-rent of his whole estates, heritable and moveable, and "(Third) that, as soon as convenient after the death of my wife, my trustees shall dispoise and convey to my said daughter Margaret my heritable property in Mill Street, Dingwall, with the pertinents thereto belonging, but, in the event of her marrying and having no issue alive at the time of her death, the same shall revert and belong to my surviving children, share and share alike. . . ."

2^d DIVISION.
Sheriff of Ross,
Cromarty, and
Sutherland.

The truster was survived by his wife, by his daughter Margaret, and by other children.

On 28th February 1893 the trustees sold the property in Dingwall which was the subject of the third purpose of the trust to Donald Groat, grocer, Huntly Street, Inverness, at the price of £336, and Groat, who was anxious to execute certain alterations on the property, but was not satisfied with the title offered, consigned the price in bank upon a deposit-receipt in name of the trustees. Subsequently, in November 1893, Groat, who had intimated that he resiled from the contract, brought an action in the Sheriff Court at Dingwall, against the trustees as trustees and also as individuals, the leading conclusion being that the defenders should be ordained to indorse and deliver to him the deposit-receipt for the price.

A variety of questions were raised upon record, but the case ultimately came to turn upon the question whether the trustees, with consent of the truster's widow and daughter, could give a good title to a purchaser of the property, the ground of objection being that the property had not vested in the daughter as *fiar*.

The pursuer pleaded, *inter alia*;—(1) The defenders having no power to sell the said subjects, the pursuer is entitled to resile from the purchase thereof. (2) The defenders having unreasonably delayed, and being now unable to deliver a valid disposition of the said subjects, the pursuer is entitled to resile from the purchase thereof.

The defenders pleaded, *inter alia*;—(1) The defenders being able and willing to deliver to the pursuer a valid and sufficient disposition of the subjects purchased by him, he is not entitled to resile from the purchase.

On 29th January 1894 the Sheriff-substitute (Hill), holding that the case fell within the rule of *Bryson's Trustees v. Clark*,¹ pronounced this

¹ *Bryson's Trustees v. Clark*, Nov. 26, 1880, 8 R, 142.

No. 188. interlocutor (after findings in fact in conformity with the foregoing narrative):—"Finds in point of law that the trustees had no right to sell, and that they are not in a position to give a good and valid title, Therefore decerns in terms of the conclusions of the petition. . . ."

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On appeal the Sheriff (Johnston) pronounced this interlocutor:—"Finds that, by virtue of the trust-disposition and settlement of the late John Stewart, dated 11th September 1889, the fee of the subjects in question in this action, described as 'my heritable property in Mill Street, Dingwall,' vested *a morte testatoris* in his daughter Margaret Stewart, one of the defenders, as an individual, subject to her mother's liferent, and with a substitution in a certain event only: Finds therefore that the defenders, as trustees of the said John Stewart, in conjunction with his widow and daughter Margaret, had title and right to dispose of said subjects, notwithstanding that there was no power of sale in the settlement; therefore recalls the interlocutor appealed against; sustains the first plea in law for the defenders, and assoilzies them from the conclusions of the action. . . ."

The pursuer appealed, and argued;—The fee of the property in Dingwall did not vest in anyone until the death of the liferentrix; consequently the trustees, even with the consent of the liferentrix and of Margaret Stewart, could not give a valid title to the defender. The case was indistinguishable from *Bryson's Trustees*,¹ since the only gift of the fee was contained in the direction to convey at the death of the liferentrix, and until the death of the liferentrix it was impossible to say in whose favour the conveyance was to be made. In any case there was only vesting subject to defeasance in the daughter before the death of the liferentrix,² but such vesting was of no avail in the present question of title.

The defenders supported the Sheriff's judgment upon the grounds stated by him, and further referred to the use of the word "revert" as shewing that a right of fee vested in the daughter subject to a substitution merely.

At advising,—

LORD RUTHERFURD CLARK.—The question is, whether Margaret Stewart took a fee in the heritable property mentioned in the third purpose of the trust-deed

* NOTE.— . . . It appears to me that the interpretation of the late John Stewart's will is ruled much more nearly by the case of *M'Alpine*, 10 R. 837, referred to by the defenders, than by that of *Bryson*, 8 R. 142, founded on by the pursuer. The terms of Mr Stewart's settlement are peculiar, and effect nothing more, in my opinion, than a postponement of the enjoyment of the fee of the Mill Street property during Mrs Stewart's liferent of the estate, coupled with a substitution to Margaret Stewart, the fiar, in one event only, viz., in the event of her marrying and having no issue alive at her own death. This does not provide for the event of her dying unmarried, or for the event of her marrying and having issue alive at her death. This, then, is plainly a substitution directed to the point of the fiar's death, and not a destination over directed to the point of time of the liferenter's death. This substitution Margaret Stewart could, I think, evacuate by deed executed now, just as well as executed after her mother's death, hence I think that the title which the trustees, with concurrence of her and her mother (whose liferent is not protected), are able to give, is valid and sufficient, and that the pursuer is bound to accept it. . . ."

¹ *Bryson's Trustees v. Clark*, Nov. 26, 1880, 8 R. 142.

² *Snell's Trustees v. Morrison*, March 20, 1877, 4 R. 709.

a *morte testatoris*, so that the trustees with the concurrence of her and the life-renter can give a good title to the purchaser. No. 188.

The truster gave to his widow a liferent of his whole estate, and on her death he directed his trustees to convey the property in question to his daughter Margaret, "but in the event of her marrying and having no issue alive at the time of her death, the same shall revert and belong to my surviving children, share and share alike." July 7, 1894.
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The Sheriff-substitute has held that the case falls under the rule of *Bryson's Trustees*, and that no right vested until the death of the widow. The Sheriff, on the contrary, thinks that the deed creates a mere substitution to Margaret, but only in the event of her marrying and having no issue, and that there is "not a destination over directed to the point of time of the liferenter's death." On these grounds he has decided that the fee vested a *morte testatoris*.

I am far from saying that the case is free from difficulty, but I have come to be of opinion that no right of fee is vested in Margaret.

There is to be no conveyance till the death of the widow, and until that event occur the person in whose favour it is to be made cannot be known. If Margaret is then alive, the conveyance will be made to her. If she is dead, it will be made to her children, and if she marries and leaves no children, to the surviving children of the truster. I do not think that any substitution is contemplated. The conveyance is to be made in favour of the person or persons who on the death of the liferenter are ascertained to have right to it.

There is no express institution of Margaret's children. It is, however, impossible to doubt that the truster meant that they should take if their mother predeceased the period when the conveyance was to be made. For nothing is given to the surviving children of the truster except in the case of Margaret dying without issue, and the *conditio si sine liberis* is clearly applicable. Nor is it stated that in order to succeed the children of Margaret must survive the liferenter. But this is the plain meaning of the trust-deed, inasmuch as there can be no conveyance in their favour unless they survive that event.

According to the words of the trust-deed, there is no institution of the surviving children of the truster, except in the event of Margaret's marrying and leaving no issue alive at the time of her death. It is doubtful whether we should read the words in their literal sense. It is difficult to imagine that the truster could intend that the succession of his own children should depend on the fact of Margaret's marrying or not marrying, and if they might succeed though Margaret never married, they might also succeed if she left issue who, by predeceasing the liferenter, could not be disponees. But it is not necessary to enter into that question. For however strictly we construe the trust-deed, I cannot accept the proposition that there is nothing more than a mere postponement of the enjoyment of the fee. It is at the present time uncertain who is to be the eventual fiar. If it happened that Margaret married and predeceased the liferenter without leaving issue, the conveyance must be made in favour of the truster's surviving children. They would take in their own right, and not as substitutes to Margaret. If Margaret died unmarried there would be intestacy. For nothing could vest in her while it was uncertain whether the disposition was to be in her favour, and nothing could vest in the other children of the truster if their right was conditioned on the marriage of Margaret.

No. 188. The ground of the Sheriff's judgment is that there is nothing more than a postponement of the fee, with a substitution to Margaret in favour of the children of the truster who may survive her, though in one event only. He seems to me to leave out of account that no right is given except through a conveyance to be made on the death of the liferenter, and that until that event shall happen it is uncertain in whose favour it is to be made. So long as the uncertainty exists there cannot be vesting. The conveyance is withheld not merely for the protection of the liferenter, but also in the interest of the contingent disponee.

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I have already said that in my opinion there is no substitution. When the liferenter dies the conveyance will be made to the person who on the occurrence of that event is ascertained to be the disponee. If Margaret survives the liferenter there will be a simple conveyance in favour of herself and her heirs. There is no direction that it shall contain a destination in favour of her children, and if they are not to be included as substitutes, there cannot be a substitution of the children of the truster who might survive her, but conditional on her marrying. It is said that the direction that the property "shall revert and belong to my surviving children," indicates that it shall pass from Margaret to them, and therefore that they take as substitutes to her. To my mind there is no force in the argument. The language is inaccurate, but I cannot read a clause, the evident purpose of which is to specify the person in whose favour the conveyance is to be made, as directing a substitution.

Nor do I see any ground for holding that the surviving children of the truster mean the children who survive Margaret. The whole clause is conditioned on the death of the liferenter, and just as the word "surviving" must in the ordinary case be referred to the date of distribution, so in this case it must be referred to the date at which the clause comes into operation. The surviving children of the truster are only possible disponees by reason of surviving the liferenter.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal and recall the interlocutor appealed against: Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-substitute dated 29th January 1894: Find in law (1) that the fee of the subjects in question did not vest *a morte testatoris* in Margaret Stewart, daughter of John Stewart, the truster; and (2) that the defenders as trustees of the said John Stewart in conjunction with his widow and daughter had no title or right to dispose of said subjects: Therefore sustain the first plea in law for the pursuer, and decern in terms of the conclusions of the summons," &c.

ALEXANDER ROSS, S.S.C.—MACKENZIE & BLACK, W.S.—Agents.

BURNLEY STEAMSHIP COMPANY, LIMITED, Appellants.—*Dickson—Wilson.* No. 189.

JOHN AIKEN (Surveyor of Taxes), Respondent.—*Comrie Thomson—A. J. Young.*

July 10, 1894.

Income-tax—Deductions for wear and tear—Obsolete type of ship—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100, Schedule D, Case I. Rule iii.—Customs and Inland Revenue Act, 1878 (41 Vict. c. 15), sec. 12.—Section 12 of the Customs and Inland Revenue Act, 1878, provided that the Commissioners should in assessing the profits or gains of any trade or adventure chargeable under schedule D of the Income-Tax Acts, or the profits of any concern chargeable by reference to the rules of that schedule, “allow such deduction as they may think just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern.”

Held that the owners of a ship engaged in trade were not entitled under this section to a deduction for depreciation in the value of their ship caused by ships of a better construction being built.

At a meeting of the Commissioners for General Purposes acting under the Property and Income-Tax and Inhabited House Duty Acts for the Lower Ward of the County of Lanark held at Glasgow on 21st March 1894, the Burnley Steamship Company, Limited, owners of the steel steamship “Burnley,” which was employed in the carrying of cargo for hire, appealed against an assessment under schedule D of the Income-Tax Acts for the year ending 5th April 1894, on the sum of £327. The appellants objected that a sufficient sum had not been allowed in respect of diminished value under the provisions of the 12th section of the Customs and Inland Revenue Act, 1878.*

The depreciation allowed to the appellants under the assessment had been fixed on the basis of deducting five per cent from the cost of the ship for the first year of her existence, and of deducting five per cent from the written down or reduced value for each subsequent year.

After hearing evidence, the Commissioners found the deduction of depreciation at the rate of five per cent upon the written down value from year to year just and reasonable, in the case of a vessel such as the “Burnley,” if applied as an average rate over a series of years. The Commissioners accordingly confirmed the assessment.

The appellants thereupon asked and obtained a case for the opinion of the Court of Exchequer† under the Taxes Management Act, 1880 (43 and 44 Vict. c. 19), sec. 59.

Argued for the appellants ;—Under the Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100, schedule D, case 1, rule 3, the Commissioners were empowered to make a deduction only for the actual cost of repairs. It being thought inequitable that no allowance should be made for plant

* Quoted in rubric.

† “NOTE.—The Commissioners in this case were asked by the appellants to take into consideration, in deciding what rate was just and reasonable, the facts (1) that ships frequently became obsolete and of less earning power before they were physically worn out ; and (2) that their market or sale value might and frequently did fall below their value as fixed by the depreciation rate allowed in making the assessment or even that proposed by the appellants. Evidence was led on both these points. The Commissioners are of opinion that the words ‘diminished value by reason of wear and tear’ used in section 12 of the Customs and Inland Revenue Act, 1878, do not cover (a) loss of earning power owing to plant being rendered more or less obsolete through the introduction of improved or other plant, or (b) diminution in market value apart from its having been caused by wear and tear.”

No. 189. gradually becoming depreciated, the Customs and Revenue Act, 1878, by section 12, introduced an allowance for diminished value by reason of tear and wear. Now, these latter words were open to construction, and occurring as they did in a remedial statute they must receive a liberal construction.¹ So construed they covered depreciation caused by newer and better ships being built.

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Argued for the Surveyor of Taxes;—It was a sufficient answer to the appellants' argument to say that the "tear and wear" contemplated by the Act of 1878 was physical deterioration caused by ordinary use of the subject. It could not cover depreciation caused by plant becoming obsolete and out of date.

LORD PRESIDENT.—Mr Dickson very properly admitted that if the question were to be determined upon a consideration of the Act of 1842, he would have no case. The provision of the Act of 1878 referred to was passed because the Act of 1842 did not allow anything to be deducted but the actual amount of repairs. It is, therefore, really upon the Act of 1878 that the question turns.

Now, I can quite follow the argument by which it is maintained for the shipowners that a logical carrying out of the policy of the provision ought to lead to a further extension of the principle of allowing deductions. I do not say that this is a necessary consequence, but the contention is plausible.

The question we have, however, to consider, is whether the relief now claimed is given by the Act of 1878, and I think it quite plain that it is not. What is asked is an allowance for loss of earning power owing to the plant being rendered more or less obsolete through the introduction of improved or other plant.

Now, by the words "the introduction of improved or other plant" is meant improved plant in the ships of other people, and accordingly the state of the argument is this,—Can we say that this company's ship has suffered "wear and tear" because other people have built better ships? The words "wear and tear" clearly point to physical deterioration going on in the subject under consideration, and to bring under those words the fact that the ship is of less value because other and better ships have been built is entirely unwarrantable. I am, therefore, in favour of refusing the appeal.

LORD M'LAREN.—I am of the same opinion, and upon the same grounds. It seems to me that the kind of depreciation referred to under head (a) in the Commissioners' note, if it is such depreciation as will affect the earning capacity of the vessel during the year actually current, has been already allowed for, because on the income side of the account the amount of profit is less, and therefore less duty is paid. But if it is intended to cover the case of a vessel being rendered in competition with others less able to earn freight for the remainder of its existence, then I think that, on the principle of the case of the *Coltness Iron Company v. Solicitor of Inland Revenue* (Feb. 6, 1879, 6 R. 617, and April 7, 1881, 8 R. (H. L.) 67), and other cases of that class, no deduction can be allowed on that head, because the assessment is not made on the capital value but on the income, and the principle of the Act is that you must pay the tax even on a diminished income, and when the power of raising income is exhausted the tax of course ceases. There is one, and only one, exception ad-

¹ *Caledonian Railway Company v. Special Commissioners of Income-Tax*, Nov. 18, 1880, 8 R. 89, per Lord Justice-Clerk Moncreiff, p. 96.

mitted to this somewhat hard principle of taxation, and that is that a deduction is to be allowed for diminished value caused by wear and tear, but on a fair construction these words only mean physical deterioration apart from the subject becoming less useful owing to the invention of better machinery or modes of doing the same thing.

LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT affirmed the determination of the Commissioners.

J. & J. ROSS, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

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G. P. GARDNER & COMPANY, Petitioners.—*Kennedy*.
JOHN WALDO LINK AND OTHERS, Respondents.—*Sym.*

No. 190.
July 11, 1894.
Gardner & Co.
v. Link.

Company—Winding-up by Court—Inability to pay debts—Companies Act, 1862 (25 and 26 Vict. c. 89), secs. 79 and 80.—A creditor of a company charged the company for payment upon an extract decree, and the *induciae* having expired without payment, presented a petition for judicial winding-up of the company under the 79th and 80th sections of the Companies Act, 1862. Five other creditors opposed the application, on the grounds that a liquidation would be injurious to the just interests of the creditors, and that the petitioner would gain nothing by it, but they did not aver that there were no assets which could be made available in the liquidation for payment of the petitioner's debt. The Court granted the prayer of the petition.

Observations upon In re Chapel House Colliery Company, 1883, L. R., 24 Ch. Div. 259.

ON 15th May 1894 G. P. Gardner & Company, chemical manufacturers, 1st Division. Glasgow, creditors of the Columba Steamship Company, Limited, for two sums of about £100 each, constituted by separate decrees, charged the company for payment of the sum contained in one of these decrees. The *induciae* having expired without payment, they, upon 18th June, presented a petition under sections 79 and 80 of the Companies Act, 1862,* for the purpose of having the company wound up by the Court.

The nominal capital of the company was admitted to be £200,000, divided into A shares fully paid-up, and B shares not fully paid-up.

Answers were lodged for John Waldo Link and four other creditors, the majority of whom were also shareholders of the company. They submitted that the petition ought to be refused or directed (section 91 of the Companies Act, 1862) to stand over until after a meeting of creditors should have been held for the purpose of ascertaining and expressing the wishes of the creditors. The respondents stated,—“The respondents are creditors to the amount of £29,400 or thereby. . . . The other debts of the company, excluding the petitioners' debt, do not much, if any, exceed £1000. The respondents, as creditors, are opposed to the company being put into liquidation by the Court, and submit, in the circumstances after stated, that that course would be very injurious to the

* The Companies Act, 1862 (25 and 26 Vict. c. 89), section 79, enacted,—“A company under this Act may be wound up by the Court . . . under the following circumstances . . . (4) whenever the company is unable to pay its debts. . . .”

Section 80,—“A company under this Act shall be deemed to be unable to pay its debts . . . (3) Whenever in Scotland, the *induciae* of a charge for payment on an extract decree . . . have expired without payment being made . . .”

No. 190. just interests of the creditors of the company, and would defeat their prospect of being paid their claims; further, that the petitioners could not gain anything by a winding-up order.

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"The company was formed for the purpose of acquiring steamships, and founding a line of steamers, to be known as the 'Columba' Line, to run from the United Kingdom to North American ports. The company acquired four steamers known as the 'Pelican,' 'Kent,' 'Louisiana,' and 'Alabama' for its purposes, and the price was to be paid partly by cash raised on mortgages of the vessels, partly by bills, as well as from other sources. Money was raised on mortgage of certain of the vessels.

"Some time after the formation of the company, the company, without having themselves worked the vessels, arranged for the sale of their property, or a great part thereof, including said four vessels, to a society or company formed and registered in Belgium, and called The Columba Belge Navigation Compagnie, which company was to pay a lump price of £89,000, being £40,000 in cash and £49,000 in its own shares. The 'Kent' and the 'Pelican' have been delivered to the said Belgian Company, and the said Belgian Company have made payment of about £16,000 in cash, and have undertaken to transfer £24,000 of their shares to the Columba Company; but the 'Louisiana' and 'Alabama,' which also form part of the property sold for said lump price, are at present in the possession of a mortgagee, a Mr Stewart, engineer, Glasgow.

"In order to the Columba Company receiving the balance of the said lump price of £89,000 (£40,000 in cash and £49,000 in shares of the Belgian Company), it will be necessary for the Columba Company to transfer the remainder of the property agreed to be transferred, including the 'Louisiana' and the 'Alabama,' to the Belgian Company, and, on making such transference, they will be in a position, as the respondents believe and aver, to make payment of the debts due to all the creditors, and will have a valuable property in said Belgian Company.

"If, however, a winding-up order were pronounced as craved by the petitioners, the said 'Louisiana' and 'Alabama' would not pass into the possession of the liquidator, but would be realised by said mortgagee, and the value would be entirely lost to the Columba Company, and further, there would arise to the said Belgian Company against the Columba Company a large claim of damages for the non-fulfilment of the contract to transfer the property at the said lump price, as well as for repayment of what has been already paid. A liquidator would further be without funds to incur the responsibility of questions arising between the Columba Company and the said Belgian Company relative to the carrying out by that company of its said agreement with the Columba Company.

"If the Columba Company be not forced into liquidation, the mortgagee, who is interested in said firm of Muir, Houston, & Company [one of the respondents], has expressed his intention not to proceed to realise his security.

"The respondents further have ascertained, and aver, that under the memorandum and articles of association the directors of the Columba Company have, in order to secure premiums of insurance, hypothecated to underwriters at Lloyd's the calls which might otherwise have been made by a liquidator upon the shares so far as not fully paid up (or issued as fully paid up), and that, in the event of a liquidation, a liquidator would only have the claim upon the said Belgian Company, which he would not be able to enforce if unable to perform the Columba Company's part of said contract.

"The respondents refer to the sections of the statute quoted in the petition, and also to section 91 thereof, by which it is provided that the

' Court may, as to all matters relating to the winding-up, have regard to the wishes of creditors or contributories as proved to it by sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of such meeting, and to report the result of such meeting to the Court. In the case of creditors, regard is to be had to the value of the debts due to each creditor. . . . "

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A petition for the winding-up of the company had also been presented on 18th January preceding by another creditor, but he had consented to grant delay.

Argued for the petitioners;—The company was unable to pay its debts in the sense of section 80 of the Act of 1862, and the petitioners were entitled, *ex debito justitiæ*, to a winding-up order.¹ The cases relied on by the respondents as authorities for refusing the prayer of the petition were inapplicable. In them the petitioners were debenture-holders and not outside creditors, and the companies had earned profits, and the prospect of their earning more would have been destroyed if a winding-up order had been pronounced. Here the company had never earned profits, and a liquidator could carry out all that remained to be done as well as the directors. It was impossible to say that there were no assets upon which the order would take effect because there was uncalled capital. Delay was only granted in exceptional circumstances,² and in the present case was unnecessary, and six months had elapsed without anything being done since the first petition for winding up had been presented. If, however, delay was granted, a provisional liquidator must be appointed.³

Argued for the respondents;—The proposition that an unpaid creditor was *ex debito justitiæ* entitled to a winding-up order only applied where the question was between the petitioning creditor and the company. The matter was one for the creditors of the company to decide, and the Court would not grant the order where (as here) a large majority of them were opposed to it, and the petitioning creditor would not be in a better position by obtaining it.⁴

In any case a petitioning creditor was not entitled to an immediate order, and delay should be granted till a meeting of creditors could be held.⁵

LORD PRESIDENT.—The petitioners, G. P. Gardner & Company, are creditors of the company whose winding-up they seek, and that company is in the position defined by the 80th section of the Companies Act, 1862, because it is a debtor who must be deemed to be unable to pay his debts. The petitioners are therefore, *prima facie*, entitled to have a winding-up order pronounced.

¹ Buckley on the Companies Acts (6th ed.), sec. 79 of the Act of 1862; Lindley on Company Law, pp. 630 and 635.

² *In re St Thomas' Dock Co.*, 1876, L. R., 2 Ch. Div. 116.

³ *In re Olathe Silver Mining Co.*, 1884, L. R., 27 Ch. Div. 278; *Benhar Coal Co.*, Feb. 25, 1879, 6 R. 706.

⁴ *In re Uruguay Central Hygueritas Railway Co. of Monte Video*, 1879, L. R., 11 Ch. Div. 372; *In re Chapel House Colliery Co.*, 1883, L. R., 24 Ch. Div. 259, per Baggallay, L. J., p. 266; Buckley on the Companies Acts, sec. 91 of the Act of 1862.

⁵ *In re St Thomas' Dock Co.*, 1876, L. R., 2 Ch. Div. 116; *Companies Act*, 1862, sec. 91; *In re Brighton Hotel Co.*, 1868, L. R., 6 Eq. 339; *In re Western of Canada Oil Lands and Works Co.*, 1873, L. R., 17 Eq. 1.

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But Mr Sym, as representing creditors, who are at the same time, be it observed, in the main shareholders, maintains that the circumstances of the case are such that the ordinary course should not be followed, and in support of his argument he referred particularly to the case of *In re Chapel House Colliery Company*, 1883 (L. R. 24 Ch. Div. 259).

Now, in that case, the judgment of Lord Justice Bowen states the question raised. His Lordship says (p. 269):—"The case may be decided on the simple principle that no one can be entitled to ask for a winding-up order when it is impossible that he should obtain anything by it. Here, if a winding-up order were made, there are no assets on which it could take effect."

Now, any person objecting to the winding up of a company on this ground is bound to satisfy the Court that the company stands in the predicament he asserts it to occupy. Here, *prima facie*, there are assets, because there is, among other things, a certain amount of uncalled capital. It is said that this is hypothecated; but that statement is left in such a state of vagueness that we are neither told the amount of the debt for which it is hypothecated nor the amount of stock which is thus hypothecated.

Therefore, it having fallen upon the objectors to make out this point, I think they have completely failed to do so. There is nothing, therefore, against the petitioning creditor being granted a winding-up.

It is true that certain dilatory pleas have been stated to the effect that it is desirable that there should be a meeting of the creditors of the company; but unfortunately, although liquidation was threatened six months ago, apparently no practical step was taken, and no definite practical step has been contemplated. Therefore, unless we are to encourage the idea that every time a company cannot pay an individual creditor it may have the crisis tided over, in order to have time to consider whether it should have the uncalled capital called up, which should in this case have been considered six months ago, I think we cannot give effect to Mr Sym's contention.

LORD M'LAREN concurred.

LORD KINNEAR.—I am also of the same opinion. I take the general rule to be that laid down by Lord Justice Bowen in the case of the *Chapel House Colliery Company*, where he says that it is not a matter of discretion whether the Court will comply with the application of a creditor whose debt is unpaid for a winding-up, but that it is the duty of the Court to give the creditor that relief which the Legislature intended to give him. His Lordship goes on to say, what is obviously quite consistent with the words I have quoted, that nevertheless the Court will not grant the winding-up order if it is obvious that the machinery of the Act for securing the payment of debts due to company creditors cannot avail for that purpose, and that it would be an abuse of that machinery to put it in motion when it cannot avail for the purpose for which it is intended. But in that case it was clear that the petitioner could take no advantage from the winding-up. It was an application by a debenture-holder for a winding-up order, in respect of interest due on his debentures. All the other debenture-holders opposed the application. It appeared that the company was still carrying on business; its property consisted of a colliery held under a lease which would have been forfeited if the winding-up order had been granted, and all the other assets were so tied up that it would have been impossible for the liquidator or the creditors through him to touch them. The

ground, therefore, on which the Court held that no benefit could result to the applicant from a winding-up was simply that there were no assets to be affected by the order, or to come into the hands of the liquidator at all. For the reasons stated by your Lordship, it is impossible to suggest that the company with which we are now concerned is in that position. They obtained £16,000 on a sale of ships, and it is not shewn that the money is beyond the reach of creditors; they have other property subject to a mortgage, the amount of which is not stated, and further, some of the capital is uncalled. It is therefore not made clear that there are no assets existing for payment of the company's debts. That being so, the case of the *Chapel House Colliery Company* is not an authority for the present case, except in so far as it lays down the general principle that creditors have a legal right which is not subject to the discretion of the Court.

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LORD ADAM was absent.

THE COURT granted the prayer of the petition.

MARTIN & M'GLASHAN, S.S.C.—RICHARDSON & JOHNSTON, W.S.—Agents.

JAMES MERRY FORRESTER AND OTHERS (Trustees of Mrs Margaret Merry or Forrester), First Parties.—*Dickson—Younger*. No. 191.

WILLIAM FORRESTER AND OTHERS, Second Parties.—*Dickson—Younger*.

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MARGARET MERRY ROBSON AND OTHERS, Third Parties.—*Jameson*
—*G. W. Burnet*.

Succession—Conditio si institutus sine liberis decesserit.—A mother in her settlement bequeathed one-third of her silver-plate to her daughter M, and small keepsakes to M's daughters, and by a subsequent clause bequeathed to each of her children an equal share of residue. By a codicil the testator, on the narrative of M's death, revoked the bequest of silver-plate, and directed it to be divided among the testator's family. In a question between M's children and the testator's heirs *in mobilibus*, held that the *conditio si sine liberis* was to be implied in the settlement with regard to the bequest of residue, and was not displaced by the codicil.

Carter's Trustees v. Carter, Jan. 29, 1892, 19 R. 408, distinguished.

MRS MARGARET MERRY OR FORRESTER, residing in Ayr, died on 23d June 1893, leaving a trust-disposition and settlement, dated 23d July 1888, by which she conveyed to her trustees her whole means and estate for the purposes of the trust and codicils of subsequent dates.

The second purpose was " . . . For delivery and payment of the specific bequests and legacy after mentioned, viz.:— . . . (Fifth) To my daughter Mrs Margaret Elizabeth Forrester or Robson, one-third of my silver and plated articles so far as not specially bequeathed, the mourning brooch with my father's hair in it, the half of my napery and wearing apparel, and a knitted bed-cover, one of my bracelets for her daughter Margaret Merry, and another for her daughter Agnes as keepsakes." She further directed,—“(Lastly) I direct and appoint my trustees to divide the residue of my said means and estate into seven equal shares, and to pay over one share to each of my said children, excepting my son Robert Forrester, whose share I direct and appoint my said trustees to hold in trust for behoof of his wife Mrs Margaret Campbell or Forrester, in liferent for her liferent alimentary use alienarily, and for her children in fee, payable the said fee to the said children on their respectively obtaining majority, or to the survivors or survivor of them (their mother's liferent having always first lapsed).”

A codicil dated in May 1890 was in the following terms:—“May 1890.—Now, since poor Maggy [Mrs Robson] is gone, I leave all my

No. 191. silver to William Forrester, with the chest. The tea set to Kate Vaughan. The hot-water jug to Henry Forrester. Other things not named to be divided amongst my family. (Signed) MARGARET FORRESTER."

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The question having been raised whether Mrs Robson's children were entitled to their mother's share of residue, a special case was presented to the Court by (1) Mrs Forrester's trustees; (2) William Forrester and others, the truster's heirs *in mobilibus*; and (3) the children of Mrs Robson.

The questions for the opinion of the Court were:—" (1) Has the said share of residue in question, destined to the said Mrs Margaret Elizabeth Forrester or Robson, fallen into intestacy, and ought the same to be divided by the first parties as trustees and executors foresaid according to the laws of intestate succession? or (2) Ought the said share of residue to be paid by the first parties as trustees and executors foresaid to the third parties?"

Argued for the second parties;—The question here was whether the *conditio si sine liberis* applied so as to entitle the third parties to their mother's share of the residue. It was settled that there was no room for the application of the doctrine unless it could be clearly shewn that a testator had overlooked or forgotten the contingency of his child predeceasing him, and leaving issue.¹ That could not be said here. In the will, the testatrix shewed that she was then aware that her daughter Margaret had children; and again in the codicil she expressly shewed that she had in her mind her daughter's death. The just inference was that she had purposely failed to dispose of the share of residue appointed to be paid to Margaret. The result was that Margaret's share of the residue fell into intestacy, and fell to be divided among the surviving children of the testatrix, and the issue of Margaret as representing their mother.

Argued for the third parties;—As regarded the relationship of the parties, this was a typical case for the application of the *conditio*,² which moreover was not prevented by the terms either of the will or of the codicil. The giving in the will of "keepsakes" to Margaret's children could not be regarded as a gift to them to come in place of what they would take otherwise in succession to their mother.³ The reference in the codicil to Margaret's death was merely to explain the desire of the testatrix to give to other of her descendants that which she had originally intended for Margaret.

LORD M'LAREN.—This special case raises a question of some general importance, but not, as I venture to think, attended with any serious difficulty. It is rather remarkable, considering the number of questions to which the *conditio si sine liberis* has given rise, that this one should now apparently be raised for the first time. But the case is that the testatrix, while providing in a very usual way for the division of her estate amongst her children, and saying nothing about the contingency of one of these children dying leaving issue, afterwards made a codicil in which she does refer to the death of a daughter who had died between the date of the execution of the will and that of the codicil.

Now, it was argued to us on behalf of the first parties, who are the next of kin, that the foundation of the rule of law, known as the *conditio si sine liberis*, is the presumption that the testator has overlooked the contingency of a child

¹ Greig v. Malcolm, March 5, 1835, 13 S. 607, per Lord Corehouse, p. 611; Carter's Trustees v. Carter, Jan. 29, 1892, 19 R. 408.

² Allan v. Thomson's Trustees, May 30, 1893, 20 R. 733.

dying leaving issue, because it is not supposed that any parent making a will, and not leaving his or her money to go as the law directs, would omit all reference to such a case if he or she had contemplated it. That seems to have been the foundation of the rule of Roman law, and has been generally referred to as underlying the form of the *conditio* which has been received into our law. Then it is argued that if a testator, as in this case, survives a child and makes a codicil, and especially if in that codicil reference is made to the death of the child, the foundation of the rule is taken away, and it must be assumed that there was no intention to give to the issue of the predeceasing child any share of the succession. Reference was also made to the circumstance that some of these children of Mrs Robson, the daughter who died, received some small articles of jewellery as mementoes or keepsakes of the testatrix.

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Now, it is quite true that we have admitted this qualification of the *conditio*, that it may be excluded by an express clause dealing with the contingency in question. If a testator, contemplating the case of the death of his immediate descendants, makes a special provision for their issue, then that special provision comes in place of the *conditio* right which would otherwise have come to them. But it appears to me that in order to bring the case within that exception either there must be a substantial provision given to the issue, or if it is unsubstantial, it must be given with such explanations as shew that it was not intended that under any circumstances the individual in question was to take more. A testator may give a nominal sum to a descendant for the very purpose of shewing that no substantial right was intended to be given; but where the bequest to the grandchild takes the form which we have in this will,—“One of my bracelets for her daughter Margaret Merry, and another for her daughter Agnes, as keepsakes”—it is plain that she was not thinking of giving any benefit to the children of her daughter Mrs Robson, but only giving something which they were to retain as a mark of affection. Therefore I cannot admit that the giving of these articles of jewellery as keepsakes can be regarded as a gift or benefit to those children in place of what they might otherwise take in succession to their mother.

Then with reference to the argument founded on the codicil, everything depends in such cases upon the purpose for which reference is made to the death of a legatee. If in the codicil the lady had begun by referring to the death of her daughter, and then had dealt with her share of the succession—dealing with it, it may be, incompletely—probably we should have held that the *conditio* was displaced, and that the vacant share must be disposed of in the precise manner prescribed by the codicil, even although that might lead to the exclusion intentionally or unintentionally of one of the objects who might be expected to be favoured. But then she only refers to the death of her daughter Maggy—that is Mrs Robson—for the purpose of disposing of three articles of silver-plate which she had left to her in the same deed in which she gives the other articles which she describes as keepsakes. Of course these were articles which could not be divided. If they went to a class they could not be enjoyed specifically by that class, and could only have been enjoyed by being sold, and that would not be consistent with the lady's intention in making the gift. And so she wishes these articles to be retained in her family; she makes them over to other members of the family—two to sons and one to a daughter—and it is significant that these silver things are not given to the children of Mrs Robson. I cannot think, therefore, that when she was disposing of those

No. 191. silver articles she was thinking at all of the contingency of the death of her daughter, and the necessity which would then arise of making a suitable provision for the issue. The argument would not have been very strong even if she had provided that the pieces of plate should go to Mr Robson's children, because she would have been merely continuing what she had given as a keepsake to her daughter's descendants. But when they take no benefit whatever under the codicil, it is difficult to see that the mere reference to her death, for the purpose of conferring a benefit upon other members of the family, can be taken as meaning a displacement of the *conditio si sine liberis*. The rule has received in some cases liberal extension, and I think while this case is in some respects distinguishable from all previous cases,—I mean it raises a new point,—yet to hold the *conditio* excluded here would be contrary to the spirit and tendency of all the recent decisions on this subject. It was not disputed at the bar that if the will had directed a division amongst the family without naming them, the application of the *conditio* would be clear, but in the case of children I can hardly think that the question of succession is to depend on whether they be named or unnamed, because if they are named that is merely for the purpose of distinguishing the different benefits which each is intended to receive. In this case the children are not all left on the same footing. One of the sons gets only a life interest, and therefore it was necessary to name them all, not, as I think, for the purpose of putting them on the footing of the legatees who were only intended to take personal benefit, but simply for the sake of clearness in distinguishing the interests which each was to receive in the division of the residue of the estate. My view, therefore, is that neither on the ground of small bequests being given to Mrs Robson's daughters, nor on the ground that in the codicil reference has been made to Mrs Robson's death, can we find sufficient reasons for excluding the application of the *conditio si sine liberis*, and that we ought to answer the second question in the affirmative.

LORD KINNEAR.—I am of the same opinion. I think the case when fully considered is really a very strong one for the application of the *conditio si sine liberis*. The testatrix directs her trustees to divide the residue of her estate into seven equal shares, and to give one share to each of the children whom she has named in a previous part of the will. There is no gift over to the survivors of the children or to anyone else in case any one of those seven children should die before the testatrix. The question then is, whether the share of a predeceasing child is to go to the children of that child by virtue of the *conditio*, or whether we are to hold that in so far as regards that share of the estate the testatrix has died intestate.

Now, I should be very sorry to say anything inconsistent with the doctrine to which we gave effect in the case of *Carter's Trustees v. Carter*, which was established by the previous case of *Malcolm v. Greig*, or at all events which was very clearly expounded by Lord Corehouse in *Malcolm v. Greig*. There can be no question that the presumption which arises from the failure of the testator to advert to the contingency of one of his legatees dying leaving issue, may be rebutted by evidence, in the will itself, of the contrary, and there can be no stronger evidence to defeat the presumption, as Lord Corehouse says, "than a clause in the settlement by which the testator does make a provision for the issue of predeceasing legatees, because," as his Lordship says, "it incon-

testibly shews that he had them in view when he made the substitution." But No. 191. then there is no provision in this will from beginning to end for the issue of predeceasing legatees. There are several specific legacies in favour of the grand-children of the testatrix, and there is a provision in favour of the children of one of her sons to take effect during the lifetime of the son himself; but there is no provision for the issue of the predeceasing legatees at all that I can find. That is to say, I find nothing in the will which shews that the testatrix contemplated the contingency of one of her children dying before herself and leaving issue, and that she made some provision in contemplation of that contingency, inconsistent with the presumption we are now asked to apply, and therefore I see nothing in the will itself to tend in any degree to defeat the presumption.

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The question which arises on the application of the codicil is of a somewhat different kind. It is quite clear that the testatrix then had in her mind the fact that her daughter Margaret had died, and she could hardly have been ignorant of the fact that she left children for whom she had made, indeed, specific legacies in her will. I think the sole effect of the codicil is that the testatrix provides for a different destination of certain silver-plate which she had left to her daughter Margaret, leaving the will in so far as regards the general estate of the testatrix exactly where it was before.

I agree with Lord McLaren in his observations as to the effect of the codicil. I think the will stands exactly where it did, and that Margaret Robson's children take the share originally destined to their mother by virtue of the condition.

LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT answered the second question in the affirmative.

CAMPBELL & SMITH, S.S.C.—CLARK & MACDONALD, Solicitors—Agents.

THOMAS WHITE (Mr and Mrs Elliott's Marriage-contract Trustee), First No. 192.
Party.—*J. A. Reid—Howden.*

MRS EDITH ELLIOTT, Second Party.—*C. J. Guthrie—Walton.*

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Succession—Testament—Construction—Revocation—Marriage-contract—Alimentary liferent—Power of spouses jointly to recall alimentary liferent to widow—Trust—Denuding.—By antenuptial contract of marriage the husband on his part conveyed his whole means and estate to trustees for payment, to himself during his life, and after his death to his wife, should she survive him, of the free annual income thereof, "for the liferent and alimentary use alienably of them and the survivor of them, declaring that the same shall not be affectable by the debts or deeds of either of them, or the diligence of their creditors." Then followed provisions to the effect that in the event of there being no children of the marriage the fee of the husband's estate should be reconveyed to him, or made over to his heirs and assignees on the death of the wife.

The marriage was dissolved, without issue, by the death of the husband, who left a will, by which he bequeathed "all my real and personal estate, including any property over which I have power of appointment, to my dear wife absolutely," appointed her his sole executor, and revoked "all former wills and testamentary dispositions."

The widow having called on the trustee under the marriage-contract trust to denude of the trust-estate in her favour, *held* (per the Lord Justice-Clerk, Lord Rutherford Clark, Lord Trayner, and Lord Kinnear, *diss.* Lord Young, Lord

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Adam, and Lord M'Laren) that, on a sound construction of the husband's will, it was not his intention to discharge his estate of the alimentary liferent in his widow's favour, and consequently that the trustee was not entitled to denude of the trust-estate.

Question, whether it was in the power of the husband, with the consent of his wife, to revoke the alimentary liferent.

Opinion (per the Lord Justice-Clerk, Lord Rutherford Clark, and Lord Trayner) that it was not.

Opinions (per Lord Young, Lord Adam, and Lord M'Laren) *contra*.

2D DIVISION,
with three
consulted
Judges.

By antenuptial contract of marriage, dated 23d and 27th April 1886, between George Augustus Cuming Elliott, of 44 Queen Street, Edinburgh, on the one part, and Miss Edith Hamilton, daughter of Richard Fisher Hamilton, of Lisson Hall, in the county of Dublin, with the special advice and consent of her father, and her father for himself, on the other part, Mr Elliott, on his part, conveyed to trustees the whole means and estate, heritable and moveable, real and personal, then belonging to him or to which he might acquire right during the subsistence of the marriage for the following purposes:—“(Primo) For payment to the said George Augustus Cuming Elliott during his life, and after his death to the said Edith Hamilton, if she shall survive him, of the free annual income or revenue thereof, for the liferent and alimentary use alienary of them and the survivor of them: Declaring that the same shall not be affectable by the debts or deeds of either of them, or the diligence of their creditors. (Secundo) After the death of the survivor of the said spouses, for behoof of the child or children of the present marriage,” subject to certain provisions not necessary to be mentioned here. “(Tertio) In the event of the said George Augustus Cuming Elliott surviving his said intended spouse and there being no children or issue of children of the said intended marriage then alive, the said trustees shall assign, dispose, and reconvey to the said George Augustus Cuming Elliott the whole trust-estate hereinbefore conveyed or agreed to be conveyed by him. (Quarto) In the event of the said Edith Hamilton surviving the said George Augustus Cuming Elliott and of there being no children or issue of children of the said intended marriage then alive, or in the event of such children or issue of children all predeceasing the said Edith Hamilton, the said trustees shall on the death of the said Edith Hamilton pay and convey the said whole trust-estate to the heirs and assignees whomsoever of the said George Augustus Cuming Elliott.” The marriage-contract then contained provisions (not necessary to be explained here) by Miss Hamilton in favour of her intended husband and the children of the marriage. Mr Hamilton, her father, made no provision out of his own funds.

The marriage, which was duly solemnised, was dissolved, without issue, by the death of Mr Elliott on 22d October 1892.

Mr Elliott left a will, in English form, dated 16th January 1888, in the following terms:—“I devise and bequeath all my real and personal estate, including any property over which I have power of appointment whatsoever and wheresoever, unto my dear wife, Edith Maude Elliott, absolutely, and I appoint Henry Bazalgette of Bournemouth, solicitor, sole executor of this my will, and I hereby revoke all former wills and testamentary dispositions by me at any time heretofore made.”

He also left a codicil, in Scots form, dated 30th May 1890, by which he recalled the appointment of the executor in the will and appointed “my wife, Edith Maude Elliott, the sole executor of my said will, and with this alteration I hereby confirm my said will.”

After her husband's death Mrs Elliott called on Mr Thomas White, S.S.C., the sole surviving trustee acting under the antenuptial contract of

marriage, to denude of the trust-estate and to pay it over to her absolutely. He intimated that, though willing personally to comply with this request, he was not satisfied that he was entitled to do so, in respect that her liferent under the antenuptial contract was declared to be alimentary. No. 192.
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A special case was accordingly presented, to which the trustee was the first party and Mrs Elliott the second party, for the determination of the following question of law :—"Is the first party bound to denude himself of the trust-estate, and to convey and pay over the capital thereof to the second party?"

The first party maintained that he was not entitled to denude of the trust-estate, and so terminate the alimentary liferent, in the first place, on the ground that it was not the intention of Mr Elliott, as disclosed in his will and codicil, to discharge his estate of the alimentary liferent in his widow's favour, his intention merely being to give her the fee of his estate subject to that alimentary liferent. The first party contended further, that assuming it to be Mr Elliott's intention to discharge the alimentary liferent, he had not power to do so, even with the consent of the second party.

The second party maintained that, on a sound construction of the will and codicil, it was Mr Elliott's intention to give her his whole estate freed of the alimentary liferent, and further that it was in his power to do so, with her consent, there being no other matrimonial purpose for which it was necessary to retain the trust-estate.¹

After a hearing the Second Division appointed the case to be argued before the Judges of the Division and three consulted Judges.

At advising,—

LORD JUSTICE-CLERK.—By the contract of marriage entered into between the second party to this special case, Mrs Edith Maude Elliott, then Miss Hamilton, and Mr George A. C. Elliott, now deceased, Mr Elliott assigned, disposed, and conveyed to certain trustees, the survivor of whom is the first party to this case, all "means and estate, heritable and moveable, real and personal, wherever situated," then belonging to him, or to which he might acquire right during the subsistence of the marriage. The trust purpose now in question is the fourth :—"In the event of the said Edith Hamilton surviving the said George Augustus Cuming Elliott, and there being no children or issue of children of the said intended marriage then alive, or in the event of such children predeceasing the said Edith Hamilton, the said trustees shall on the decease of the said Edith Hamilton pay and convey the said whole trust-estate to the heirs and assignees whomsoever of the said George Augustus Cuming Elliott." The purpose of the trust thus directed to subsist until the death of Mrs Elliott is, so far as she is concerned, the first purpose, by which the trustees are directed after Mr Elliott's death to pay Mrs Elliott "the free annual income or revenue thereof" for her "liferent and alimentary use allenarly," with a declaration added by which the liferent is declared not to be affectable by her debts or deeds, or the diligence of her creditors.

Mr Elliott died without issue, and his will contains the following clause :—

¹ *Authorities cited on the question of the revocability of the marriage-contract.*—Martin v. Bannatyne, March 8, 1861, 23 D. 705, per L. J.-C. Inglis at p. 709, 33 Scot. Jur. 347; M'Lean's Trustees v. M'Lean, Feb. 23, 1878, 5 R. 679; White's Trustees v. Whyte, June 1, 1877, 4 R. 786; Duthie's Trustees v. Kinloch, June 5, 1878, 5 R. 858; Hughes v. Edwardes, June 25, 1892, 19 R. (H. L.) 33; Menzies v. Murray, March 5, 1875, 2 R. 507; Cosens v. Stevenson, June 26, 1873, 11 Macph. 761, 45 Scot. Jur. 469; Barron v. Dewar, July 7, 1887, 24 S. L. R. (Outer-House) 705; Montgomery's Trustees v. Montgomery, Feb. 2, 1888, 15 R. 369; Fraser on Husband and Wife, ii. 1496.

No. 192. "I devise and bequeath all my real and personal estate, including any property over which I have power of appointment whatsoever and wheresoever, unto my dear wife, Edith Maude Elliott, absolutely."

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Under this clause the second party maintains that she is now entitled to call upon the surviving marriage-contract trustee to denude himself of the trust-estate in her favour, and he feeling uncertain as to his position, declines to do so without judicial authority, and accordingly the question now put to the Court is whether the first party is bound to denude of the trust-estate and to pay over the capital to the second party.

The position of Mr Elliott after entering into the marriage-contract was that he had conveyed his property to trustees by deed, under the terms of which he had retained to himself two powers only, the one a power of apportionment among the children of the marriage, to take effect on the death of the last surviving spouse, the other a power of disposal of the estate on the lapse of the liferent purposes by the death of the last survivor of the two spouses, there being then no issue alive. According to the expression of the contract itself, if he predeceases his wife the direction to the trustees to denude is one to take effect only "on the death" of his widow. He could dispose of the fee, but not so that the fief could call upon the trustees to denude in his favour until the contract restriction, under which the trustees were to hold, realise the annual product, and pay it to his widow as an alimentary provision, came to an end by her death. That is the plain course the trustees had to follow, unless by authority of law they were ordained to depart from it. For it is quite certain that if Mr Elliott had left his estates to a third party, the trustees could not have been called upon to denude in his favour whatever security the fief might have offered to make the widow's interest safe, and whatever consent she might have given to renounce her rights under the contract, and accept the equally good or even it might be the better money terms offered to her for its renunciation; for the trustees' duty to protect her enjoyment of the protected alimentary provision would remain. She could not discharge it, and the trustees could not without breach of duty part with the estate on her discharge. In short, the position is such under the deed that nothing can be done which may lead to the defeat of the intention of the trust in creating the trust. And the security provided by the trust is the only security that can be suffered to be the guard of the interest. For only by the trust can the protection specified by it be effectually maintained. Any new arrangement, however binding in its form of expression, will be only a contract between the new contracting parties. The removal of the estate out of the protection of the trust would cause the alimentary unattachable quality of the benefit to perish. That quality would cease to be a protection given by another to secure the enjoyment of a gift, and become a protection stipulated for in his own transaction by the person benefited, in which case, to use the words of the late Lord President Inglis, such a qualification "would be of no avail whatever." For it is a trust, and a trust only, which can protect an estate, and limit its disposal and its liabilities for the debts and obligations of those who have the beneficial enjoyment of it. If a protective trust be competently created, its terms are the law of the administration of the trust property, and all must submit to their operation. Whereas if, without the protection of a trust, estate be made over to another, conditions forbidding or restraining alienation cannot be effectual to protect it from alienation by direct act, or by legal diligence. An alimentary declaration

cannot hedge it from attack by those having claims against its owner, or prevent the owner from doing with it what he pleases. No. 192.

The peculiarity of this case is that Mr Elliott, who retained to himself the power of disposing of the fee of his estates in certain events, has by his will bequeathed his whole estates to his widow. This the widow maintains makes her now entitled to demand from the trustee a conveyance of the estate, notwithstanding the direction of the contract that the trustees are only to convey on the death of the widow. Her case is that being now the *fiar* the trustee is not entitled to continue to hold the estate, and to pay its produce to her from time to time, and that she can give the trustee a sufficient discharge on its being disposed and conveyed to her absolutely in terms of the will. July 13, 1894.
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Mrs Elliott could not, as it appears to me, have discharged had she not been made *fiar*. But the question is, can the fact that she is made the *fiar* enable her to discharge as she could not otherwise have done? Or is it not the true view that although her husband has constituted her the *fiar* the contract restriction must still remain operative—a restriction which limits her powers to the end of protecting her present enjoyment? I think that that question must be answered in accordance with the latter alternative. The husband here had in the marriage-contract exercised his power to dispose of the *liferent* of his estate for onerous causes, and protected his gift of it against alienation, voluntary or enforced. He had not, as I think, by retaining the power to dispose of the fee after his wife's death, retained to himself the power to revoke and alter what he had already done with the *liferent*. He could not himself discharge the trustees of their duty, and it is, as I think, very doubtful indeed whether he could by any act of his enable his widow to do so, and thus place her in a position which is inconsistent with the restriction and protection given by the trust conveyance. This trust was a subsisting trust at the time of her husband's death. I cannot hold that leaving a will in her favour could confer upon her a power to bring the trust created by the marriage-contract to an end, and to take without restriction that which she could not so take under that contract. He could of course confer upon her the fee, which she might dispose of as she pleased, even by using her right to it to improve her position financially during her life by conveying it away for a money consideration. But that is not the same thing as taking away the protection of the trust from the alimentary provision.

There is another question. Can it be held that, granted the power existed, the deceased has expressed an intention to do what the second party here maintains that he has done? At the time when the deceased made his will he desired to give to Mrs Elliott all that he had. But what he had was a burdened estate, under which protection was given to a *liferent* for the wife, both against her own acts and those of others, and he gave it as such, so far as appears. I should be unable to hold that the expressions used by him necessarily implied that he did not wish the protection provided to his widow of an alimentary non-attachable income to be still upheld for her.

I think therefore that the question put in this special case should be answered in the negative.

LORD YOUNG.—I think the most accurate and comprehensive statement of the question in the case is this, What is the construction and legal effect of the will (and codicil) of the deceased George A. Cuming Elliott, having regard to the

No. 192. fact that the testator was married and under contract with his wife, who survived him, by the antenuptial marriage-contract stated in the case? On the one hand it is maintained that the language of the will (and codicil) is so plain that it does not admit of construction, and that in the circumstances the existence of the marriage-contract was no impediment to the testator making the will and codicil according to the plain meaning of the language which he used, and affords no reason for putting a special construction on that language at variance with its usual and ordinary meaning. These circumstances are that there being no children of the marriage the contract at its dissolution subsisted only as a contract between the spouses, and that the predeceasing husband left everything (taking his language in its ordinary sense) to his surviving wife, who is of course willing to accept it. On the other hand, it is maintained that the language employed admits of the construction that the testator's wife should have the property or fee of his estate, but only subject to her own life interest secured to her by the contract, for which purpose the estate itself—i.e., the subjects of the property—must go to the marriage trustees to be held for her during her life, but subject on her decease to her debts and deeds as owner, and that if the testator intended more or other than this his intention was illegal, and therefore inoperative.

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Now, in the first place, it seems to me clear that if the testator had power, with the assent of his wife (for I assume her assent), to make a will in her favour, according to the plain meaning of the language employed by him in the will in question, it must have effect accordingly. The only reason suggested for denying it effect according to its language, and for putting a special and qualified meaning upon it, is defect of power. The question then comes to be this, Was there such defect of power by reason of the marriage-contract? There is plainly no other reason, and so if this be bad, no reason at all.

I had myself thought it to be a settled rule of law that a marriage-contract had effect and operation as a contract only between the parties to it and the issue of the marriage, who are regarded as parties, and that the parties may, with reference to the event of dissolution of the marriage without issue, modify the contract between themselves as they please, and even cancel it. The rights of children of the marriage, including, as we must now hold to be settled, grandchildren and possibly great-grandchildren, cannot be affected by any subsequent arrangement between the spouses or by the acts of either, but in a case where the marriage is dissolved without issue, the contemplated and provided for possibility of their existence may be disregarded, and so account taken only of the spouses themselves, at least where there are no other contracting parties, such as parents or others who have given funds to be dealt with under the contract.

But we were told that it had been otherwise settled by authority, and we were specially referred to the case of *Duthie's Trustee v. Kinloch*, June 5, 1873, 5 R. 858, as an authority exactly in point. But the point being whether and how far the power of testing is limited by a marriage-contract to which the testator is a party, I quite fail to see how that case can be an authority upon it, seeing that there was in that case no marriage-contract, and indeed no question whatever of a testator's power to test as he pleased, but only a question regarding the construction and meaning of a particular codicil by a testator whose power to test as he pleased was clearly and admittedly unlimited—certainly not limited by marriage-contract, there being none. I do not think that *Duthie's Trustee v. Kinloch* has the remotest bearing on the present case.

Is there any other authority for the trustee's contention that by the existence of the marriage-contract the testator was disabled from making the will he did? No. 192. The trustees referred to the case of *Hughes v. Edwardes*, 19 R. (H. of L.) 33, not indeed for the decision, which was admitted not to be in point, but for some July 13, 1894. *Elliott's Trustee v. Elliott.* judicial *obiter dicta*. What I have to say regarding that case may, I think, be usefully prefaced by a few preliminary observations. And, in the first place, I would remark that a trust for the protection of an alimentary liferent (or annuity), and to secure the fee to others on its termination, cannot be terminated without the consent of the truster by an arrangement between the liferenter and fiar. The rule is based on the consideration that the intention of the truster must be regarded and executed, and cannot be defeated by an arrangement to which he is no party, and so can have no application when he is a party to the arrangement or signifies his assent to it in any way. Where such an arrangement has been attempted (as it has repeatedly) before the fee is vested, and it is yet uncertain who will be the fiar, it is of course bad on that ground—it is not an arrangement between the beneficiaries interested. But even where it is vested and all the beneficiaries interested are certain, the arrangement is bad on the rule as a frustration of the truster's intention. The cases usually referred to as examples and illustrations of the rule are cases of testamentary trusts where after the testator's death an arrangement in violation of his intention has been attempted, and these cases can have no bearing on any question regarding the testator's power by will or codicil subsequent to the trust to test as he pleases. He may be deprived of such power by onerous contract or a completely executed gift, which may have been made by a deed of trust, but the cases I am now noticing, relating to the invalidity of an arrangement among beneficiaries or donees to defeat the donor's purpose, can have no bearing on a question regarding a limitation of the donor's own power. In the second place, I have to point out that the only question I am now considering is, whether and to what extent the present testator's power of testing was limited by the marriage-contract to which he was a party? I have thus expressed the question, because it is, I think, clear that his testing power was thereby limited. Without the contract he might have tested as he pleased, leaving his wife to her legal rights of *terce* and *jus relictæ*, while with the contract he certainly cannot. He could deprive his wife of nothing to which she had right under the contract, but that on a rule of contract law which is as foreign to the rule which forbids arrangements by beneficiaries under a will in violation of the testator's intentions as one thing can be to another. Then, as regards the validity and effect of the wife's assent to what he has done by his testament in violation of her contract right, it may be valid or not, but must be the one or other on grounds which cannot possibly have been considered or decided in cases about the validity of agreements amongst beneficiaries under a will made after the testator's death, and to which he consequently gave no assent. In saying so I only mean that on the question before us we can have no light from these cases.

When a marriage without issue is dissolved by the predecease of either spouse, leaving a will in favour of the survivor, who assents to it, I venture to submit as sound in law these two propositions—First, that the validity of the will is not affected by the existence of a marriage-contract, to which the spouses were the only parties, and in which at the dissolution of the marriage the survivor alone has an interest; and second, that the construction of the will is not thereby affected, unless indeed the language of the will is such that on the ordinary rules

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of construction the existence and terms of the contract may afford legitimate assistance in reaching the true meaning and intention of the testator.

Now, is the case of *Hughes v. Edwardes* adverse to either of these propositions? In that case there was a marriage-contract, whereby the wife conveyed to the marriage trustees a sum of £4000, "paid to her in view of the marriage" by her stepfather, to be held by them for her husband in liferent and the children of the marriage in fee. She predeceased, survived by her husband and a son of the marriage, leaving a will of all she possessed to her husband, and the question in the case, speaking generally, regarded the validity of a demand by the husband, with consent of the son (he being of full age), for immediate payment, and this question was, by the Lord Ordinary and the First Division, and I think also by the House of Lords, dealt with as turning upon whether or not the *conditio si sine liberis* applied. The First Division, by a majority and reversing the judgment of the Lord Ordinary, held that the *conditio* did not apply, and so authorised immediate payment. The House of Lords held that the *conditio* did apply and so reversed the judgment of the First Division. The *conditio*, if applicable, was of course conclusive, for on that footing the fee was not vested in the son, and might never vest in him, for he might predecease the liferenter leaving issue, who would then be the fee. But it is said that there are *obiter dicta* in Lord Watson's judgment which shew satisfactorily that he would have disallowed the husband's demand for immediate payment even though the *conditio* had not applied, on the ground that the terms of a marriage-contract cannot be altered or affected though all the parties to it or interested in it, being *sui juris* and at large, and never so able to manage their affairs regarding matters of the greatest magnitude, concur. I can find no such *obiter dicta*. He does indeed refer with emphatic approbation to the decision in *Duthie's Trustee v. Kinloch*, which I have already noticed, and also to one or two other cases, as distinctly recognising the rule that the beneficiaries in liferent and fee under a beneficent trust cannot by arrangement between themselves after their benefactor's death defeat his distinctly expressed intention. I have shewn, I hope satisfactorily, that this rule has no bearing on either of the two propositions which I have advanced. Lord Watson's reference to it, and statement of his approval of the case of *Duthie's Trustee v. Kinloch* and other cases which recognised it, is perhaps explained by the first sentence in his judgment, which runs thus—"The appellants, as trustees under an antenuptial contract between Dr and Mrs Edwardes dated 20th February 1855, hold in trust a sum of £4000, which was settled by the lady's stepfather upon the spouses and their children." Had this been so, the rule referred to would have been conclusive of the case, for then the beneficent giver of the £4000 in question, and the party to the marriage-contract with respect to it, being dead, his expressed intentions were protected by the rule, and could not be defeated by an arrangement among the objects of his bounty even on the assumption of vesting and consequent certainty. But it was not so, the fact being, as I have stated, that the money was the wife's, and settled by her. This misapprehension, really unimportant in itself, explains what is said by his Lordship on a rule which otherwise has no very obvious application.

We cannot reject and refuse effect to this will as *ultra vires* of the testator or put a construction on it at variance with the plain meaning of its clear and familiar language, without affirming some general proposition in law of the greatest, even startling magnitude and importance. What is that proposition?

Rejecting the propositions which I have propounded as in my opinion sound, **No. 192.** we must affirm others, and they must be of the most general and extensively applicable character, for we are not dealing with a case of special or peculiar features and circumstances. Are we to give it forth that so far as our judgment goes it is a rule of the law of Scotland that a marriage-contract is so lastingly and conclusively binding that the only parties to it, and the only parties interested in it, or who can possibly ever be so, cannot alter it in any particular; and that those who have been by themselves named as trustees under it may always step forward and veto any change? Or is a change impossible only where trustees have been named? Or is this Court to exercise a discretion as to what change may be made and what not?

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We must in this case act on a rule which by so doing we sanction and proclaim as a general rule, the case being general and in no way special or exceptional. I never saw a more general case or one which must of necessity be decided on a more general and more largely applicable rule of law. Can we limit it to cases where an annuity or liferent is given? On what principle can we do so, assuming that the parties may alter a marriage-contract in which they alone are interested, just as the parties to any other contract may? Are there religious considerations, but these applicable only where a liferent or annuity is given, for which, on religious grounds, no fee whatever can be accepted in substitution, or even, I suppose, a liferent of another property, however much larger and more valuable it may be?

I only wish to say a few words as to the difficulty of imputing to the testator the intention of giving his wife the fee of the estate burdened with the alimentary liferent. The will is an English will, and by the rules of law we must give effect to it as if it were a Scots deed in absence of any proof that the English law attributes a particular meaning to the words used. The language used is,—“I devise and bequeath all my real and personal estate, including any property over which I have power of appointment whatsoever and wheresoever, unto my dear wife absolutely.” There can be no dubiety as to the man's meaning if he has the power. He gives all he possesses to his wife absolutely. Then he calls in a Scots solicitor to give effect to his will. The Scots solicitor proposes a codicil, recalling the appointment of the executor by the English will, and appointing the wife as “the sole executor of my said will.” The meaning imputed by the first party to the codicil is that the testator appointed his wife to be his executor to ingather his estate, and hand it over to the marriage-contract trustee to hold for her alimentary use during her life. I must say that to impute such an intention to the maker of the will and codicil in my opinion approaches the ridiculous.

I am therefore of opinion that it was the intention of the testator that his wife should have the unburdened fee of his estate, that the will and codicil were not in excess of the power of the testator, and that they should receive effect.

LORD RUTHERFURD CLARK.—By antenuptial marriage-contract Mr Elliott disposed his whole estate to trustees for payment to himself during his lifetime, and after his death to his wife if she should survive him, “of the free annual income thereof, for the liferent and alimentary use allenary of them and the survivor of them, declaring that the same shall not be affectable by the debts or deeds of either of them, or the diligence of their creditors.” The fee was settled on the children of the marriage, and in the event of there being none, the trustees

No. 192. were directed, on the death of Mrs Elliott, to convey the estate to the heirs and assignees of Mr Elliott.
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The conveyance contained in the contract came into operation on the celebration of the marriage. The question which we are asked to determine is whether the trustees are bound to denude. Mrs Elliott survived her husband, and thus became entitled to the alimentary liferent. There were no children of the marriage, consequently the fee was not disposed of by the marriage-contract. It remained in Mr Elliott.

By his will Mr Elliott devised and bequeathed all his real and personal estate to his wife absolutely. He makes no reference to the marriage-contract.

The question before us is, whether Mrs Elliott can require the trustees to denude in her favour, with the necessary effect of extinguishing her alimentary liferent? She maintains that they are bound to do so by reason of her husband's will, by which he has made her absolute fiar, and by which, as she contends, he has signified his consent that the liferent should be terminated.

We have not to consider the question whether the spouses had the power of altering the marriage-contract during the subsistence of the marriage. They made no attempt to do so, and I think that there can be no doubt that on the dissolution of the marriage Mrs Elliott took under the contract an alimentary liferent in her husband's estate. It is not, I think, difficult to determine the legal qualities of that right. The liferent is created and secured by the constitution of a trust. By the trust-deed it is declared that it shall not be affected by her debts or deeds, or by the diligence of her creditors. In my opinion it is an estate which she cannot assign, renounce, or discharge. This is, I think, well-settled law, and I need cite no other authority than the cases of *Rennie*, in the House of Lords, April 25, 1845, 4 Bell, 221 (17 Scot. Jur. 332), and of *White*, 4 R. 786, as well as the case of *Hughes*, to which I shall have occasion afterwards to refer.

Mrs Elliott does not contend that as a mere alimentary liferenter she can put an end to the liferent, nor, in my opinion, could she maintain with success that she is entitled to require the trustees to denude from the mere fact that she has come to have right to the fee. That fact could not justify any such demand unless she could shew that of legal necessity the liferent perishes by being merged in the fee. I see no reason for thinking that there is any such necessity. The trust-deed was constituted in order to the creation and protection of the liferent, and was probably essential for that purpose. So long as it exists the benefits of the liferent are secured to the liferenter. The legal title is in the trustees, and Mrs Elliott, whether as liferenter or as fiar, has nothing more than a claim against them. These claims are distinct, and with the legal title in the trustees there is no difficulty in keeping them distinct and in maintaining both.

I do not mean to suggest that the beneficial fee is not vested in Mrs Elliott. The fact that she has an alimentary liferent over it is no impediment to the condition that the liferent must be preserved. Mrs Elliott has the full fee. She may dispose of it as she sees fit, and it may, I think, be attached by her creditors. But her deeds and the diligence of creditors will be postponed to the liferent, and will be suspended until the liferent terminates. In other words, the fee cannot be disposed of or attached to the detriment of the alimentary liferent. But there is no other limitation on the rights of the fiar or of the creditors of the fiar.

The argument on which Mrs Elliott relied was that both the spouses consented to the discharge of the liferent. I do not require to consider the

question whether the liferent could be terminated with the joint assent of the spouses. For in my opinion the argument fails on the fact. I am unable to read the will as signifying Mr Elliott's consent to the determination of the alimentary liferent. I think that it expresses no more than that his wife should have all the estate which he had the power to convey, or, in other words, the estate burdened with the alimentary liferent. Such a liferent secures her due support and maintenance after his death. He made this provision for her in his marriage-contract, and I do not think that he meant to alter it by a will which makes no reference to that contract, and which can receive full effect consistently with the preservation of the liferent. He merely made an addition to those rights which were already vested in her by giving her a power of disposing of the fee. He has signified nothing more than that she should have both the alimentary liferent and the fee. I do not attach importance to the use of the word "absolutely." A fee and an absolute fee are precisely the same. I do not think that Mr Elliott in giving the fee absolutely intended to distinguish the right he was then giving from the right given under the marriage-contract, or to indicate that he was substituting the one for the other. It seems to me that he meant no more than to declare that he did not by his will impose any limitations on the fee which he thereby gave.

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We are not without authority, and to my mind conclusive authority. In the case of *Hughes*, Lord Watson, with the concurrence of the other noble Lords, said,—“The learned Judges of the Inner-House who decided in favour of the pursuers do not suggest that a trust duly constituted for payment of an alimentary annuity can be brought to an end by the joint action of the annuitant and the parties having beneficial right to the fee. A rule to the contrary has long been settled, and was recently enforced in *White's Trustees v. Whyte*, 4 R. 786, and *Duthie's Trustees v. Kinloch*, 5 R. 858. In both instances the parties entitled to the fee had a vested interest, which is not the case here; and in *Duthie's Trustees v. Kinloch* the alimentary liferenter and the beneficial fiar were one and the same person. Yet it was held that the combined action of all parties interested could not defeat the settler's intention to make the annuitant's right alimentary, a result which could not be attained except by continuing the trust.”

The language seems to me to be conclusive of the present case. For, of course, it did not escape the notice of Lord Watson in *Duthie's* case that the limited right and the fee were created by the same person, and I take him to mean that a person who has created an alimentary liferent by means of a trust does not put an end to that liferent by giving the fee to the liferenter. It is said that it was merely *obiter*, and that is true in the sense that the case was decided on another ground. But to my mind it is not the less authoritative. It is the statement of what the House regarded as a well-settled rule, and in my opinion I should be bound to follow that rule, even if I were not convinced that it was sound.

It was urged that Lord Watson mistook the import of the case of *Duthie*, when he said that the Court held that a trust could not be determined when the alimentary liferenter and the beneficial fiar were one and the same person. It is true that in that case there was no liferent. The truster had directed that an alimentary annuity should be purchased for his sister, and that the title to the annuity should be taken in the names of the trustees. By a subsequent codicil he revoked the residuary clause of his trust-deed, and left the whole residue to his sister. There could be no doubt that the whole estate belonged to her partly as an annuity and partly as residue, and that if the annuity was not to be

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bought, she was *fiar* of the money which would have been required to purchase it. If she could sell or discharge the annuity she would have been entitled to prevent the trustees from purchasing, and to require them to denude. For the Court will not allow trustees to do against the wish of a beneficiary what the beneficiary can undo. But the Court refused to pronounce such an order, because they were of opinion that she could not discharge the annuity. I do not think that there was any doubt on this question. The only point which was discussed was, whether the direction to purchase an annuity was revoked by the subsequent codicil.

In a question of this nature I see no difference between an alimentary annuity to be bought from the estate of which the annuitant is owner, and an alimentary *liferent* on an estate of which the *liferenter* is the *fiar*, so that the language of Lord Watson if erroneous in form is, to my mind, accurate in substance. But were it otherwise, we have the expression of a distinct opinion, in which the other noble Lords concurred, that where a trust is constituted in order to the creation of an alimentary *liferent*, the trust cannot be brought to an end because the *liferent* and fee happen to coalesce in the same person. I should be very unwilling to decide to the contrary.

Holding, therefore, that the *liferent* does not perish by the fact that Mrs Elliott is beneficial *fiar*, and that Mr Elliott has not signified his consent to the termination of the *liferent*, I am of opinion that Mrs Elliott cannot require the trustees to surrender. I have not entered on the question whether such consent would avail her. I think it better to reserve my opinion. My impression is that it would not. I do not see how he could by his will alter the quality of the estate which had vested in her at his death, or how he could empower her to renounce the alimentary *liferent* secured to her by the marriage-contract.

LORD ADAM.—My opinion is in accordance with that of Lord Young.

LORD M'LAREN.—My opinion coincides with that of Lord Young and Lord Adam.

The first question is the question of intention. The testator in his will does not use the word fee, or residue, or reversion, or any equivalent term, but professes to give to his wife his "real and personal estate absolutely." He adds, parenthetically, that he includes any property over which he has the power of appointment. If these words are not sufficient to express an unqualified gift of the testator's estate, then the English language must be incapable of expressing the distinction between a universal legacy and a gift of the same estate burdened by a *liferent*.

On the second point, I have always understood that alimentary conditions were effectual in law as being conditions of the gift or contract to which they relate, and I cannot assent to the description of an alimentary right as a particular kind of estate in any other sense than that it is a conditional gift. If a father in his lifetime puts a sum of money into the hands of trustees to provide an alimentary life interest to his son, it is, I think, self-evident that the father and son by their joint act can put an end to the trust. They alone are interested in its fulfilment, and the father's consent is of course sufficient to release the son from his obligation not to assign the life interest or to allow it to be carried away by creditors.

The reason why alimentary trusts are indissoluble when constituted by will is that the testator being dead, his consent to the revocation of the alimentary

trust cannot be obtained. This is the only legal proposition which I can extract from *Duthie's Trustees* and similar cases; the question in such cases always is, whether the testator meant by his codicil to revoke the alimentary liferent and to give the fund in property, or whether he meant the legatee to take an alimentary liferent and a fee concurrently.

But in the present case the alimentary liferent was constituted by a marriage-contract, and its efficacy depends on contract. Supposing there were no trust, but only an obligation to provide an alimentary liferent, there is no reason that I can discover why the husband and wife during the subsistence of the marriage should not by their joint act discharge the obligation. Such a discharge would of course be revocable by the wife on the ground of *donatio inter virum et uxorem*, but if the husband gave her a better provision she would not be likely to exercise the right of revocation.

Now, in the present case there is in the contract of marriage the form of a conveyance to trustees. But then, it is a conveyance of the husband's whole estate, and it is a settled point in the law of marriage-contracts that such a trust only comes into operation on the husband's death.

Accordingly, it appears to me that in the present case it was quite open to the wife, upon the terms of her husband's will (and codicil) being made known to her, to elect to take under the will (and codicil) instead of taking under the marriage-contract. If my view upon the first point be correct, she could not take under both instruments, but her husband's will (and codicil) on that view is a discharge of the alimentary condition so far as he is concerned, and the wife's election to take under the will (and codicil) is a discharge of the condition on her part. No human being is interested in the fund except the spouses, and there are no trustees put into possession in Mr Elliott's lifetime who could interfere with their action.

The trustee very properly states that he is willing that Mrs Elliott should have the capital, but he does not feel at liberty to part with it unless with the authority of the Court. He only comes into possession on Mr Elliott's death, and his possession for purposes of administration of the real and personal estate left by Mr Elliott can be no bar to the exercise of Mrs Elliott's election to accept the testamentary gift of her husband's estate. In such circumstances I cannot help thinking that the right claimed by Mrs Elliott is demonstrably clear.

LORD KINNEAR.—I agree with Lord Rutherford Clark. I admit the force of the argument that the parties to a contract may in general by mutual consent alter or cancel stipulations which they themselves have made and in which no other person is interested. I do not, however, think it necessary to determine the conditions under which that doctrine will avail to put an end to a trust which has once been effectually constituted for the protection of an alimentary liferent. To make any agreement effectual for that purpose it must be made quite clear, not only that the parties interested have consented, but also that they all have power to consent, and it appears to me very doubtful, in the present case, whether the wife had such power. But the husband and wife have made no agreement to cancel the stipulation of their marriage-contract, that the income of the trust-estate should be an alimentary provision for the wife in case of her survivance, and should not be affectable by her debts or deeds or the diligence of her creditors. The question is whether the husband has cancelled it by the terms of a bequest in his will.

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Now, if he had declared in terms that the stipulation should have no force and had revoked the conveyance in trust for that purpose, I think that that declaration of his will would have been inoperative, and that his wife's right would have remained exactly as it stood under the marriage-contract. A husband may of course give his wife more by will than he has undertaken to give her by contract, and therefore he may liberate her from a mere restriction upon her enjoyment of his estate which has been laid upon her for the protection of other interests which have been determined or have never emerged, and not for her own benefit. But the stipulation in question is not a mere restriction. It is a stipulation for the benefit of the wife that her life interest shall be protected from the diligence of her creditors. I do not understand it to be maintained that the husband could, without her own consent, deprive her of the benefit of this protection for which she and her father—who was a party to the contract—have formally stipulated. But I hardly see how the argument can stop short of that contention. For the argument is that by his will he has given her power to consent to the abolition of the restriction, and the validity of the restriction depends entirely on the stipulation that she shall have no such power. It is not the absence of her consent, but her incapacity to consent, which excludes her creditors from attaching the life interest. It is perfectly well settled, and indeed it is elementary, that money or estate of any kind cannot be placed *extra commercium* and exempted from the diligence of creditors so long as the person to whom it belongs has power to dispose of it at pleasure. This is the principle on which it was held in *White's Trustees v. Whyte* that the only way in which an alimentary right can be effectually created is that which was adopted in the marriage-contract in question,—that is, by the constitution of a trust under which the trustees are prohibited from giving any effect to the claim of assignees or arresting creditors, and which the life renter or annuitant is effectually debarred from discharging. It appears to me to follow that the husband cannot liberate his wife from the restraints involved in the alimentary character of his right without necessarily, and at the same time, depriving her of the protection for which she had stipulated, and opening the estate by his will to the diligence of her creditors. A trust which she has power to determine at pleasure is totally ineffectual for the purpose for which it was created, and therefore if the husband by his will has given that power to the wife, the stipulation for the protection of her life interest from creditors is no longer of any validity whatever, whether she desires to avail herself of the power or not. It appears to me that if the meaning of the will is to give the wife an absolute and uncontrolled power of disposal, not only of the fee, but also of the life interest, it must either be held that the testator has cancelled the protection from creditors by his own act, or else that the bequest is altogether inoperative to alter or affect the alimentary right.

But, however that may be, I agree with Lord Rutherford Clark that the husband's will does not purport to relieve the wife of the conditions or deprive her of the protection attached by contract to her life interest right. The estate which he could dispose of by will consisted of the fee under burden of the life interest. That appears to me to be all that is carried by the will. There could be no question either as to the construction of the words of bequest or as to their legal effect, if the will had been in favour of a stranger, and I think it makes no difference that it is in favour of the wife. It would have made a very material difference if the bequest of the fee in favour of the life renter carried

with it by necessary implication the determination of all conditions and limitations affecting her life-rent enjoyment. But I think it must be taken as settled law that when a person who is vested in an alimentary life-rent acquires the fee by a separate title, the two rights are not merged as in the case of a simple life-rent, but co-exist in the same person as separate and distinct rights. I agree with what Lord Rutherford Clark has said as to the case of *Duthie*, and as to Lord Watson's observations upon that case in *Hughes v. Edwardes*. The distinction that has been taken between these cases and the present is no doubt just so far as it goes. They do not decide that the persons who have imposed a restriction by contract may not remove it by mutual consent. But they decide that an alimentary right which is effectually protected by a trust may still subsist under the conditions by which it was originally limited, notwithstanding that the life-renter has acquired an absolute right in the fee. Now, there is nothing in the will we are construing to affect the alimentary character of the life-rent except the absolute terms of the bequest. If that does not by itself merge the life-rent in the fee, and give the wife the whole estate by a new title, there is nothing from which it can be inferred that the testator intended to deprive his wife of the protection provided by the marriage-contract, or that he had adverted at all to the conditions attaching to her rights under the marriage-contract in bequeathing to her, in addition to what was secured to her by contract, all the estate he had power to dispose of by will. I think the word "absolutely," upon which so much stress was laid in argument, has no reference to the life-rent, with which the will has no concern, but only to the estate which the testator had power to dispose of. The legatee's right in that estate is to be absolute and unlimited. But that does not affect the separate right, which he had no power to give or take away. I do not see that the case raises any question of election. I think the wife shall take the life-rent by virtue of her marriage-contract, as she would have done if the fee had been bequeathed to a stranger, and that she takes nothing under the will except the fee already burdened by her life-rent right.

LORD TRAYNER.—I concur in the opinion of Lord Rutherford Clark.

THE COURT answered the question in the negative.

THOMAS WHITE, S.S.C.—DRUMMOND & REID, S.S.C.—Agents.

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July 13, 1894.*
Ireland & Son v. Merryton Coal Co.

DAVID IRELAND & SON, Pursuers (Respondents).—*Ure—Aitken*.
MERRYTON COAL COMPANY, Defenders (Reclaimers).—*D. Dundas—Salvesen*.

Contract—Construction—Reparation—Measure of damages.—A coal company contracted to supply a firm of coal-merchants with 3000 tons of coal at 7s. per ton to be delivered "over the next four months" in "average" or "about equal" monthly quantities, and in shipping lots of from 400 to 600 tons, due notice being given.

The sellers having at the end of the period of four months delivered only about half of the 3000 tons, the buyers brought an action of damages against them, in which the pursuers calculated the damages on the basis of the market price ruling at the end of the four months for the whole coal undelivered.

Held (rev. the judgment of Lord Stormonth-Darling) that under the contract

* Decided July 6, 1894.

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the defenders were bound to deliver, and the pursuers entitled to receive, no more than about 750 tons of coal during each of the four months over which the contract extended; that the pursuers had no right to call on the defenders to make up in succeeding months for quantities short delivered in earlier months, but that it was the duty of the pursuers to buy in against the defenders at the end of each month for the quantity short delivered during that month, through the fault of the defenders, and therefore that the amount of damages was to be calculated on the basis of the market price ruling at the end of each month for the quantity short delivered during that month.

2D DIVISION.
LdStormonth-
Darling.

ON 1st May 1893 David Ireland & Son, coal-merchants, Dundee, wrote to the Merryton Coal Company, coalmasters, near Hamilton,—“We have an inquiry for Hamilton Ell, shipment during the next few months, and might arrange 3000 tons at 7s. f.o.b. Grangemouth, in lots of 4/600 tons.”

On 2d May the Merryton Coal Company replied,—“We would take the 3000 tons Ell coal at 7s. per ton f.o.b. G'mouth, for delivery over next four months in average monthly quantities. Delivery in shipping lots of 4/600 tons at a time on due notice being given. We don't guarantee delivery during strikes or stoppage of pits.”

On 8th May Ireland & Son wrote,—“We have now succeeded in placing the 3000 tons of Ell, and accept this quantity at 7s. f.o.b. Grangemouth, delivery in about equal monthly quantities over the next four months.”

The Merryton Coal Company replied next day,—“We have your memo. of 8th inst., and confirm same in terms of our offer of 2d inst.”

There was no delivery under this contract during the month of May, Ireland & Son having no vessel on which to ship the coal, and the Merryton Coal Company making no tender of delivery. In June Ireland & Son asked for only one shipment of coal, amounting to 426 tons 8 cwts., and this they got from the Merryton Coal Company. During the months of July and August, Ireland & Son asked for delivery of quantities in all considerably exceeding the average of 750 tons a-month, but received in July 261 tons 5 cwts. less than that amount, and in August 70 tons 14 cwts. less. On 28th August the Merryton Coal Company wrote to Ireland & Son intimating that they held themselves bound to deliver at the rate of 750 tons a-month only, and declining to make up for short deliveries during the three earlier months. The total amount delivered was 1594 tons 9 cwts., leaving 1405 tons 11 cwts. undelivered.

On 4th December 1893, Ireland & Son brought an action against the Merryton Coal Company concluding for payment of £238, 17s. The greater part of this sum was sued for as damages for failure to deliver the 1405 tons 11 cwts. of coal. The amount of these damages was calculated at the rate of 3s. 3d. a ton, being the difference between the contract price of 7s. a ton, and the market price of 10s. 3d. a ton at the end of August.

The pursuers maintained that the contract was one for the sale of 3000 tons of coal in all, delivery to be reasonably spread over the period of the contract, so that deliveries short of 750 tons in all in one month should be made up in the succeeding months, and consequently that the damages for the total short deliveries at the end of the period of the contract should be estimated at the market rate then ruling.

In defence the Merryton Coal Company maintained that they were bound to deliver, and the pursuers entitled to receive, no more than about 750 tons of coal during each of the four months over which the contract extended; that consequently it was the duty of the pursuers to buy in against the defenders at the end of each month for the quantity short delivered during that month through the fault of the defenders,

and that the pursuers had no right to call on the defenders to make up in succeeding months for quantities short delivered in earlier months. The defenders, therefore, contended that the amount of the damages ought to be calculated on the basis of the market price ruling at the end of each month for the quantity (if any) short delivered during that month through their fault.

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After a proof, from which the foregoing facts, in so far as they had been in dispute appeared, and from which it further appeared that the market price of coal at the end of July was 1s. in advance of the contract price, the Lord Ordinary (Stormonth-Darling), on 20th March 1894, pronounced an interlocutor, finding the defenders liable in £106, 10s. as damages to the pursuers.*

* "OPINION.— . . . I do not think that each month's delivery was a hard and fast quantity of 750 tons, and that a portion remaining undelivered at the end of any month was necessarily wiped out of the contract without reference to the cause of non-delivery. In short, I regard the contract as one contract, and not four contracts; but I think that the deliveries were to be spread over the months of May, June, July, and August, in nearly equal proportions, with the result that, if the purchaser failed to take something like the proper proportion in any month, he was not entitled to demand delivery of that quantity in succeeding months, and that if the seller failed to give delivery of the proper proportion for any month when asked, he was not thereby relieved of the duty of delivering that quantity, but must make it up as soon as possible, provided the purchaser were still willing to take it.

"Now, the facts are these: In their letter of 9th May confirming the contract, the sellers asked Ireland when his first boat was expected, so that they might prepare. The answer next day was that he hoped to send the first order in a day or two, but that the navigation to Cronstadt was reported still unsafe. On 17th and 27th May the sellers repeated their inquiry, but not till 7th June did Ireland send his first order, and that was for a vessel not expected to be ready till 13th or 14th June. It may be that the state of the Baltic made it difficult to procure tonnage, but the sellers have proved that six vessels sailed from Grangemouth for Cronstadt in May 1893, taking large cargoes of coal; and in any case I do not see that the purchaser can be relieved on that ground from the consequences of what was clearly a breach of contract on his part. The sellers did not at once intimate that they regarded the first month's instalment as cancelled, but the result, I think, was the same, unless they chose to carry forward the delivery. So far from being willing to do that, the whole subsequent correspondence consisted of demands for coal by Ireland to an extent considerably exceeding the contract quantity, and excuses by the sellers for non-delivery, except of comparatively small shipments, on the ground that their men were not working full time. It is in evidence that during the summer of 1893 there were difficulties with the miners in the west of Scotland, but the Merryton Company's average output was something like 400 tons a-week, and I have heard no satisfactory reason why the deliveries were not much larger than they were. On the whole, down to the last delivery in the early part of September, the quantity delivered was 1594 tons 9 cwt. The balance undelivered was thus 1405 tons 11 cwt. From this I deduct 750 tons, as representing the quantity which Ireland failed to take in May, leaving 655 tons 11 cwt. for non-delivery of which I hold the Merryton Company responsible.

"In the view which I take of the case, it is unnecessary to analyse the correspondence, or to inquire how far short of the required quantity the Merryton Company were in any particular month. From the beginning of June onwards they were, I think, continuously in default. The only remaining question is whether the purchaser was bound to treat them as in default at the end of each month, and buy in against them at once, or was entitled to wait until the termination of the contract. I do not doubt that when a seller inti-

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The defenders reclaimed, and argued;—Under the contract they were bound to deliver to the pursuers 3000 tons of coal in quantities of about 750 tons, during each of the months of May, June, July, and August. The mention of the lots of 4/600 tons was merely a protective clause in their favour, so that they should not be called upon to deliver more than the output would admit of. Although the contract was one contract it had four periods, at each of which any damage for breach fell to be assessed. The principle adopted by the Lord Ordinary of accumulating the damage until the termination of the contract was erroneous. The proper measure of damage was the sum of the differences between the contract price and the market price upon the last day of the particular month in which the shortage occurred.¹ Lord Selborne's *dictum* in the *Mersey Steel and Iron Company*² case was *obiter*, and in any view had reference to the particular contract before him. *Ogle's*³ case had no application. In it there was a pactional modification of the bargain in the shape of an agreement by the plaintiff at the request of the defendant to postpone the delivery during the contract. There were here no letters instructing any forbearance on the part of the pursuer at the request of the defenders.⁴

Argued for the pursuers;—The contract was a *unum quid* for the sale of 3000 tons of coal, and no less, to be delivered in equal quantities of 750 tons, if possible, during the four months, with exceptions which excused the sellers from delivery during the actual period of the contract.⁵ If, then, the quantity asked for and got was less than the monthly quantity of 750 tons, then the quantity short delivered was to be made up by the sellers at the end of the contract. The Lord Ordinary's judgment was therefore right,⁶—the law of *Brown's*⁶ and *Roper's*⁷ cases was not disputed. It might well be that where a seller said he was not going to deliver, then that was the period at which the buyer must go into the market and buy in against him in order to constitute the damage. Here there was no absolute refusal to deliver till 28th August; the defenders merely made excuses for their delay, and it appeared from the correspondence that in respect of their excuses the pursuers forbore to press

mates unequivocally that he intends to make no more deliveries it is the right and duty of the purchaser forthwith to buy in against him at the market price of the day. But that rule applies to the case where there is an absolute repudiation of the contract. I do not find in this correspondence any positive refusal on the part of the sellers to make further deliveries until their letter of 28th August. The contract was treated by both parties as in full vitality till then, and although the sellers had once or twice asserted their view that they were not bound to deliver more than 750 tons per month, these were rather of the nature of excuses for short deliveries, and not binding declarations on which the other party would have been justified in acting.

"I hold it proved that at the end of August the price of Ell coal had risen from 7s. to 10s. 3d. a ton, and Ireland is therefore entitled to the difference of 3s. 3d. on 655 tons 11 cwt., being £106, 10s."

¹ *Roper v. Johnson*, 1873, L. R., 8 C. P. 167; *Brown v. Muller*, 1872, L. R., 7 Exch. 319; *Llansamlet Tin Plate Company, in re Voss*, 1873, L. R., 16 Eq. 155.

² *Mersey Steel and Iron Co. v. Naylor, Benzon, & Co.*, 1884, L. R., 9 App. Ca. 434, per Lord Selborne, 439.

³ *Ogle v. Earl Vane*, 1867, L. R., 2 Q. B. 275.

⁴ *Llansamlet Tin Plate Company, in re Voss*, 1873, L. R., 16 Eq. 155, per Sir James Bacon, pp. 159, 160, 161.

⁵ *Tyers v. Rosedale and Ferryhill Iron Co.*, 1875, L. R., 10 Exch. 195; *cf. Higgin v. Pumpherston Oil Co., Limited*, March 14, 1893, 20 R. 532.

⁶ *Brown v. Muller*, 7 Exch. 319.

⁷ *Roper v. Johnson*, 8 C. P. 167.

for the full monthly instalments, but always subject to their right to obtain ultimately the full amount of their contract. The measure of damages was thus the difference between the contract and market price as at 31st August.¹ Lastly, under the contract there were certain excepted causes excusing delivery by the defenders, *e.g.*, stoppages of pits and strikes. Under these causes the quantities short delivered were not wiped out of the contract, but the delivery of them was merely postponed.²

At advising,—

LORD TRAYNER.—This is an action of damages for breach of contract, and the questions for determination are,—(1) What is the contract between the parties? (2) have the defenders (the sellers) committed a breach of the contract? and (3) if so, what damage is due to the pursuers (the buyers) in respect of said breach?

1. The contract between the parties is contained in the seller's letter of 2d May 1893 and the buyer's reply on 8th May following, the first of these letters being in effect an offer which by the second letter was accepted. The contract was this: The defenders undertook to deliver to the pursuers 3000 tons Ell coal at 7s. per ton *f.o.b.* Grangemouth, to be delivered over the "next four months" in average (or "about equal") monthly quantities; and to be delivered in shipping lots of from 400 to 600 tons at a time on due notice being given.

I agree with the Lord Ordinary in holding that this was one contract for the whole 3000 tons of coal, and not four contracts, each for 750 tons. I think this is quite clear. But it is equally clear that while the contract was for 3000 tons, it was a contract for the delivery of that quantity not in lump but in four monthly quantities of equal or about equal extent. Accordingly what the defenders were bound to deliver, and the pursuers entitled to demand, was 3000 tons of coal in quantities of about 750 tons during each month over which the contract extended. So far I think parties are practically agreed.

2. Did the defenders commit a breach of their contract? In the month of May the pursuers were not in a position (from want of a vessel) to take delivery of any coal, and they asked for none. The defenders tendered none, because, I suppose, they could otherwise dispose of the produce of their colliery during that month. But there was no breach of contract in not delivering what the pursuers did not want, did not ask for, and could not take. In June the pursuers asked for one shipment and got it. Again there was no breach of contract. In July demands were made for the whole monthly quantity which the defenders failed to deliver to the extent (as is agreed) of 262 tons; while in August there was delivery only of the monthly quantity, less 71 tons. Accordingly there was a breach of contract on the part of the defenders in the months of July and August, for which they must answer. And that leads to the third question.

3. What amount of damage must the defenders pay in respect of such breach? The Lord Ordinary has answered this question by finding that the defenders are liable to the pursuers in 3s. per ton on each ton of the whole 3000 short delivered, 3s. per ton being the difference between the contract rate and the market price of the same coal on 1st September, the day after the contract period expired, his view being that under the contract the defenders were

¹ Ogle v. Earl Vane, L. R., 1867, 2 Q. B. 275.

² De Oleaga v. West Cumberland Iron and Steel Co., 1879, L. R., 4 Q. B. D. 472.

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bound to deliver 3000 tons in all, and that what was not delivered in one month should have been delivered in another. I am unable to concur in that view of the contract. I have already stated that in my opinion the contract was one for delivery of 3000 tons of coal, but for delivery of that *cumulo* quantity in about equal quantities in each of the four specified months. Even these monthly quantities could only be demanded in shipping lots of from 400 to 600 tons "on due notice being given," so that the pursuers had no right to demand, and the defenders no obligation to deliver the whole monthly quantity at one time. The defenders fulfilled their obligation if they gave 400 tons at one time on due notice being given to them. But there is no stipulation that if the quantity asked for or got in one month was less than the monthly quantity agreed on, such quantity short delivered was to be made up in the following month, or otherwise during the currency of the contract. If that had been intended I should have expected to find it expressed, or something at all events leading by clear implication to the view that that was the contract intention of the parties. There is, however, nothing of the kind. The want of such a stipulation did the pursuers no harm if they wanted the whole coal they had contracted for within the contract time. For each month that there was a short delivery they could have gone into the market and bought in coal to supply the deficiency at the defenders' expense. Just as, on the other hand, the defenders could have sold elsewhere any coal which the pursuers did not take, and charged them with the difference between the price obtained and the contract price, had the former been less than the latter. In a word, the contract was for monthly deliveries of about 750 tons of coal until 3000 tons had been delivered between 1st May and 31st August. Each monthly delivery was separate and separable, although the rights and obligations *hinc inde* arose out of one contract for 3000 tons of coal. If this view of the contract be the right one, the damage due by the defenders for breach of contract is easily ascertained. There was no breach in May or June. In July there was a breach in respect of a short delivery of 262 tons. On 1st August the market price of the coals was 1s. per ton in advance of the contract price, and at that price the pursuers could have bought in against the short delivery. Had they done so, they would have been in the same position as if the defenders had fulfilled their contract, but this would have cost them £13, 2s., and that is the amount of their damage. In like manner there was a breach of contract in August by a short delivery of 71 tons. The market had advanced 3s. per ton on the contract rate; the pursuers therefore could have supplied the deficiency at a cost of £10, 13s., which is their damage in August through the defenders' breach. I think the pursuers have thus sustained damage through the defenders' breach of contract to the extent of £23, 15s.

LORD YOUNG, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and assessed the damages due by the defenders to the pursuers at £23, 15s.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—W. & J. BURNES, W.S.—Agents.

ALAN KING SMITH AND OTHERS (Ross's Trustees), Petitioners.—
G. W. Burnet.

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Trust—Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97), sec. 7—Advances out of income for maintenance of beneficiaries.—The Trusts Act, 1867, sec. 7, enacts,—“The Court may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced.”

Testamentary trustees held the residue of a trust-estate for behoof of the testator's children, who were all minors, subject to a direction to divide it among the children or the survivors, when the youngest child should reach twenty-one years of age. The settlement contained a declaration that the provisions to the children should not become vested interests in them until the period of division, and there was no direction as to the application of the accruing income. There was no destination over in the event of the children all dying before the date of division.

A petition was presented by the trustees for authority to apply the whole of the income, or such part thereof as they should think proper, for behoof of the children, on the ground that this was necessary for their maintenance and education.

Held that the petition might be granted under sec. 7 of the Trusts Act, 1867, in respect (1) that the unappropriated income formed part of the capital; (2) that although the interest of each child was contingent, and had not vested, the children as a class had a vested interest in the sense of the statute; (3) that no persons had an interest in the residue other than the children and their heirs or representatives, as in the event of all the children dying before the provisions vested, the residue would fall to be dealt with as intestate succession of the testator, and would be payable to the representatives of the children, his next of kin.

THIS petition was presented by the testamentary trustees of the late David Ross, and by Arthur William Ross and Montague Armitage Ross, two of his children, for authority to the trustees to make certain payments from the trust-funds for behoof of the testator's children, who were all in minority. 1ST DIVISION.

David Ross died at Edinburgh on 5th March 1893 leaving a trust-disposition and settlement whereby he conveyed to trustees his whole means and estate, and directed them to pay to his widow the annual profits or produce of the residue of his estate under the declaration that she should be bound to aliment, maintain, and educate the children of the marriage until they should be able to maintain themselves. In the fourth purpose of the deed he provided as follows:—“That my trustees shall hold the residue of my whole means and estate, heritable and moveable, for behoof of the children that may be born of the marriage between me and my said wife, and shall, after the death of the longest liver of me and my said spouse . . . divide and apportion my whole estate and effects, heritable and moveable, equally among my whole children to be born of the marriage between me and my said wife; but declaring that such apportionment and division shall only then take place provided the youngest of our children alive at the time shall have attained the age of twenty-one years, and if not, shall be postponed until the youngest of the survivors of them shall attain that age, with power, nevertheless,

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to my said trustees, with the consent and approbation of my said spouse, in the event of her surviving me . . . to advance to my son or sons such part of their provisions as to my trustees shall seem proper for apprenticing them or otherwise fitting them out in life, which advances shall form preferable claims against and be deducted from his or their proportion of the residue of my said estate payable to him or them; declaring that the provisions to my said children shall not become vested interests in them until the term of division of my said estate above mentioned; but declaring, nevertheless, that in the event of any of my said children dying before the said term of division, and leaving lawful issue, such issue shall be entitled to their parent's share, and the same shall be divided equally among his or her issue alive at the period of payment or conveyance, and failing such issue, the share of such child deceasing shall fall and accresce to the survivors, and be payable to them on the same condition as their original shares."

The truster was survived by his widow, by a son, Arthur William, born on 20th June 1875, and by two daughters, Montague Armitage, and Isobel Mary, born respectively on 3d September 1877 and 3d March 1885.

The trustees paid the widow the annual income arising from the residue until her death, which took place on 27th April 1894.

The petitioners stated that the estate consisted of moveable property to the value of about £2600, and that the annual income, about £78, was the whole sum available for the maintenance and education of the children. They also stated that the deed conferred no express power upon the trustees to apply the income of the estate for the benefit of the children until the period of vesting had arrived, which was not until the youngest of them attained the age of twenty-one complete, i.e., until 3d March 1906. They therefore craved the Court to authorise and appoint them to apply the whole or such part as they might think proper, of the income of the trust-estate for behoof of the children.

After the petition had been intimated, the Court remitted to Mr A. H. Cooper, W.S., to report.

Mr Cooper reported generally in favour of the granting of the prayer, and pointed out that the children were without guardians for the purpose of the application, and that the parties who would be the nearest of kin in the event of the death of the children were not called.

Counsel for the petitioners referred to the 7th section of the Trusts (Scotland) Act, 1867,* and to the undernoted cases.¹

LORD M'LAREN.—Our power to grant this application depends on the authority given to the Court by the Trusts (Scotland) Act, 1867, which in form relates only to advances out of capital. But as the income of this estate is unappropriated, of course as each year's income accrues it is the duty of the trustees to add it to the capital to increase the amount of the residue. It is the right and duty of trustees to accumulate undisposed of income with capital, and therefore I think this application is quite within the scope of the Act of Parliament, which deals with the unappropriated capital of trust-estates.

Now, not to repeat the words of the clause, the conditions of a valid application to the Court are that the class of children—the family of children—must have an interest in the trust-fund, and that no other persons can shew an inte-

* Quoted in rubric.

¹ Mackintosh v. Wood, July 5, 1872, 10 Macph. 933, per Lord Cowan, p. 936; Latta, June 5, 1880, 7 R. 881.

rest under the deed. If these conditions exist the Court may grant the trustees power to make advances from the capital of the estate, even though the interest of any individual child may be contingent, because it is so put in the statute. The object of this remedial provision is to avoid the difficulty which arises, where, owing to the existence of a clause of survivorship as between children, it would not be held that a right to an absolute share vested in each child at the testator's death. But the statute recognises that, provided the children, as a family, have the sole interest in the fund, and that there are no other funds applicable to their maintenance, power to apply this common fund may be granted. Now, I think we have before us exactly the case which the Act contemplates. There is no destination over in this deed, and if the children were all to die in minority the only persons who could claim this fund would be the next of kin. These are the children themselves, and although in the case I am putting they are all dead, their collateral relatives do not take as next of kin in their own right but as representing the children. This was established in the case of *Lord v. Colvin* (Dec. 7, 1860, 23 D. 111), and the principle was recognised in the very carefully considered judgment of the House of Lords in *Gregory's Trustees v. Alison* (April 8, 1889, 16 R. (H. L.) p. 10), and it therefore appears to me to be quite unnecessary to call the next of kin of the children for whose behoof this application is made. The same considerations render it unnecessary to appoint a curator ad litem, because, according to the report which is before us, there is no other source of maintenance open to these children. The application is for their benefit, and my opinion, which I understand your Lordships agree with, is that it would be unnecessary to appoint a curator ad litem, except for the protection of some interest in the children themselves. I am therefore of opinion that we may now grant the power craved.

No. 194.

July 14, 1894.
Ross's Trustees.

The LORD PRESIDENT and LORD KINNAR concurred.

LORD ADAM was absent.

THE COURT pronounced this interlocutor:—" Authorise the petitioners, as trustees of the deceased David Ross, sometime manufacturer in Alloa, to pay and apply the whole, or such part as they may think proper, of the income of the trust-estate of the said David Ross to or for behoof of Arthur William Ross, Montague Armitage Ross, and Isobel Mary Ross, his, the said David Ross's, children, in accordance with the directions contained in his said trust-disposition and settlement, and direct the expense of this application, and of all relative procedure, to be charged against the shares of the said estate provided to such children, and decern."

FRASER, STODART, & BALLINGALL, W.S., Agents.

THE LORD ADVOCATE, Pursuer (Respondent).—*Sol.-Gen. Asher—A. J. Young.*

No. 195.

JOHN HAY WILSON AND OTHERS, Defenders (Reclaimers).—*Dickson—Glegg.*

July 17, 1894.
Lord Advocate
v. Wilson.

Revenue—Inventory-duty—Stamp-duty on accounts—Voluntary settlement—Reservation of interest in property settled—Customs and Inland Revenue Act, 1881 (44 and 45 Vict. c. 12), sec. 38, subsec. 2 (c)—Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), sec. 11, subsec. 1.—The Customs and Inland Revenue Act, 1881, sec. 38, subsec. 2, imposes a stamp-duty in respect of "(c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day" (that is, on or after 1st June 1881) "by

No. 195. deed or any other instrument not taking effect as a will, whereby an interest in such property for life, or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.”
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The Customs and Inland Revenue Act, 1889, sec. 11, subsec. 2, amends the above quoted section thus,—“ . . . The description of property marked (c) shall be construed as if the expression ‘voluntary settlement’ included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression ‘such property,’ wherever the same occurs, included the proceeds of sale thereof.”

In 1887 W transferred to three of his sons, who formed a copartnership, the whole stock in trade and goodwill of his business. No cash was paid down by his sons, but they undertook, both as individuals and as a firm, to grant a bond of annuity in favour of their father, and after his death of their mother, equivalent to 5 per cent on the value of the stock in trade. The bond was in no way secured on the business. The sons further, in consideration of their father entering into the arrangement, discharged all claims competent to them on his death to any share of his estate. W died in 1893.

In an action at the instance of the Inland Revenue to recover duty on the property so acquired by his sons, *held* (following *Crossman v. The Queen*, 1886, L. R., 18 Q. B. D. 256) that the transfer of the business was a voluntary settlement within the meaning of the Customs and Inland Revenue Act, 1881, sec. 38, subsec. 2, and that the annuity was an interest in the business reserved by implication to the settlor, and therefore that duty was payable.

1st Division. In December 1893 the Lord Advocate, on behalf of the Board of
 Exchequer Inland Revenue, brought an action against John H. Wilson, Louis G. O.
 Cause. Wilson, and Charles A. Wilson, photographers in Aberdeen, concluding
 Ld. Wellwood. for decree against the defenders ordaining them to “deliver to the pursuer a full and true account, verified by oath and duly stamped, of the personal or moveable property of the deceased George Washington Wilson, photographer, Aberdeen, which passed to and was acquired by the defenders under an agreement between him and them, dated 4th May 1887,”* in the following circumstances.

* The Customs and Inland Revenue Act, 1881 (44 and 45 Vict. c. 12), enacts, sec. 38.—“(1) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof. (2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz :— . . .

“(c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day” (that is, on or after 1st June 1881) “by deed or any other instrument not taking effect as a will, whereby an interest in such property for life, or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.”

Sec. 39.—“Every person who, as beneficiary, trustee, or otherwise, acquires possession or assumes the management of any personal or moveable property of a description to be included in an account according to the preceding section shall, upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased, deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property, duly stamped, as required by this Act.”

The Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), sec. 11, subsec.

George Washington Wilson carried on a photographic business in Aberdeen, in partnership with George Brown Smith, under the firm of George Washington Wilson & Company, until 31st March 1887, when the partnership was dissolved, it being agreed that Mr Smith should be paid out.

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Thereafter, on 4th May 1887, Mr Wilson, as party of the first part, entered into an agreement with his said sons, as parties of the second part, whereby it was agreed as follows:—“(First) The second parties hereby agree to enter into a formal contract of copartnery in terms to be approved of by the first party; (second) on said contract being executed, and a bond and bills granted, as hereinafter provided, the whole stock in trade of the said firm of George Washington Wilson & Company, together with the goodwill of the business and the right to use the said company name of George Washington Wilson & Company (but not the book debts of the firm) shall belong to the second parties’ firm as their absolute property, and the first party hereby agrees to grant all deeds necessary for this purpose; (third) in consideration of the second parties’ firm receiving the said stock in trade and goodwill of the business, the second parties, as individuals and as a firm, hereby agree to relieve the first party of the sum payable by him to the said George Brown Smith . . . to the extent of £750, and to grant three bills or promissory-notes accordingly, by themselves as individuals and also as a firm, to the first party; . . . and further, the second parties, as individuals and as a firm, agree to grant a bond of annuity in favour of the first party and his wife Mrs Maria Ann Cassie or Wilson, securing to the first party during his life, and after his death to his said wife during her life, if she shall survive the first party, an annuity equivalent to 5 per centum on the value of the said stock in trade, which has been ascertained by mutual valuation to amount to the sum of £7291, 17s. 6d., after deducting the said sum of £750, . . . from the date when the said stock in trade was handed over to the second parties . . . during the lives of the first party and his said wife, and of the survivor of them; . . . (fourth) the first party shall be entitled to collect for his own use the whole of the debts due to the said firm of George Washington Wilson & Company prior to 31st March 1887; . . . (fifth) the first party hereby agrees to grant, and the second parties, as a firm and as individuals, agree to accept a lease or leases of seven years’ duration,” of certain premises which had been occupied by Mr Wilson at a rent in all of £150; . . . “(seventh) further, it is also hereby agreed as part of the consideration for the first party entering into this agreement, that the second parties shall discharge and renounce, as they respectively do hereby expressly discharge and renounce, all claims which they or any of them have or may have by or through the death of the first party to any part or share of his estate, heritable or moveable, in respect of legitim, bairns’ part of gear, or otherwise.”

On the same date, and in terms of the agreement, the sons executed a bond of annuity and entered into a lease of the business premises. The annuity amounted to £364, 12s., and it was not secured in any way on the business or the property transferred to the sons.

1, enacts,—“Subsec. 2 of sec. 38 of ‘The Customs and Inland Revenue Act, 1881,’ is hereby amended as follows:— . . . The description of property marked (c) shall be construed as if the expression ‘voluntary settlement’ included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression ‘such property,’ wherever the same occurs, included the proceeds of sale thereof.”

No. 195. Mr Wilson died on 9th March 1893, the annuity having been regularly paid to him.

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The pursuer pleaded, *inter alia*;—(1) The personal property acquired by the defenders from the deceased having passed to them by voluntary settlement within the meaning of the said statutes, they are bound in respect thereof to pay stamp-duty on account.

The defenders pleaded, *inter alia*;—(3) Said property not having passed to the defenders by voluntary settlement, in terms of said statutes, they are not liable in payment of the duty sued for. (4) The deceased George Washington Wilson, not having retained an interest for life in the property condescended on, nor having reserved power to reclaim the absolute interest in said property, the defenders ought to be assoilzied, with expenses.

A proof was allowed, the import of which sufficiently appears from the opinion of the Lord Ordinary (Wellwood). On 8th June 1894, the Lord Ordinary (Wellwood) gave decree in terms of the conclusions of the summons.*

* “OPINION.—(After quoting the sections of the Revenue Acts cited *supra*)—I have to decide whether the agreement between the late George W. Wilson and his sons, the defenders, which is partially quoted in condescendence 4, was or was not a ‘voluntary settlement’ in the sense of the statutes, and whether by that agreement an interest in the property made over was reserved to him for his life. In considering those questions it must be kept in view that under the statute the reservation may be either express or by implication; and also that an instrument constitutes a ‘voluntary settlement’ whether it is made for valuable consideration or not.

“It will be seen that the net is spread very wide and that the meshes are small.

“My opinion is, that the agreement in question was a voluntary settlement in the sense of the statutes, as distinguished from a transaction or bargain for substantial consideration. It was in substance simply a family arrangement. It does not bear to be a sale; it proceeds on the narrative that the father had arranged to ‘hand over’ the whole of the business to his sons, including the stock in trade and goodwill, but not the book debts of the firm. No cash was paid down, but the second parties undertook to pay out a former partner of their father, George Brown Smith, at the price of £750. On the other hand, they received goods and stock in trade to cover that sum, in addition to the value (£7291, 17s. 6d.) upon which the annuity to be afterwards mentioned was calculated. In return the second parties undertook as individuals, and as a firm, to grant a bond of annuity in favour of their father and mother and longest liver of them, equivalent to 5 per cent on the value of the stock in trade (£7291, 17s. 6d.), after deducting the said sum of £750. Lastly, in respect of the provisions in this deed, the second parties renounced all claims which they had or might have through the death of their father, to any part of his estate, heritable or moveable.

“It seems to me that this is simply a voluntary settlement, under which the settler reserved to himself for his life an interest in the property settled. It is true that the interest was not secured upon the property itself. But this, I think, is not material, because the statute says the reservation either may be express or by implication. The interest reserved was simply the interest on the value of the whole concern handed over; and it was secured by a bond which bound not merely the sons as individuals, but also the firm. The intention and understanding of parties is made clear by this, that when the business was converted into a limited company, shares and cash to the value of £7296 were allotted to G. W. Wilson, as nominee of his three sons, manifestly for the purpose of securing the annuity in question.

“It is said by the defenders that they gave an adequate value for the business, because they came under an obligation to pay an annuity, the capitalised

The defenders reclaimed, and argued;—There was no voluntary settlement, for substantial consideration had been given for the business. The

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value of which was £4331, 3s. 6d. But when we turn to the statement of the profits made by the second parties for the six years following the agreement, we find that they amounted on an average to about £2000 a-year. It is true that for a year or two immediately preceding the agreement the works had not been carried on to a profit; but there must have been some exceptional cause for this, which disappeared whenever the sons took up the business, because in the very first year the profits rose to £1605.

"There are two decisions which have a close application to the present case, viz.:—*The Lord Advocate v. M'Kersie*, 19 S. L. R. 438, and *Crossman v. The Queen*, L. R., 18 Q. B. D., 256.

"The case of *The Lord Advocate v. M'Kersie* was a decision under section 7 of the Succession-Duty Act of 1853, but the question was practically the same. There a father assigned and made over to his sons his interest in a business, the value being declared to be £28,750, as a payment to account of the share of residue of his estate provided for them in his settlement. In return the sons agreed to make payment to their father during his lifetime of an annuity of £1150, and the following observations of Lord Fraser shew the nature of the question and the views which he took of it (p. 440),—'On the death of William M'Kersie, the father, the defenders undoubtedly obtained an increase of beneficial interest, in respect that their obligation to pay the annuity of £1150 then ceased. But this is not enough in all cases to entitle the Crown to judgment. There is one exception expressly specified in the Act, within which the defenders contend their case comes. If the transaction be a *bona fide* sale, then no duty is exigible, and there may be such a *bona fide* sale although the money may not be payable until the death of a certain person, as was decided by the Master of the Rolls in the case of *Fryer v. Morland*, 3d August 1876, L.R., 3 Chanc. Div. 675. Now, was this a *bona fide* sale? Or was it, as the Lord Ordinary holds it to have been, simply a gratuitous transference by the father to his two sons, reserving to himself the interest of the value of the property which he conveyed? No doubt the transference was irrevocable, but still the transaction was one whereby the transferer reserved to himself, not in express words, the liferent of the estate, but he did so in effect. Dealing with this 7th section the Master of the Rolls in the above case of *Fryer* says of it,—'The object is plain enough; it was to prevent a man conveying the fee reserving to himself a life interest.' Now this is as effectually done in the mode astutely adopted in the present case, by taking a bond from the transferees for the interest, at the rate of 4 per cent on the money value of the property conveyed. The defenders paid down nothing in the shape of money or money's worth, and therefore there is absent in this case the first characteristic of a sale, viz., a price paid out of the pockets of the purchasers.'

"On the facts, I do not think that that case can be distinguished from the present.

"The case of *Crossman v. The Queen* was a case in the Queen's Bench Division under the Customs and Inland Revenue Act, 1881. The circumstances were practically the same. The father, Robert Crossman, made over to two of his sons his interest in a partnership business, the sons in return covenanting to secure to their father during his life interest at the rate of 4 per cent on the value of the shares appointed and assigned to them respectively, and also, in the event of his death, to secure annuities to his widow and another son, the latter annuities to be paid out of the profits. As I have said, this was a suit brought in 1886 under the Act of 1881, and before the passing of the amending Act of 1889 quoted in record. It was strongly urged for the suppliants that the transaction was one for a valuable consideration and not a voluntary settlement, in respect that the covenants to pay interest at 4 per cent during the life of Robert Crossman were not dependent upon the future prosperity of the business, and were a good consideration for the transference of the business.

"Even without the aid of the amending Act, the Court held that this plea

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consideration did not require to be adequate if the divestiture was complete.¹ This was the case here, for the transfer of the business was absolute. Nothing was left to the father but the personal obligations of the sons and their firm. The sons were quite unfettered, and might have disposed of the business as they liked. The case of the *Lord Advocate v. M'Kersies*² had no bearing, for it was on the construction of a different Act of Parliament.

Argued for the pursuer;—The transfer of the business and the payment of the annuity to the father were evidently just a family arrangement. They were not a commercial transaction like a sale. The case of *Crossman*³ exactly applied, and ought to be followed. *M'Court's* case¹ did not apply, for the Court were satisfied there that there had been an out-and-out gift of the estate.

At advising,—

LORD PRESIDENT.—My opinion is in accordance with that of the Lord Ordinary.

The expression “voluntary settlement” is not one with which Scottish lawyers are familiar, and, on this account, I am disposed to attach an especial weight to the English decision in *Crossman v. The Queen*, where the facts were very similar to those now before us.

This is a handing over by a father to his sons of his whole business, and, in respect of what the sons get, they renounce all claims of succession to their father's estate. The father gives a very advantageous lease of the building in

was ill-founded. Justice Hawkins, in reading the judgment of the Court, said (p. 265),—‘It is said, however, that the absolute covenant to pay to Robert Crossman during his life 4 per cent interest on the value of the shares, regardless of whether the profits of those shares amounted to that sum or not, was in itself a sufficient consideration. We do not so regard it. We look upon that covenant in substance, though possibly not in form, as a mere mode of reserving to Robert Crossman a life interest in the shares transferred to the extent of £4 per cent on their value, a sum in all probability far less than the actual annual nett profit they were yielding. In substance, it was a gift of whatever annual profit (if any) beyond the £4 per cent the shares might yield during his life, and an absolute gift of them on his death, subject only to the said annuities.’

“The Judges in that case quoted with approval Lord Fraser's remarks, which I have already quoted.

“In both these cases, it will be observed the annuity was not secured on the property, but, as here, rested on the personal obligation of the transferees.

“Of course if the owner of property makes an absolute disposition *inter vivos* for a price down, however small, putting the funds entirely beyond his control and reserving no life interest in them directly or by implication, they will on his death be free from any claim at the instance of the Crown. The latest case on the point is *Lord Advocate v. M'Court*, 20 R. 488, in which, although the First Division of the Court took a different view from myself in regard to the *bona fides* of the transaction, no doubt was expressed by the Inner-House or myself of what was the legal effect of a *bona fide* absolute transference and divestiture *inter vivos*.

“But under the statutes with which I am at present dealing it is sufficient to subject the parties taking under such a settlement to account duty that it's proved that the agreement was voluntary and that the settler reserved to himself in the way which I have explained an interest for life in the property made over.”

¹ Lord Advocate v. M'Court, March 7, 1893, 20 R. 488.

² Lord Advocate v. M'Kersies (Outer-House), Dec. 22, 1881, 19 S. L. R. 438.

³ Crossman v. The Queen, 1886, L. R., 18 Q. B. D. 256.

which the business was carried on. On the other hand, he stipulates for an annuity to himself and his wife successively of 5 per centum on the value of the stock in trade.

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On the face of the agreement this is not a commercial transaction. It cannot be imagined that if the father had been approached by a third party and offered this annuity he would have entered into such an agreement. The facts proved in evidence bear out the impression produced by the deed itself, that it was executed because the father was minded to bestow his business on his sons, contenting himself with some small annual return proportionate to the value of the stock in trade. This was therefore a settlement on his sons of this part of his estate, and it proceeded from his good will. I consider that it is a voluntary settlement in the sense of the Act.

I agree with the Lord Ordinary in thinking that the words in the section "expressly or by implication" entitle us to hold that this annuity was in the sense of the statute "reserved." It is a pretty direct implication by which we conclude that the annuity of 5 per cent on the stock in trade was really reserved out of the business handed over. On this matter the case of *Crossman* is in point, for there the annuity was not expressly payable out of what was conveyed. The case of *M'Kersie* has a less direct bearing, for it is a decision on a different statute, and the section there founded on did not require that the consideration should be reserved,—the words being "reservation or assurance of or contract for any benefit."

LORD ADAM.—There appear to be two questions in this case.

1st, Whether the agreement of 4th May 1887, whereby the defenders acquired right to the whole stock in trade of the firm of George Washington Wilson & Company, together with the goodwill of the business, was a voluntary settlement in the sense of the 38th section of the Customs and Inland Revenue Act, 1881?

2d, Whether, if so, the settler, George Washington Wilson, thereby reserved an interest in such for life, either expressly or by implication?

I concur with the Lord Ordinary that the agreement in question amounts in substance to a family arrangement. It is not alleged, and is not the fact, that any money was paid by the defenders for the property to which they thereby acquired right.

It is true that they thereby agreed to relieve their father of a sum of £750 due by him to George Brown Smith, a former partner, but value in the shape of goods was put into their hands by their father to enable them to meet this obligation.

Further, it appears that the defenders by the agreement bound themselves to grant a bond of annuity in favour of their father and his wife, securing to him, and after his death to her, an annuity at the rate of 5 per cent per annum on the value of the stock handed over to the defenders, and the defenders did, of the same date, grant a bond of annuity, in terms of this obligation.

It will be observed that this annuity is not in any way secured over the property specified in the agreement, and if the question had been open, it might very well have been doubted whether the settler had thereby reserved an interest in such property for life, seeing that the property had passed out of his hands, and might have been dissipated next day.

But I think the question was in terms decided in the Queen's Bench in Eng-

No. 195. land in the case of *Crossman v. The Queen*, and that we ought to follow that case.

July 17, 1894. Lord Advocate I therefore think we should adhere to the interlocutor reclaimed against v. Wilson.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT adhered.

THE SOLICITOR OF INLAND REVENUE—DALGLEISH, GRAY, & DOBBIE, W.S.—Agents.

No. 196. JOHN CURRIE (Owner of s.s. "Easdale"), Pursuer (Appellant).—*Ure—A. S. D. Thomson.*

July 17, 1894. FRANCIS M. ALLAN AND ANOTHER (Owners of s.s. "Dunlossit"), Defenders Currie v. Allan. (Respondents).—*Dickson—Salvesen.*

Reparation—Ship—Danger to ship at quay—Obstruction by vessel lying outside and parallel—Right to cut mooring ropes of outside vessel to escape danger.—While the s.s. "Dunlossit" was lying at a quay the s.s. "Easdale" came in, in the evening, took up her position outside and close to the "Dunlossit," and moored herself to the shore by ropes crossing the stem and stern of the "Dunlossit." A gale rose during the night, and the position of both vessels became perilous. During the night the master of the "Dunlossit" repeatedly asked the master of the "Easdale" to move, so that the "Dunlossit" might escape, but the master of the "Easdale" did not do so. In the morning the master of the "Dunlossit," after giving warning of his intention, cut the mooring ropes of the "Easdale" and steamed away. The "Easdale" was then driven ashore by the wind and damaged. In an action of damages at the instance of the owner of the "Easdale" against the owners of the "Dunlossit," held that the cutting of the ropes was *prima facie* an illegal act, and that the defenders had failed to justify it, and were therefore liable in damages for the consequences of the act.

1st DIVISION.
Sheriff of
Lanarkshire.

IN December 1893 John Currie, owner of the s.s. "Easdale," raised an action in the Sheriff Court at Glasgow against Francis M. Allan and Neil Campbell, owners of the s.s. "Dunlossit," concluding for payment of £450 for damage alleged to have been done to the "Easdale" by the crew of the "Dunlossit" cutting her adrift from her moorings at Port Askaig in the Isle of Islay.

The following narrative of the circumstances under which the "Easdale" was damaged is taken from the findings in the final interlocutor of the First Division of the Court:—On the afternoon of 17th November 1893, while the s.s. "Dunlossit" lay moored to the quay at Port Askaig in the Isle of Islay the s.s. "Easdale" came to Port Askaig and was moored to the quay alongside but outside of the "Dunlossit," by ropes passed across the "Dunlossit." Before six p.m., and while the two steamers thus lay, a gale of exceptional violence came on, which lasted all night and until after the unmooring after mentioned. Throughout the night the "Dunlossit" suffered considerable damage through the tossing against her of the "Easdale" and of another vessel lying on her inner side. The master of the "Dunlossit," from and after six p.m. on the 17th November, desired to leave, but it was impossible for him to do so unless the "Easdale" cleared out. The master of the "Dunlossit" repeatedly asked the master of the "Easdale" to clear out. It was impossible for the master of the "Easdale" to move his steamer so as to enable the "Dunlossit" to leave without the "Easdale" herself going to sea. It was impossible for the "Easdale" to go to sea, with safety to life and property on board, owing to two of the crew having refused to go out on account of the gale, and the remaining crew not being sufficient to man the ship in the existing state of the sea and weather. The master of the "Easdale" declined to

go out. During the night and morning the master of the "Dunlossit" repeatedly threatened to the master of the "Easdale" to cut the moorings of that vessel. Shortly after eight A.M. on 18th November the master of the "Dunlossit" cut the moorings of the "Easdale," the men on board hastily left, and the "Easdale" drifted to sea with no one on board, and was driven on shore and suffered damage. At the time when the moorings were cut the "Dunlossit" was suffering damage from the contact of the "Easdale," and was in serious peril of further damage owing to contact with the "Easdale" and the steamer on her inner side, and also to the possibility of another vessel (the "Macbeth") moored in front of her coming into collision with her. The master of the "Dunlossit" in cutting the moorings of the "Easdale" acted without any consent or authority from anyone representing the "Easdale," and in the knowledge that by cutting her moorings he exposed her to the certainty of her being driven out to sea and to the probability of serious damage. The master of the "Dunlossit" so acted solely for the protection of the "Dunlossit" against present and possible damage.

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The pursuer averred that the crew of the "Dunlossit" "wrongfully and unnecessarily cut the 'Easdale' adrift from her moorings."

The pursuer pleaded;—The s.s. "Easdale" having sustained the loss and damage before condescended on, and such loss and damage having been caused wrongfully and unnecessarily by those on board the s.s. "Dunlossit," for whom the defenders are responsible, the pursuer is entitled to decree as craved, with expenses.

The defenders pleaded;—(2) The pursuer's master and crew having abandoned their vessel, which became a source of danger, and having regard to the state of the weather, the position of the various vessels, and the whole circumstances, the defenders' master was justified in cutting the "Easdale" adrift. (3) Any damage occasioned to pursuer's vessel not being owing to fault on the part of defenders or their servants, they are not liable, and should be assoilzied, with costs. (4) Pursuer in any case having contributed by his servants' negligence to the damage is barred from suing.

A proof was led, in which the facts above narrated were proved.

On 6th April 1894, the Sheriff-substitute (Balfour) pronounced this interlocutor (after findings in fact similar to those above quoted):—"Finds that immediately before the departure of the 'Dunlossit' the master of the 'Macbeth' found that the north end of the quay was giving way and damaging his moorings, and he called this out to the master of the 'Dunlossit'; finds that shortly after the departure of the 'Dunlossit' the north end of the quay gave way to such an extent that the 'Macbeth's' moorings were destroyed, and by skilful manœuvring she was swung down on the outside of the 'Islesman'; finds that if the 'Dunlossit' had not left the quay at the time she did, and if the three vessels which had been lying abreast of one another had remained at the quay for about half-an-hour, the 'Macbeth' would have come down on the top of them, and probably the whole four vessels would have been wrecked; finds under the circumstances that the master of the 'Dunlossit' was justified in cutting the ropes of the 'Easdale' so as to admit of his leaving the quay, and that the defenders are not responsible for the consequences to the 'Easdale'; therefore assoilzies the defenders from the conclusions of the action, and decerns."

The pursuer appealed to the Court of Session, and argued;—The "Dunlossit" was not entitled to cut the "Easdale's" moorings in view of the certain danger to the latter vessel. Nothing but absolute necessity would justify such a course, and the facts as proved did not disclose any

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such case. The ships had all weathered the worst part of the gale, and there was no necessity to cut the moorings in the morning. There was no abandonment by the crew of the "Easdale"; all they refused to do was to put their lives in danger by going to sea in such a gale. The *onus* of justifying their high-handed act lay on the defenders. This they had failed to do, and as they had used the pursuer's property to save themselves, they ought to pay the damage done in doing so.¹

Argued for the defenders;—The "Easdale" had voluntarily put herself in such a position as to be a source of danger to the defenders' vessel, and that being so she was under an obligation to move if the "Dunlossit's" requirements made it necessary. The dangers incurred by the "Dunlossit" were obvious, and so serious as to justify her master in sacrificing the "Easdale."²

At advising,—

LORD PRESIDENT.—The leading facts in this case are singular and striking. During the night of the 17th and morning of the 18th November last, two steamers lay moored to the quay at Port Askaig in Islay. The weather was most tempestuous all night and morning. The one steamer, all through the night, was anxious to go out to sea, but could not do so unless the other, which was moored outside her, consented to go out also. This the outside vessel could not, or at least did not, do. At eight o'clock on the morning of the 18th the master of the steamer desiring to go out, the "Dunlossit," solved the problem by cutting the moorings of the other steamer, the "Easdale," and sending her adrift. He thus freed his own vessel and got away. The owners of the "Easdale" now sue for damages, the "Easdale" having when cut adrift gone ashore and suffered injury.

I think it sufficiently clear that *prima facie* the act of the master of the "Dunlossit," in cutting the moorings of the "Easdale" and sending her adrift, was an illegal act; and that it is therefore for the defenders to justify that act on some ground known to law. I shall state briefly what I take to be the facts.

Port Askaig has no harbour, and vessels lying there are moored to the pier or wharf, there being no pier projecting into the sea. On the afternoon of the 17th the "Dunlossit" was lying moored when the "Easdale" arrived, and the "Easdale" accordingly lay outside the "Dunlossit," and was moored to the quay by ropes, which passed over the "Dunlossit." The "Dunlossit" explained to the "Easdale," at the outset, that she intended soon to leave, and the "Easdale" had no intention herself of making any stay. By six o'clock, however, the storm had come on, and the "Easdale's" business at Port Askaig was only then finished. From that time onwards the storm raged with great violence, and two of the "Easdale's" hands declined to go to sea on account of the severity of the weather. Whether, if she had been fully manned, she could safely have gone out to sea may be doubtful, but it is certain that, with two of her crew away, it would have been impossible to face the storm. The "Easdale" accordingly stayed where she was. Meanwhile the "Dunlossit" was impatient to get away. She was lying between two steamers, the "Easdale," as already explained, being outside her. As the night went on she was suffering damage

¹ Rylands v. Fletcher, 1863, L. R., 3 H. L., 330; Marsden on Collisions at Sea, pp. 502 and 503, and cases there cited; The "Innisfail," 1876, 35 L. T. (new ser.) 819.

² Bailiffs of Romney Marsh v. Trinity House, 1870, L. R., 5 Exch. 204.

from the other steamers tossing against her and tearing the belting off her side ; No. 196. and I think that, towards morning, her position became one of considerable July 17, 1894. peril, having regard not merely to the contact with the steamers on either side, Currie v. but also to the proximity of a fourth steamer moored in front of her. Suffering Allan. damage from hour to hour, and apprehensive of dangers which might involve the destruction of his steamer, the master, by eight in the morning, had resolved that his position was no longer tolerable. He had repeatedly appealed to the "Easdale" to let her out, but it was manifest that the "Easdale" could not move without having to go to sea, and could not go to sea without her crew. Accordingly the master of the "Easdale" refused to move. The master of the "Dunlossit" threatened several times to cut the moorings of the "Easdale" before he actually did so. About eight he proceeded to do so, and the men on the "Easdale" had just time to clear out before the steamer was sent adrift.

Now, I am prepared to hold that the "Dunlossit" was suffering substantial damage and was in serious peril ; that she could only avoid damage and peril by going out ; and that as the "Easdale" declined to move, the cutting of that steamer's mooring was the only way of enabling the "Dunlossit" to escape damage and peril. On the other hand, it is equally certain that to cut the "Easdale" adrift was to expose her to at least equal damage and peril ; and it is not disputed that, when the master of the "Dunlossit" sent the "Easdale" out into the storm, he did it with his eyes open to what it meant to that vessel.

In using the word "peril," it is necessary to remember that there is on neither side any question of peril to life. It was, so far as the "Dunlossit" was concerned, merely present and probable injury to the ship to a greater or less (and an entirely uncertain) extent, that is put forward as the justification of the act in question. On the other hand, as already pointed out, the men on the "Easdale" had time to clear out before she was sent adrift.

Now, I own to having a strong repugnance to the idea that one man is entitled, at his own hand, to send his neighbour's ship it may be to perdition, in order to save his own ship, and then to refuse to bear the loss. I have stated, I hope fairly, what I consider to have been the serious risks to which the "Dunlossit" was exposed. But, after all, the ultimate consequences were calculable in money ; and if anyone was liable for such damage as the "Dunlossit" might sustain, that damage could be made good to her owners. I am not satisfied of the soundness of the reasoning by which the defenders maintain that the owners of the "Easdale" were guilty of a breach of duty to the "Dunlossit" in that the "Easdale" did not go out to sea and thus release the "Dunlossit." But, even assuming the "Easdale" to have been in the wrong, it does not follow that the "Dunlossit" had the right to wreck her, and the defenders have failed to place their right to do so at the cost of the pursuer upon any satisfactory legal ground. Even assuming fault on the part of the outside vessel, and serious danger to the inside vessel, it is difficult to ascertain whether it is under all conditions, and, if not, then under what conditions, that the right to destroy the outside vessel arises to the inside vessel for her own safety. I have heard no theory which would give this right to a vessel of similar value to the vessel to be wrecked, and at the same time withhold from a vessel worth £1000 the right to sacrifice to her own safety a vessel worth £100,000. Such heroic measures as that adopted by the master of the "Dunlossit" do not readily fit in with the methods of protecting property, and redressing injury to property, which

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pass current in peaceful communities. It is perhaps on the whole better that the master of a vessel in danger from another should protest against such conduct as he considers injurious and hold the offender liable in the consequences, which the sequel will frequently shew to be less overwhelming than had been apprehended.

Let it be remembered, however, that the question we have got to settle is not whether the master of the "Dunlossit" can be justified *in foro poli* for laying violent hands on his neighbour's goods. The question is, who is to bear the loss? Now, I cannot help thinking that the frankness of the defenders' claim is apt to make one forget its exceeding arrogance. They assert right, for their own benefit, to seize and destroy another man's ship, and to make him pay for the consequences. This new form of compulsory taking would have for its characteristics that it is unauthorised by anything but the needs of the taker, that it serves none but his private benefit, and that it is unrestrained by any obligation to compensate. I own my inability to fall in with such views.

A subordinate argument was submitted that there was no damage inasmuch as the "Easdale" would have been destroyed had she been left where she was, at the pier. This theory is highly conjectural, and, in my opinion, the evidence does not establish it.

I am for recalling the interlocutor of the Sheriff-substitute.

LORD ADAM.—I am of the same opinion.

LORD M'LAREN.—The facts in this case are not seriously in dispute. I accept entirely the narrative given by your Lordship, and agree in the conclusion drawn from the facts. On the evidence, and as a matter of general knowledge, I assume that when the "Easdale" moored herself as she did she was exercising the ordinary right of a vessel touching at a wharf of the description of Port Askaig. It is equally clear that she was under an obligation to remove from the position which she had taken up when required to do so by the "Dunlossit," in order to allow that vessel to proceed on her voyage. It appears to me, however, that this obligation must always and of necessity be qualified by the condition that a vessel in the position of the "Easdale" is only bound to remove as and when it is consistent with her own safety. In a crowded harbour it may be physically impossible for a ship moored as the "Easdale" was to remove at any given time so as to allow another vessel to proceed. It appears to me that in the case of a wharf open to the sea, if the master when required to move cannot do so without imperilling the ship and the lives of the crew, that is equivalent to physical impossibility. The ordinary case of obligation to remove is certainly not an obligation to leave the ship and then to cut her moorings and allow her to drift on to a lee shore; it is an obligation, if possible, to give the other vessel a passage, having regard to the relative positions of the ships and the dangers of navigation.

On the evening before this accident occurred it was the intention of both the vessels to proceed on their voyage that evening, but it is perfectly clear that the state of the weather was such as to make it unsafe for either to go to sea, and there can be no doubt that at that time the master of the "Easdale" was justified in refusing to leave his moorings; indeed, his view was acquiesced in by the master of the "Dunlossit." But in the course of that evening a fresh element was introduced, for the master of the "Easdale," in his anxiety to get to a safe harbour, endeavoured to persuade his crew to try to take the vessel

across the sound. They, however, refused, and the mate absconded. Next morning when the "Dunlossit" again wished to proceed, though there is doubt whether the "Easdale" could have sailed in safety (the balance of the evidence seems to me adverse to the view), I assume that she could have sailed if her crew had been ready. The crew had, however, not turned up, and it was clearly impossible for the master to proceed with a deficient crew. I am far from saying that a master who refuses to proceed on the ground that his crew has left the ship may remain where he is without incurring liability for damages of the nature of demurrage, but if he is prevented from leaving by the state of the weather, then he is excused absolutely. But admitting that the "Easdale," was in fault in not having a sufficient crew, we have to consider the very different question whether the "Dunlossit" was entitled to take the conduct of the "Easdale" into her own hands and to cut her adrift. I cannot assent to the proposition that even if there had been absolutely no crew and no master on board the "Easdale," the "Dunlossit" would have been entitled to take such a step. In such a case the master of the "Dunlossit" might, if the weather permitted, remove the "Easdale" sufficiently to permit him to get out, and then bring her back to the wharf, but the right which is here asserted is that when the "Easdale" was unable to move without incurring great danger, the "Dunlossit" was entitled to cut her moorings and make her a derelict. That is what, in fact, was done. Now, I asked during the argument whether the authority of any jurist or moralist could be cited in support of such a proposition, that you may lawfully destroy your neighbour's property in order to make the better use of your own. I can see that very alarming consequences might result from the recognition of such a principle, and I am not willing to give effect to it. The case is indeed a very unfavourable one for giving effect to the right claimed, as it is clear that if the "Dunlossit" had waited a few hours until the gale had subsided, both vessels might have moved with safety.

LORD KINNEAR was absent.

THE COURT pronounced this interlocutor—(after finding the facts as above narrated):—"Find in law that in so cutting the moorings of the 'Easdale' the master of the 'Dunlossit' made the defenders liable for the damages resulting to the 'Easdale': Find the defenders liable in expenses in both Courts: On the motion of both parties, remit to the Sheriff of Lanarkshire to ascertain the amount of damage, and to proceed in the cause as shall be just; and authorise him to decern for the taxed amount of the expenses for which the defenders are hereby found liable."

MORTON, SMART, & MACDONALD, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

TINNEVELLY SUGAR REFINING COMPANY, LIMITED, AND OTHERS, Pursuers No. 197.
(Respondents).—*Jameson—Cooper.*

MIRPLEES, WATSON, & YARYAN COMPANY, LIMITED, Defenders
(Reclaimers).—*Ure—Younger.*

Company—Agent and principal—Contract by agent for intended company—Title to sue.—In an action of damages against a firm of manufacturing engineers at the instance of a limited company, registered on 29th July 1890, the pursuers averred that, on 11th July 1890, D, as agent for the company, entered into a contract with the defenders for the supply by the latter of certain

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No. 197. pieces of machinery, and that the machinery supplied was defective, and had caused great loss to the company.

July 17, 1894. *Tinnevelly Sugar Refining Co., Limited, v. Mirrlees, Watson, & Yaryan Co., Limited.* *Held* that the company had not set forth a title to sue, as D could not have acted as its agent before it was in existence.

1st Division. By contract, constituted by a tender and relative acceptance, dated respectively 26th November 1889 and 11th July 1890, the Mirrlees, Watson, & Yaryan Company, Glasgow, agreed to supply Messrs Darley & Butler, Billiter Square, London, with certain machinery and iron-work for a building for a refinery in Tuticorin. Delivery was to be given free alongside vessel in Glasgow Harbour.

The Tinnevelly Sugar Refining Company, Limited, registered on 29th July 1890, on 24th January 1894, with consent and concurrence of Messrs Darley & Butler, and Messrs Darley & Butler for all right and interest they might have in the premises, raised an action of damages against the Mirrlees, Watson, & Yaryan Company, on the ground that the machinery supplied by them was defective, and had caused loss to the company.

The pursuers averred;—" . . . The said machinery and iron-work, though ordered by the pursuers Darley & Butler, were intended for the Tinnevelly Sugar Refining Company, which was then in course of formation, and this was made known to the defenders before the contract was entered into. . . . Messrs Darley & Butler, who have all through the negotiations transacted for the Tinnevelly Sugar Refining Company with the defenders, are large shareholders in the pursuers' company. The contracts for the machinery were made by them for behoof and on behalf of the pursuers the Tinnevelly Sugar Refining Company. The defenders knew before the contract was given to them for the machinery that it was for the pursuers' company's use, and that Messrs Darley & Butler were acting in making the said contract for behoof of or as agents for the pursuers' company. Messrs Darley & Butler have, from the beginning of negotiations with the defenders, acted for behoof of the Tinnevelly Sugar Refining Company, and the defenders have treated and transacted with Messrs Darley & Butler on that footing. The machinery was paid for out of the capital of the Tinnevelly Sugar Refining Company. . . . The said machinery and iron-work was manufactured by the defenders, and early in 1891 was erected at works at Tuticorin, which had been specially constructed for its reception on plans approved of by the defenders. The work of erection was effected under the superintendence of an engineer sent out by the defenders. The defenders knew that Messrs Darley & Butler and the pursuers, in giving them the order for the making and erection of the machinery, relied on the defenders' practical knowledge to provide the pursuers with machinery capable of performing the work required of it. . . . Work was begun at the refinery at Tuticorin in September 1891. The manager, Mr Thomas Arthur, was a well-qualified sugar refiner, selected and approved by the defenders on behalf of the pursuers. . . . After the refinery was started, the defenders were always fully informed of how it was working, and continually assured the pursuers that the machinery was quite adequate, and would, when everything was in full working order, produce what was stipulated for. . . ."

The pursuers further averred that the machinery had proved incapable of performing the work which under the contract it was to be made to do, and that the Tinnevelly Company had in consequence suffered damage to the extent of £23,000, of which they gave the details. They made no averment of any damage having been suffered by Messrs Darley & Butler.

The pursuers pleaded, *inter alia*;—(2) The pursuers having suffered damage to the amount sued for in consequence of the defenders' said breach of contract, decree should be granted as craved. (3) The defenders having negotiated and contracted on the footing that Messrs Darley & Butler were acting for behoof of or as agents for the Tinnevely Sugar Refining Company, are barred from questioning the pursuers' title. (4) The defenders, having admitted by their actions, as condescended on, their obligation to make the machinery perform the work required of it by the pursuers, are barred from pleading want of title in the pursuers, or failure of the pursuers to make timeous rejection.

The defenders pleaded, *inter alia*;—(1) No title to sue. (2) The pursuers' statements are irrelevant, and insufficient to support the conclusions of the summons.

On 7th June 1894 the Lord Ordinary (Low) allowed a proof.*

* "OPINION.—The defenders maintain that their first plea in law of no title to sue should be sustained, and the action thrown out without any inquiry. They argued that the contract, for breach of which damages are sought, being made by Messrs Darley & Butler before the Tinnevely Sugar Refining Company was incorporated, that company cannot sue upon the contract, even although it was made for behoof of the company when it should come into existence, and that the concurrence of Darley & Butler cannot aid the company, because that firm, not having sustained the loss for which reparation is sought, have no interest and could not themselves have sued the action.

"It seems to be clear that a company incorporated under the Companies Acts is not bound by a contract made for it or on its behalf before incorporation, unless, after incorporation, it has so acted as to make the contract its own. Further, it appears to be settled in England that a company, after incorporation, cannot ratify a contract entered into on its behalf before incorporation, because ratification (in the strict sense) refers to an act previously done for the person ratifying, and cannot apply to an act done before that person came into existence.

"The case chiefly relied upon by the defenders was the *Northumberland Avenue Hotel Company*, 33 Ch. Div. 16. In that case the plaintiff sued the liquidator of the hotel company for damages for breach of a contract entered into between him and one acting as trustee for the intended company before its incorporation. The plaintiff had a lease from the Board of Works of certain lands, upon condition that he should erect certain buildings within a specified time. The contract with the trustee for the intended company was for a sub-lease of the lands at a higher rent than that which the plaintiff was under obligation to pay to the Board of Works—the company being bound to erect the buildings stipulated for in the plaintiff's lease. The articles of association of the company provided that the contract should be adopted and carried into effect. After being registered the company entered into possession of the lands, spent large sums of money upon them, made payments to the plaintiff to account of rent, and passed certain resolutions, with the assent of the plaintiff, modifying the contract which had been made with him. The company went into liquidation, and the Board of Works cancelled the lease to the plaintiff, and resumed possession of the lands, apparently because the company had not erected the buildings stipulated for within the specified time.

"The Court of Appeal held that the plaintiff had no claim for damages (1) because the contract, being made before the company was in existence, was not binding upon it, and was incapable of ratification by the company after incorporation; and (2) because the acts of the company were not evidence of a fresh agreement having been entered into between it and the plaintiff, having been done under the erroneous belief that the contract was binding on the company.

"That judgment goes very far, because it was clear that the company had, as far as it possibly could, recognised and taken advantage of the contract. The ground of judgment was that, to give the plaintiff a claim against the company,

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No. 197. The defenders reclaimed, and argued;—There was no averment of any contract between the Tinnevely Company and the defenders, even taking the Lord Ordinary's reading of the record. The defenders' contract was on the pursuers' own statement, with Darley & Butler, and the latter could not at its date act as agents for the Tinnevely Company, as averred by the pursuers, for that company was admittedly not then in existence. For the same reason there could not be ratification of the contract by the Tinnevely Company.¹ According to its terms the contract was executed by delivery of the iron in Glasgow Harbour, before, therefore, the occurrence in Tuticorin of the incidents on which the Tinnevely Company relied to bring them into direct relation with the defenders. Besides, the contract was not assignable. There were no averments to the effect that a new agreement was made by the Tinnevely Company. The presence

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it was necessary that the latter should have made a new contract with him upon the same terms as the original contract, and that the facts shewed that they had not done so, but had proceeded upon the erroneous belief that the original contract was binding upon the company. The footing, therefore, on which the company took possession of the lands, and otherwise recognised the contract, was essential to the judgment. If it had been proved that the directors knew that the original agreement was not binding on the company, it may well be that the judgment would have been different, and that the Court would, in that case, have held that the actings of the company were evidence of an agreement between them and the plaintiff.

"The decision, therefore, apart from the peculiar circumstances of the case, does not appear to me to go further than to affirm that an action will not lie against a company unless it is rested upon a contract with the company itself. But I know of no authority for saying that such a contract must be a formal contract. I apprehend that it is sufficient if the actings of parties necessarily lead to the inference that they intended to be, and held themselves out as being, bound to each other. If a company by its acts adopts a contract made before its incorporation, takes benefit by the contract, and allows the other contracting party to act upon the footing that the company is bound to him in the terms of the original agreement, I can see no principle upon which the company should not be bound, just as an individual is bound who homologates an informal or defective contract. And there are many authorities in the English law pointing in that direction, among which I refer to *Touche v. The Metropolitan Railway Warehouse Company*, L. R., 6 Ch., p. 671; *Spiller v. Paris Skating Rink Company*, 7 Chanc. Div. p. 368; and *Howard v. Patent Ivory Manufacturing Company*, 38 Chanc. Div. p. 156.

"In this case the averments are that the defenders were from the first told that the machinery which was ordered from them was for the company; that before the machinery was made the company was incorporated; that the machinery, when finished, was sent by the defenders to Tuticorin, where the company had constructed buildings for it on plans approved by the defenders; that the machinery was fitted up by an engineer sent out by the defenders; that the manager who was to work the machinery for the company was selected by the defenders, and that the price was paid out of the capital of the company. According to these averments, the defenders were brought directly into contact with the company as the principals in the transaction. If this had been an action by the defenders for payment of the price upon such averments of adoption of the contract by the company, I think that there would have been a relevant case to go to proof; and, in like manner, when the action is by the company for damages on the ground that the machinery is not fit for the purpose for which it was supplied, I am of opinion that there must be inquiry, so that the precise facts may be ascertained.

"I shall therefore allow a proof before answer."

¹ *Kelner v. Baxter*, 1866, L. R., 2 C. P. 174; *In re Empress Engineering Co.*, 1880, L. R., 16 Chanc. Div. 125; *In re Northumberland Avenue Hotel Co.*, 1886, L. R., 33 Chanc. Div. 16.

of Darley & Butler in the action made no difference. Their concurrence No. 197. in the instance did not make good the otherwise defective title of the Tinnevelly Company, and they made no allegation whatever of damage suffered by themselves.¹ The Tinnevelly Company, therefore, not having been privy to the original contract, and not having set forth facts and circumstances instructing a direct contractual relationship with the defenders, had no title to sue.²

Argued for the pursuers;—There should be a proof before answer, for it was sufficiently averred that the Tinnevelly Company had taken over the original agreement, and that the defenders had accepted them as the contracting parties. Such cases as *In re Northumberland Avenue Hotel Company*³ were distinguishable. There was there no sufficient evidence from which the Court could infer that a new contract had been entered into. It must be admitted that Darley & Butler could not have acted as agents for a non-existent company; but then the actings of the Tinnevelly Company after its incorporation, and of the defenders, inferred novation of the contract by way of adoption.⁴ The contract was assignable, for there was no *delectus personarum*.⁵ If two parties for valuable consideration enter into a contract, one of the stipulations of which is for the benefit of a stranger to the contract, it is not competent for either party afterwards to object to implement that stipulation.⁶ Title to sue depended upon interest,⁷ and the Tinnevelly Company, which had paid for the machinery, had a clear interest.

At advising,—

LORD PRESIDENT.—The contract, for breach of which this action was brought, was constituted by a tender and relative acceptance, dated respectively 26th November 1889 and 11th July 1890. The contract was for the supply of certain machinery and iron-work for a refinery. On the face of the documents the parties to the contract were the defenders on the one hand, and Messrs Darley & Butler, of Billiter Square Buildings, London, on the other hand.

The pursuers of this action are the Tinnevelly Sugar Refining Company, Limited, with consent and concurrence of Messrs Darley & Butler, and the said Messrs Darley & Butler for all right and interest they may have in the premises. The fact that Messrs Darley & Butler thus appear, not merely as consenting to the instance of the company, but as themselves pursuers, has no practical importance; for in this action of damages no averment is made that that firm has suffered damage. The action is therefore the action of the Tinnevelly Company, Limited.

Now, against this action the defenders' first plea is, "No title to sue." As argued to us, this plea means not merely that the pursuers do not possess, but that they have not set forth, any title to sue. The Lord Ordinary has, before

¹ Edinburgh United Breweries, Limited, v. Molleson, March 17, 1893, 20 R. 581, March 9, 1894, 21 R. (H. L.) 10.

² Blumer & Co. v. Scott & Sons, Jan. 16, 1874, 1 R. 379; Tully v. Ingram, Nov. 10, 1891, 19 R. 65.

³ *Supra*, p. 1012, note.

⁴ *Touche v. The Metropolitan, &c. Co.*, 1871, L. R., 6 Ch. 671; *Spiller v. Paris Skating Rink Co.*, 1878, 7 Chanc. Div. 368; *Howard v. Patent Ivory Manufacturing Co.*, 1888, 38 Chanc. Div. 156.

⁵ *British Waggon Co. v. Lea & Co.*, 1880, L. R., 5 Q. B. D. 149.

⁶ *Davenport v. Bishopp*, 1843, 2 Younge and Collyer, 451; *Gregory v. Williams*, 1817, 3 Merivale, 582.

⁷ *Pyper v. Christie*, Nov. 6, 1878, 6 R. 143, Lord Young, p. 145.

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answer, allowed a proof, but the defenders have asked our judgment on the question whether anything is averred and offered to be proved which would make out the pursuers' title.

The company was registered on 29th July 1890, and accordingly was not in existence at the date of the contract. It is therefore legally impossible that the contract can bind the company, unless the company, since its registration, has in some way acquired the rights and submitted itself to the obligations of the contract. Accordingly, the defenders are in the right when they say that the question is, Do the pursuers set forth, on this record, anything done by the company itself which has this result? I have carefully examined the condescendence, and must answer this question in the negative.

The contract, be it observed, was for certain machinery and iron-work, which was to be delivered free alongside vessel in Glasgow Harbour. Now, the pursuers endeavour to bring the company and the defenders into direct relations, by saying that the machinery was erected at Tuticorin, which is in India, under the superintendence of an engineer sent-out by the defenders. But it was admitted in argument (and is indeed manifest) that the erection of the machinery in India was outside the contract which is now sued on. It is unnecessary to criticise in detail the other averments, compendiously stated by the Lord Ordinary, for not one of them, nor all taken together, tend to shew that, after the registration of the company, any contract relation was constituted between it and the defenders.

The absence of such averments is, in truth, accounted for by the fact that the theory of the pursuers' case is entirely different. They begin by saying that when Darley & Butler contracted with the defenders they were acting, and were known by the defenders to be acting, as agents for the Tinnevely Company. This is the basis of the pursuers' case. It is in law an untenable position, for Darley & Butler could not be the agents of a non-existent company. I should infer from the record that the persons acting for the company had not realised this. Accordingly, it is quite consistent with the record to suppose that the persons acting for the company were unaware that if the company was to take the place of Darley & Butler it required,—that is to say, the shareholders or their executive required,—consciously to do so. In place of any such overt action on the part of the company things were allowed to rest on the original contract between Darley & Butler and the defenders, which was erroneously believed to bind the company. I do not pronounce this to have been the true state of the facts, having no occasion to do so; all I say is that the pursuers' record says nothing to the contrary, and much to this effect.

Well, now, the law applicable to such a case seems to be tolerably clear. First of all, where there is no principal there can be no agent, there having been no Tinnevely Company at the date of this contract, Darley & Butler were not agents of that company in entering into the contract. The next point is that, in order to bind the company to a contract not incumbent on it, it is necessary that the company should voluntarily so contract; and it is not equivalent to this if the company merely acts as if, contrary to the fact, the contract had from the beginning been obligatory on it.

I have considered, up to this point, solely the position of the company, and have not taken into account the question how far the consent of the defenders would have been necessary to the substitution of the company for Darley & Butler as parties to the contract. I do not find it necessary to enter upon this

question, inasmuch as, in my opinion, the case of the pursuers is irrelevant, No. 197. even if regard be had to the consent of the company alone.

I am for finding that the pursuers have not set forth on record any title in the Tinnevely Sugar Refining Company, Limited, to sue; that there are no relevant averments to support the conclusions in so far as insisted in by Darley & Butler; and that the action should be dismissed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

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Varyan Co.,
Limited,

THE COURT recalled the interlocutor of the Lord Ordinary, found that the pursuers the Tinnevely Sugar Refining Company, Limited, had not set forth on record any title to sue, and that the pursuers Darley & Butler had not set forth averments relevant to support the conclusions of the summons in so far as related to themselves, and therefore dismissed the action.

MILLAR, ROBSON, & M'LEAN, W.S.—J. & J. ROSS, W.S.—Agents.

CHARLES ARBUTHNOT M'LEAN (Hugh Burnie's Trustee), First Party.— No. 198.
C. N. Johnston.

MRS CHRISTINA LAWRIE, Second Party.—*John Wilson.*

REV. ROBERT PATON AND OTHERS, Third Parties.—*John Wilson.*

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Burnie's Trust-
tee v. Lawrie.

Succession—Testament—Writ—Unsubscribed holograph writing underneath subscribed holograph settlement.—A holograph writing, occurring below the subscription to a holograph trust-settlement, and containing bequests of specific articles, *held (dub. Lord Rutherford Clark)* to be effectual, as part of the trust-settlement, although not itself subscribed.

THIS was a special case presented for the determination of questions as to the testamentary validity and effect of certain writings left by Hugh Burnie, Agnew Crescent, Wigtown, who died on 3d December 1893. 2D DIVISION.

The first of these writings was a holograph paper, dated 22d November 1893, in these terms:—"In the event of my death without heirs of my body, I leave and bequeath to Christina Shaw or Lawrie, wife of Sampson Lawrie, tailor, Liverpool, the property in Whithorn belonging to her late brother James Shaw, Whithorn, together with the railway stock in my name of Portpatrick and Wigtownshire Joint Committee, with a legacy of £10 sterling for dividends drawn. As witness my hand at Wigtown the 22d day of November 1893 years." Then followed the subscription of the deceased.

The next writing was a holograph trust-disposition and settlement, dated 30th November 1893, in the following terms:—"I, Hugh Burnie, residing in Agnew Crescent, Wigtown, in order to settle my affairs, Do hereby give, grant, assign, and dispose to and in favour of John Smith, Sheriff-clerk, of Wigtownshire, and Charles Arbuthnot M'Lean, law-agent, Wigtown, all and sundry lands and heritages, goods and gear, debts and sums of money, that shall belong to me at the time of my death, and I nominate and appoint the said John Smith and Charles Arbuthnot M'Lean my sole executors, and I declare the purposes of the trust to be, (first), for payment of my just and lawful debts, deathbed, and funeral expenses; (second) for payment of following specific legacies to persons after-named" (then followed certain small pecuniary legacies, after which the writing continued), "and as both my mother and self were much benefited by the inhabitants of Wigtown, the rest residue of our joint means and estate to be divided as follows,—eight-tenths to the poor of the parish of Wigtown, one-tenth to the poor of the parish of

No. 198. Kirkinner, and one-tenth to the poor of the parish of Glasserton, said sums to be divided at the discretion of my said trustees, witness my hand at Wigtown, the 30th day of November 1893 years." Then came the subscription of the deceased.

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Immediately beneath the subscription to the last-mentioned writing was a writing, holograph of the testator, but not subscribed by him, in the following terms:—"I have left special instructions respecting Mrs Sampsons Lawrie's legacy, and would like trinkets disposed of as follows to following kind friends, if they will accept,—

"Gold watch and chain to the Rev. Mr Paton." Then followed seven other bequests of specific articles of a similar character.

The first party to the special case, who was the sole accepting trustee under the trust-disposition and settlement of 30th November, maintained that that deed (exclusive of the unsubscribed holograph writing appended to it) was the only operative testamentary writing of the deceased, on the ground that the unsubscribed writing was ineffectual, not having been subscribed, and that the trust-disposition and settlement, construed apart from the unsubscribed writing, was to be held as by implication revoking the paper of 22d November.

Mrs Sampson Lawrie, the second party, maintained that even apart from the unsubscribed writing the trust-disposition and settlement was not to be construed as revoking the writing of 22d November; and, alternatively, that the unsubscribed writing was effectual, as being part of the trust-disposition and settlement, at all events to the extent of shewing that the writing of 22d November was intended to remain operative.

The third parties, the Rev. Mr Paton and the other persons named in the unsubscribed writing as donees of specific articles, maintained that that writing, if effectual to any extent, was effectual as regarded the bequests in their favour.

The following were the questions of law:—" (1) Is the said holograph writing of 22d November 1893 valid to the effect of entitling the said second party to the bequests thereby made by the said Hugh Burnie in her favour, or, on the other hand, has the said holograph writing of 22d November 1893 been impliedly revoked by the said trust-disposition and settlement of the said Hugh Burnie dated 30th November 1893? (2) Are the bequests in favour of the third parties contained in the said holograph writing appended to the said trust-disposition and settlement of 30th November 1893 valid or invalid?"

At the hearing, the arguments were directed exclusively to the questions of the validity of the unsubscribed writing.¹

At advising,—

LORD YOUNG.—Both of the questions in the present case depend on whether the postscript to the holograph disposition and settlement of 30th November is valid, or is invalid because it does not bear the subscription of the testator. If it is valid it signifies to us quite distinctly no intention on the part of the

¹ *Authorities cited.*—Gillespie v. Donaldson, Dec. 22, 1831, 10 S. 174; Dunlop v. Dunlop, June 11, 1839, 1 D. 912, 11 Scot. Jur. 558; Grant v. Stoddart, Feb. 27, 1849, 11 D. 860, 21 Scot. Jur. 241; Speirs v. Home Speirs, July 19, 1879, 6 R. 1359; Skinner v. Forbes, Nov. 13, 1883, 11 R. 88; Pettigrew's Trustees v. Pettigrew, Dec. 6, 1884, 12 R. 249; Goldie v. Sheddon, Nov. 4, 1885, 13 R. 138; Brander's Trustees v. Anderson, July 19, 1883, 10 R. 1258; Brown v. Maxwell's Executors, May 21, 1884, 11 R. 821; Stair, iv. 42, 6; Bell's Lect. on Conveyancing, vol. i. 82.

testator to revoke the testamentary writing of 22d November by the settlement No. 198. of 30th November; if, on the other hand, the postscript is invalid, then it may be that the first writing is impliedly revoked by the second.

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It is maintained by the first party, founding on a passage in Stair, and on the case of *Skinner v. Forbes*, 11 R. 88, and certain other cases, that the postscript is invalid because it is not signed. The passage in Stair is in these terms,—“Holograph writs subscribed are unquestionably the strongest probation by writ, and least irritable. But if they be not subscribed they are understood to be incomplete acts from which the party hath resiled.”

Now, I am not at all disposed to dissent from the law there laid down, which has been acted on and recognised by both Divisions of the Court. I think that as an ordinary rule a holograph writing with no signature would be held by us to be an incomplete act from which the party had resiled. But the settlement with which we are dealing is subscribed, and that being so, the question is whether the rule applies to a writing upon the same paper in the handwriting of the testator, whether at the top, or on the margin, or at the end of it. It is not a question as to the validity of an unsubscribed holograph will, but as to the validity of a holograph writing upon a subscribed holograph will and explanatory of its contents. I do not think that a case of that kind necessarily falls within the rule stated by Stair. Whether we should give effect to an unsubscribed writing appended to, or prefixed to, or on the margin of, or indorsed upon, a holograph will, which is itself subscribed, depends on circumstances, but I do not think that there is any technical or formal rule which compels us to reject such an unsubscribed writing. The rule laid down by Stair is not a rule of formality or technicality; it is one founded upon considerations of good sense, for it is plain to the human understanding that a mere unsigned jotting by a person as to how property belonging to him is to be disposed of is not a complete writing. But is that consideration at all applicable to an explanatory note prefixed, or subjoined to, or on the margin of, or indorsed upon a holograph will, which is itself duly subscribed? Suppose that it is explanatory of a person to whom the testator means to refer—“the John Jones mentioned in my will is so-and-so.” Or suppose it be a description of the subject of a legacy, so as to remove any doubt as to what the particular subject intended is. I do not think that such cases would fall within the rule as to inchoate incomplete writings. They are quite complete, explanatory of what is meant, identifying either the donee or the subject of the gift. I give them merely as illustrations of what, in my opinion, would not fall within the rule of law stated by Stair. Here the writing is explanatory of the testator having left special instructions respecting Mrs Sampson Lawrie's legacy. I think that these words indicate quite distinctly that he did not mean to imply a revocation of that legacy. I think therefore that, in so far as this writing is an explanation regarding Mrs Lawrie's legacy, it does not fall within the rule that an unsigned testament is an incomplete writ; and holding it to be good to that extent, I think that we must hold it to be good altogether, and therefore that it must have effect as regards the gifts of the trinkets as referred to in it.

My opinion on the whole matter therefore is that the first question ought to be answered to the effect that the will in favour of Mrs Lawrie is not impliedly, as it certainly is not expressly, revoked by the settlement of 30th November, the conclusion that the testator had no such intention being arrived at from the writing or note appended in his own handwriting to the settlement; and as

No. 198. regards the second question, I think that that writing is effectual as regards the legacies also.

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LORD RUTHERFURD CLARK.—I am glad that Lord Young has reached the conclusion which he has expressed, and with which I understand your Lordship in the chair to agree. I do not think that I should say more.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Young.

LORD TRAYNER was absent.

THE COURT answered the first alternative of the first question in the affirmative, and the first alternative of the second question also in the affirmative.

KEITH R. MAITLAND, W.S.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

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Lanarkshire and Dumbartonshire Railway Co. v. Main.

LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY, Pursuers (Reclaimers).—*James Reid.*

GEORGE J. F. BUCHANAN, Pursuer (Reclaimer).—*D. Dundas.*

THOMAS MAIN, Defender (Respondent).—*Johnston—W. Thomson.*

Railway—Accommodation works—Difference between owner and occupier—Railway Clauses (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), secs. 60 and 61.—The Railway Clauses (Scotland) Act, 1845, enacts, by sec. 60, that the company shall make and maintain works for the accommodation of the owners and occupiers of lands adjoining the railway, and by sec. 61 that if any difference arise respecting the kind of accommodation works, the same shall be determined by the Sheriff.

Held that sec. 61 applies not only to a difference between the company and the owner and occupier, but also to a difference between the owner and the occupier, and that each of these as well as the railway company should be before the Sheriff in order to the determination of any dispute relative to the accommodation works to be executed.

Railway—Railway Clauses (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), secs. 60 and 61—Accommodation works—Reduction of Sheriff's determination.—The proprietor of lands intersected by a railway, who had agreed with the railway company as to the accommodation works to be provided, brought an action for reduction of a determination subsequently pronounced by the Sheriff as to the accommodation works on an application by the occupier of the lands under sec. 61 of the Railway Clauses (Scotland) Act, 1845. The pursuer averred that he was not called as a party to the application by the defender, and that it was only at the final stage, after he had become aware of the nature of the proceedings, that he sided himself as a party and asked the Sheriff to be allowed to lodge written answers to the petition, or at least to have time given him to consider his position; that this had been refused, and that he had had no opportunity given him of stating his objections.

Held (rev. judgment of Lord Low) that the pursuer's averment that the Sheriff had not allowed him time to inform himself as to the proceedings was a relevant ground of reduction.

1ST DIVISION.
Lord Low.

THOMAS MAIN, market gardener, near Bowling, and tenant under a nineteen years' lease, dated 1888, of a piece of ground belonging to Mr Buchanan of Auchentorlie, and occupied by Main as a flower and fruit garden, having differed with the Lanarkshire and Dumbartonshire Railway Company as to the accommodation works to be provided for the garden, under the Railways Clauses Consolidation (Scotland) Act, 1845, presented a petition in the Sheriff Court at Dumbarton praying the Sheriff to determine the matter in dispute.*

* The Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c.

On 9th August 1893 the Sheriff-substitute (Gebbie) issued an inter-locutor in which, "having heard parties' procurators, and considered the cause with the assistance of Mr Robertson," a civil engineer whom he had called in to inspect the ground along with him, he determined the accommodation works to be provided by the railway company, and, *inter alia*, ordained them to erect an underbridge.

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On 25th September 1893 the Lanarkshire and Dumbartonshire Railway Company and Mr Buchanan raised an action against Main concluding for reduction of the Sheriff-substitute's determination.

The pursuers averred, *inter alia*, that the railway company had arranged with Mr Buchanan, as owner of the land, all the necessary accommodation works, including a level crossing and roads for the purpose of connecting the severed portions of the garden ground, and that a minute to that effect had been lodged in the proceedings under the application in the Sheriff Court.

"The pursuer Mr Fergusson Buchanan was not called as a party to this application by the defender, and it was only at the final stage after he had become aware of the nature of the proceedings that he sisted himself as a party, and asked the Sheriff to be allowed to lodge written answers to the petition, or at least to have time given to him to consider his position. This was, however, refused, and he protested against this refusal, and has had no opportunity given to him of stating his objections. . . . Explained further that Mr Fergusson Buchanan's procurator was unable to state his case properly, owing to the manner in which the procedure was conducted.

"The said finding and determination is incompetent and irregular, and ought to be set aside. . . . In pronouncing the said finding the Sheriff-substitute altogether ignored these facts (1) that the proprietor of the land had already arranged with the railway company for all the accommodation works rendered necessary on his lands by the construction of the railway; (2) that the proprietor was very strenuously opposed to the accommodation works sought in the application, as well as to those determined by the Sheriff-substitute; (3) that he was refused an opportunity of lodging written answers to the defender's petition, although written statements had already been lodged for the defender and the railway company; (4) that no time was allowed to the proprietor to consider the works proposed so as to adequately discuss the objections to same."

Other grounds of reduction were stated for the pursuers, which it is unnecessary here to advert to.

The pursuers pleaded, *inter alia*;—1. The said finding and determination is incompetent and irregular, and ought to be reduced . . . (2) because the pursuers the said railway company had already arranged with the proprietor of the said land the accommodation works rendered necessary by the construction of the railway; (3) because the pursuer Mr Fergusson Buchanan, after being sisted as a party to the application, was not allowed to lodge a written statement in answer to the application, or allowed time to consider the same, so as adequately to state his objections.

The defender pleaded, *inter alia*;—5. The pursuers' averments being

33), enacts, sec. 60,—“The company shall make and all times thereafter maintain the following works for the accommodation of the owners and occupiers of land adjoining the railway. . . .”

Sec. 61.—“If any difference arise respecting the kind or number of any such accommodation works . . . the same shall be determined by the Sheriff or two Justices. . . .”

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irrelevant and insufficient to support the conclusions of the summons, the present action should be dismissed, with expenses.

On 27th April 1894 the Lord Ordinary (Low) sustained the defender's fifth plea in law and dismissed the action.*

The pursuers reclaimed. Mr Buchanan argued;—The Sheriff had declined to hear him on a question that was of great importance, and with reference to which he was opposed to the tenant, but there was no warrant in the Act for the Sheriff to decide what works should be executed without first hearing all parties interested. Here the work proposed threatened a very serious injury to Mr Buchanan's property.

* "OPINION.—The finding of the Sheriff-substitute is sought to be reduced upon five grounds, which are stated in the pursuers' pleas in law. . . .

"2. It is said in the second place that the railway company had already arranged with the proprietor of the land the accommodation works rendered necessary by the construction of the railway.

"It is admitted that the railway company and the proprietor arranged that the several portions of the land should be connected by a level crossing, but it is also admitted that the defender was no party to the arrangement. The question, therefore, is whether the fact that the owner of the land has agreed to accept certain accommodation works as sufficient precludes the occupier from demanding that additional works shall be executed.

"It seems to me that that question must be answered in the negative. The accommodation works which a railway company is taken bound by the Railway Clauses Act to execute are such as are necessary for the protection of both owner and occupier, and I am of opinion that the owner cannot, without the knowledge or consent of his tenant, discharge the company of their statutory obligation to make such accommodation works as are necessary for the protection of the occupier, or deprive the occupier of his right to demand that such works shall be executed. That is the view of the statute which appears to have been taken by the Court of Appeal in England in the case of *Corry v. Great Western Railway Company*, 7 Q. B. D. p. 323.

"3. The third ground of reduction is that the pursuer, Mr Fergusson Buchanan, the owner of the lands, was not allowed to lodge written answers to the defender's application to the Sheriff, or allowed time to consider the application, so as adequately to state his objections.

"It was argued for the defender that the pursuer had no title to appear in the proceedings before the Sheriff. I should hesitate to affirm that proposition, because the owner of lands has a clear interest in regard to the nature of proposed accommodation works. I do not, however, require to express an opinion upon the point, as upon other grounds I am against the pursuers.

"Mr Fergusson Buchanan appeared and asked to be sisted as a party to the process, apparently after the Sheriff-substitute had inspected the ground. The Sheriff-substitute sisted Mr Buchanan as a party, but found that it was not necessary for him to lodge answers to the petition, and also, Mr Buchanan avers (and, I assume, truly), refused to allow him time to consider his position. It is not disputed that the Sheriff-substitute heard Mr Buchanan's agent, and therefore the ground of reduction which I am now considering is reduced to this, that the Sheriff-substitute found that it was not necessary for Mr Buchanan to lodge answers, and refused to grant delay. These were both matters in my opinion which were within the discretion of the Sheriff-substitute. If he had refused to sist Mr Buchanan, or to hear him after he had been sisted, the question would have been very different. But having heard Mr Buchanan, I think that it was competent for the Sheriff to determine whether there was any necessity for written pleadings being lodged or for further delay. . . .

"Upon the whole matter I am of opinion that the pursuers have not stated relevant grounds of reduction, and that the defender is entitled to have the action dismissed."

It was idle to say that Mr Buchanan had had an opportunity of stating his objections. No. 199.

It is unnecessary for the purposes of this report to advert to the other points argued by Mr Buchanan and by the Railway Company. July 17, 1894.
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Argued for the defender;—This was practically an arbitration,¹ in which the Sheriff's judgment was final. No relevant ground for reducing it had been stated.² It was in the discretion of the Sheriff to determine how far it was necessary to hear parties. In point of fact he had heard Mr Buchanan's agent, who had thus an opportunity of making any explanation he liked. The Court should not interfere with the Sheriff's discretion.

At advising,—

LORD PRESIDENT.—The pursuers of this action impugn the validity of certain proceedings before the Sheriff-substitute of Dumbartonshire, acting under the 61st section of the Railways Clauses (Scotland) Act, 1845. It is necessary first to consider what are the rights of landlord and tenant respectively under the 60th as well as the 61st section.

The 60th section obliges railway companies to execute the necessary works, of the kind there specified, "for the accommodation of the owners and occupiers of lands adjoining the railway." Now, I take it that the section treats the owners and occupiers as the persons interested in the land, and concerned to get the works necessary for its beneficial use. That is their common interest. In the vast majority of cases their needs will coincide. It is, however, possible that the owner and occupier may differ, and even that their interests may differ, as to what are the proper works to be required of the company. Both are to be accommodated; and the interests of both are to be considered in fixing the accommodation works.

Accordingly it is clear that the owner cannot, by agreement with the railway company, conclude the question what works shall be executed, so as to preclude the demand of the tenant for what he deems necessary. If the company choose to treat with the owner alone and to bind themselves to him, they cannot, merely on account of this obligation, refuse to listen to the tenant if he asks for something else. On the other hand the owner has a clear right to be heard to object to a work which the occupier demands, if that work would be injurious to the property.

It is thus manifest that differences may arise about accommodation works not merely between the owner and occupier, as collectively representing the land, on the one hand, and the company on the other hand, but also between the owner and occupier themselves. When therefore, the 61st section says "if any difference arise respecting the kind or number of such accommodation works" "the same shall be determined by the Sheriff," the enactment applies to the case where the owner and occupier are at variance and the company sides with one of them. It is also obvious that in order to the determination of any dispute about accommodation works it is necessary that the three parties interested should all be before the Sheriff. The duty of the Sheriff is then to decide how the interests of owner and occupier (the one permanent and the other temporary) may be harmonised in due accordance with the interests of the rail-

¹ Main v. Lanarkshire, &c., Railway Co., Dec. 19, 1893, 21 R. 323.

² Drew v. Drew, March 8, 1855, 18 D. (H. L.) 4.

No. 199. way company, which is not to be saddled with duplicate obligations towards what is, for them, one estate.

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Well now, in the present case the owner and the company came to an agreement, without consulting the occupier. He then made his own demands, which were not acceded to; and the occupier and the company, having thus differed, went to the Sheriff. Written pleadings were ordered; the occupier stated his demands, which were large, and the company, in their answers, stated that they had arranged with the owner, and that the owner strongly objected to some of the works demanded by the occupier as being injurious to the property.

There was thus disclosed to the Sheriff a difference between the owner and the occupier, as well as between the occupier and the company; and if the Sheriff had noticed it, I cannot but think he would have seen that the landlord must be brought into the proceedings if they were to be effective. The Sheriff, however, went on without ordering intimation to the owner; he appointed a meeting on the ground for an inspection; he appointed Mr William Robertson, a civil engineer, to accompany him to the inspection; he met parties (to wit the occupier and the company), on the ground and heard their explanations. Having done so, he appointed them to be heard on the whole cause on a day fixed. On the day thus appointed for debate, the owner, for the first time, appeared; and he craved to be sisted as a party to the action. His right to be sisted was in my opinion indisputable. The Sheriff, however, dealt with the application in a rather singular way, for the interlocutor of 7th August 1893, bears,—“In respect he [the owner] has, in answer to the call made upon him at the bar, produced two agreements between him and the respondents relative to the ground in question, sists the said George James Fergusson Buchanan as craved: Finds it is not necessary for the said George James Fergusson Buchanan to lodge answers to the petition; and having heard parties' procurators on the whole cause, in presence of Mr Robertson, makes *avizandum*.” By a subsequent interlocutor two days later, the Sheriff fixed the works to be executed. With his decision both the railway company and Mr Buchanan are grievously dissatisfied.

Now, as I have already said, Mr Buchanan, as owner, was not only a proper, but in the circumstances of this case, a necessary party to the determination of the question what works were to be executed on his own property. He was unfortunately not made a party to the proceedings; and, as I think also unfortunately, the proceedings were not intimated to him when the Sheriff was apprised of the difference between him and the occupier. As regards the sequel, his case upon record amounts to the following,—The proceedings came to his knowledge after the Sheriff had examined the ground and heard the explanations of the parties and the views of the engineer whom the Sheriff had called to his aid. In short, when Mr Buchanan appeared and asked to be sisted, the inquiry had taken place; and all that remained to be done was that the parties' procurators should be heard on the results of the inquiry. Under these circumstances, it was manifestly impossible that Mr Buchanan or his agent could, to any purpose, make a speech about an inquiry of which he knew nothing; and to propose to hear him then and there was practically to refuse to hear him at all. What Mr Buchanan's agent is alleged to have proposed was, I think, very reasonable; he asked to be allowed to lodge written answers, or at least to have time given him to consider his position. These requests the pursuers allege to have been refused, and all that was allowed to Mr Buchanan was

that his agent should then address the Sheriff,—a permission which, as I have No. 199.
already pointed out, was entirely illusory.

Now, I should be slow to say that an award under this section could be set aside merely because the Sheriff deemed a written statement unnecessary in the case of an owner who came and verbally explained his position, even although the other parties had had the advantage of written pleadings. But in the present case the owner was not merely refused the opportunity of stating his views in writing, as the others had done, but (what is much more important) he was refused time to inform himself about what had been done in the proceedings, and was only allowed to be heard if he went on to speak of what he necessarily knew nothing.

Such being the averments, they seem to me to constitute a relevant ground of reduction. The pursuers' case is, that Mr Buchanan, being a proper party to the proceeding, was practically, although not formally, refused a hearing. I do not think that an arbiter's award could be supported in such circumstances; and the Sheriff's decision under the 61st section is, for present purposes, in the same position as an arbiter's award.

My opinion is, therefore, that the pursuers' averments are relevant, that the pursuers are entitled to prove them, and that the interlocutor having been pronounced on a record closed on preliminary defences, the case must go back to the Outer-House for the requisite procedure.

LORD ADAM.—The defender is tenant under the pursuer Mr Buchanan of some ten acres of ground used as a market garden. The ground is intersected by the line of railway which the other pursuers, the railway company, are in course of constructing.

The proceedings complained of had their origin in a petition presented to the Sheriff-substitute, under section 61 of the Railway Clauses Act, praying him to determine as to the accommodation works to be made and maintained by the railway company under the 60th section. It was quite a competent application by the tenant. But it does not appear to me that the statute contemplated two entirely distinct sets of works, one for the owner and one for the tenant and occupier. The owner, therefore, should have been made a party to the proceedings from the first. But he was not made a party, and the proceedings went on in his absence.

What took place was this: The Sheriff-substitute appointed the petitioner to lodge a statement of the accommodation works claimed. The railway company lodged answers, and on considering them the Sheriff-substitute appointed parties to meet him on the ground. All that was quite unobjectionable. On 4th August 1893 the Sheriff-substitute appointed Mr Robertson, C.E., to accompany him to the inspection, and having met the parties on the ground and heard their explanations in presence of Mr Robertson, appointed them to be heard on the whole cause. It is said by the pursuers that this was an incompetent proceeding, and that it nullified all future proceedings. It is said by the pursuers that having appointed Mr Robertson assessor the Sheriff-substitute had no more to do. *Contra* it is said, and this view is adopted by the Lord Ordinary, that the Sheriff-substitute was entitled to have the assistance of a man of skill, and that it is in accordance with ordinary practice to remit to a man of skill to report, and that the only difference was that he obtained a verbal in place of a written report. It is not necessary to determine whether that is incompetent or not.

July 17, 1894.
Lanarkshire
and Dumbar-
tonshire Rail-
way Co. v.
Main.

No. 199.

July 17, 1894.
 Lanarkshire
 and Dumbar-
 tonshire Rail-
 way Co. v.
 Main.

But with reference to what afterwards took place there is this material distinction. If there had been a written report (and men of skill are not infallible) Mr Buchanan would have had an opportunity of pointing out erroneous statements or conclusions, but being a verbal report he had, and could have, no knowledge of the advice given, however erroneous.

What next took place was that on 7th August 1893 the Sheriff-substitute sisted Mr Buchanan as a party, refused him leave to lodge answers to the petition, called on his procurator then and there to address him on the whole case, made avizandum, and thereafter disposed of the case on the merits. The effect of this was that the Sheriff gave the pursuer no opportunity of seeing the process and proceedings after he had become a party to it. He may have been quite right in thinking written answers unnecessary, but he gave the pursuer no opportunity of substantiating his objections by evidence or otherwise, and he called on him then and there to speak to questions of fact of which he had no knowledge, not having been a party to any of the prior proceedings in the cause, and there being no written record of these proceedings. It is averred on record that this was done in face of a protest by the pursuer. The averment is, that he, Mr Buchanan, asked the Sheriff to be allowed to lodge written answers to the petition, or at least to have time given him to consider his position; that this was refused, and he protested against the refusal, and has had no opportunity given to him of stating his objections. If this be true, I think that substantial justice has not been done to the pursuer, and that there must be inquiry.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and remitted to the Lord Ordinary to proceed, &c.

CLARK & MACDONALD, Solicitors—J. & F. ANDERSON, W.S.—W. & J. BURNES, W.S.—
 Agents.

No. 200.

July 17, 1894.*
 Hepburn's
 Trustee v.
 Rex.

2D DIVISION.
 Sheriff of Fife
 and Kinross.

W. H. H. C. MOUBRAY, Pursuer and Nominal Raiser.

WALTER SHAW (William Hepburn's Trustee), Defender and Real Raiser
 (Appellant).—*Clyde*.

JOHN REX, Defender (Respondent).—*Constable*.

Process—Multiplepoinding—Expenses.—In January and February 1893 Mr W. H. H. C. Moubray sold certain lots of timber to William Hepburn, timber-merchant, 16 Downfield Place, Edinburgh. Thereafter, while part of the timber was as yet undelivered, John Rex, wood-merchant, Leith, a creditor of John Hepburn, William Hepburn's son, used arrestments in Moubray's hands, alleging that the timber had truly been sold to William Hepburn as agent for John Hepburn. Rex then brought an action in the Sheriff Court of Fife against Moubray and John Hepburn and also against Walter Shaw, the trustee on William Hepburn's sequestrated estates, in which he claimed the undelivered timber. Shaw, as trustee, alone lodged defences, maintaining that the timber belonged to William Hepburn, and was carried by his sequestration. On 14th November 1893 the Sheriff-substitute (Gillespie) sisted process in this action in order that a multiplepoinding might be brought.

Shaw, as trustee, accordingly brought a multiplepoinding in name of Moubray. Rex and Shaw alone lodged claims. The Second Division

* Decided June 23, 1894.

of the Court, recalling the interlocutor of the Sheriff-substitute, sustained No. 200. Shaw's claim.

Shaw then moved that Rex should be found liable not merely in the expenses of the competition but also in the expenses of bringing the action. Shaw argued that, as he would have been found entitled to full expenses had the original petitory action gone on to judgment, he ought not to be subjected to the expenses of bringing the action of multiplepointing, as he would be if these expenses were found to be a charge on the fund *in medio*. Rex maintained that the expenses of bringing the action ought to be charged against the fund *in medio*. The Court (the Lord Justice-Clerk, Lord Rutherford Clark, and Lord Trayner) held that the expenses of bringing the action fell to be paid out of the fund *in medio*, it being observed on the bench that that was the invariable rule when the multiplepointing was competently brought.

July 17, 1894.
Hepburn's
Trustee v.
Rex.

HUGH MARTIN, S.S.C.—WALLACE & PENNELL, W.S.—Agents.

IRVINE REID STIRLING (Mr and Mrs Donaldson's Marriage-Contract Trustee), First Party.—*A. M. Anderson*. No. 201.

MRS ISABELLA DONALDSON, Second Party.—*W. Campbell—M^r Lennan*. July 17, 1894.*

JAMES THOMSON DONALDSON AND MRS HENDERSON, Third Parties.—*Jameson—Sym.* Donaldson's
Trustee v.
Donaldson.

GEORGE STRATTON (Mr and Mrs Honeyman's Marriage-Contract Trustee), Fourth Party.—*A. M. Anderson*.

Succession—Marriage-contract—Power of appointment—Exercise of—Construction.—By antenuptial marriage-contract the husband reserved power to appoint to the estate conveyed by him to the marriage-contract trustees "in the event of there being no issue born of the said intended marriage or none surviving or leaving issue at the time of the termination of the liferent interests before provided, and failing thereof to his own nearest heirs or assignees."

The marriage was dissolved by the death of the husband. He left a trust-settlement by which he, *inter alia*, provided,—“Sixth, In the event of there being no issue of our marriage alive at my death, or in the event of there being issue and their dying before the youngest of them attaining the foresaid age of twenty-one years complete, I direct my trustees” to convey the marriage-contract trust-estate to his widow, whom failing, to certain other persons named, “whom in the foresaid order I hereby appoint to be my residuary legatees and nominees under the said antenuptial contract of marriage.”

There was one child of the marriage, who survived her father, attained the age of twenty-one, and died before the termination of the liferent interests created by the marriage-contract.

Held that in the events which had occurred the sixth purpose had the effect of constituting the widow her husband's nominee under the antenuptial contract of marriage.

MR GEORGE DONALDSON, S.S.C., was married to Miss Isabella Stirling 2D DIVISION. in January 1862. By antenuptial contract between Mr Donaldson and his intended wife, he conveyed certain estates then belonging to him to trustees, in the first place, for behoof of himself in liferent, and after his death for behoof of his wife, should she survive him, also in liferent. Secondly, on the death of his wife, in the event of her surviving him, the trustees were directed to hold the trust-estate for behoof of the child or children of the marriage, and to pay them the annual income equally until the youngest child should attain the age of twenty-one years, when the trustees were to convey the whole trust-estate to the children share and share alike, the issue of any child predeceasing the term of payment to

* Decided July 13, 1894.

No. 201. succeed to their parent's share equally *per stirpes*. Then came the third and final purpose of the marriage-contract, as follows:—"Third, In the event of there being no issue born of the said intended marriage or none surviving or leaving issue at the termination of the liferent interests before provided, the said trustees shall convey and make over the said trust-estate to the said George Donaldson himself, or to such person or persons as he by any deed or writing under his hand shall have directed or appointed, and failing thereof to his own nearest heirs or assignees."

July 17, 1894.
Donaldson's
Trustee v.
Donaldson.

The marriage was dissolved by the death of Mr Donaldson on 22d July 1866, leaving a trust-disposition and settlement, the sixth purpose of which was in these terms:—"Sixth, In the event of there being no issue of our marriage alive at my death, or in the event of there being issue and their dying before the youngest of them attaining the foresaid age of twenty-one years complete, I direct my trustees, after payment of the pecuniary legacies mentioned in the third head of the purposes of this trust, and left and bequeathed by me, in the foresaid events to pay or convey the fee of the residue of said estate, including the fee of the subjects, policies, and others conveyed by me under the said antenuptial contract of marriage, to and in favour of the said Isabella Stirling or Donaldson, my spouse, in the event of her surviving me, whom failing, to the said Jane Donaldson or Henderson, James T. Donaldson, and William Donaldson [two brothers and a sister of the testator] equally, share and share alike, and survivors or survivor of them, whom in the foresaid order I hereby appoint to be my residuary legatees and nominees under the said antenuptial contract of marriage."

Mr Donaldson was survived by one child of the marriage, a daughter (Mrs Honeyman), who attained the age of twenty-one, and died intestate and without issue on 1st September 1893. She was survived by her mother.

In these circumstances a special case was presented by (1) Mr and Mrs Donaldson's marriage-contract trustee; (2) Mrs Donaldson; (3) James T. Donaldson and Mrs Henderson, Mr Donaldson's brother and sister (William Donaldson was dead); (4) Mr and Mrs Honeyman's marriage-contract trustee. The following was the first question of law:—" (1) In the events which have occurred, does George Donaldson's trust-disposition and settlement have the effect of constituting the second party nominee under his antenuptial contract of marriage so as to entitle her to the capital of the trust-estate created by said contract of marriage? Or did the capital of the said trust-estate vest in Mrs Honeyman at her father's death as his nearest heir *ab intestato*?" Then followed other questions not necessary to be here mentioned.

The second party maintained that by the final words of the sixth purpose of his trust-disposition and settlement, Mr Donaldson had exercised the power of nomination reserved to him by the third purpose of the antenuptial contract, to the effect of giving her the fee of the estates.

The other parties contended that the terms of Mr Donaldson's trust-disposition and settlement did not, in the events which had occurred, constitute an exercise of the reserved power of nomination, Mrs Honeyman having attained the age of twenty-one before her death, and consequently that the marriage-contract trust-estate fell to be disposed of as intestate succession of Mr Donaldson.

LORD YOUNG.—The question which we have here to determine is whether the late Mr Donaldson by the sixth purpose of his will shewed that he intended to exercise—and validly exercised—the power of nomination conferred on him by his antenuptial marriage-contract. It is said, on the one hand, that he did not, because the operation of the sixth purpose of the will is limited to the event of

there being no issue of the marriage, or if there was issue, to the event of their all dying before the youngest of them attained the age of twenty-one, and as neither of these contingencies happened, since his daughter (who became Mrs Honeyman) survived her father, and was more than twenty-one years of age at the time of her death, it is maintained that the condition of this clause coming into operation not having been purified, the clause is of no effect. On the other hand, it is said that the plain meaning and intention of the testator to be gathered from this clause as a whole and from his will as a whole, is that he intended to exercise the power given to him by the marriage-contract to destine the estate in the events which have happened; that this satisfactorily and conclusively appears from the words at the end of the clause "whom in the fore-said order I hereby appoint to be my residuary legatees and nominees under the said antenuptial contract of marriage"; and that it would be unreasonable to thwart and defeat what must occur to everybody to be the probable intention of the testator by qualifying these words by the introduction of the words "in the foresaid events,"—that is to say, in the event of there being no issue, or in the event of the issue, should there be issue, all dying before the youngest attained the age of twenty-one. I do not think that it is necessary, as a matter of construction, to read that qualification into the concluding words of the clause. I think that they may very well be read without that qualification, and so reading them we give effect to what I am persuaded was the intention of the testator. I am therefore of opinion that in the events which have occurred Mr Donaldson's trust-disposition and settlement has the effect of constituting his widow nominee under the antenuptial contract, so as to entitle her to the capital of the trust-estate.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

THE COURT answered the first alternative of the first question in the affirmative.

WM. AINSLIE THIN, S.S.C.—DONALDSON & NISBET, Solicitors—F. J. MARTIN, W.S.—Agents.

HENRY LAW AND OTHERS, Pursuers (Reclaimers).—*Kennedy—Wilton.* No. 202.

GEORGE NEWNES, LIMITED, Defenders (Respondents).—*Ure—*

John Wilson.

July 17, 1894.

Law v. George

Newnes,
Limited.

Contract—Constitution—Advertisement—Condition precedent—Insurance—Next of kin.—The proprietors of a newspaper advertised that £100 would be paid by an insurance company named to the person whom the proprietors of the newspaper "may decide to be the next of kin of anyone who is killed in a railway accident," provided that a copy of the current issue was in his possession at the time of the accident, or that he was a regular subscriber to the newspaper.

In an action against the proprietors of the paper, by the children and sole next of kin of a subscriber to the paper, who had been killed by a railway accident, for payment of the sum mentioned in the advertisement, the defence was that the defenders had decided that the widow of the deceased was his next of kin; that under the terms of the advertisement they were entitled so to decide; and that the money had been paid to her.

The Court, after a proof, *assolized* the defenders, being of opinion that it was a condition precedent to requiring payment of the sum mentioned in the advertisement that the person claiming the money should produce the decision of the proprietors of the paper that he was the next of kin of the deceased, and that the pursuers had failed to prove that the defenders in refusing to decide that the pursuers were next of kin of the deceased had acted in bad faith.

Question (per Lord Young) whether any valid contract had been constituted,

No. 202. ON 22d September 1893 Henry Law and others, being the children of the late Robert Law, painter, 207 Causewayside, Edinburgh, brought an action for payment of £100 against George Newnes, Limited, Southampton Street, Strand, London, the proprietors of a weekly periodical called *Tit-Bits*.

July 17, 1894.
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2d DIVISION.
Ld. Kyllachy.

The pursuers set forth the advertisement quoted below,* and averred that the defenders had established a system of insurance against railway accident in terms of the advertisement, which appeared in each weekly issue of their periodical *Tit-Bits*; that the pursuer's father was a regular subscriber, through a newsagent, to *Tit-Bits*, and as such contracted with the defenders for the benefit of their system of insurance, under which in the event of his death by railway accident his next of kin were to be entitled to payment of £100; that he had died on 4th August 1893 from injuries received in a railway accident at Dundee on 28th July; that the pursuers were his children by his first marriage, and were his only children and sole next of kin; that, as such, they had claimed from the defenders the benefit of their system of insurance, but that the defenders had refused to admit the pursuers' claim, and had intimated that they had decided that Mrs Law, the second wife of the deceased, was his next of kin; and that the money had been paid to her. (Cond. 6) "In so acting and deciding that the deceased's widow was of the next of kin of the deceased, the defenders acted and decided illegally and wrongfully, and in bad faith, and in complete disregard of the terms of their said offer, and of the rights acquired thereunder by the pursuers, among whom there are no competing claims, and against whom no other person has or could intimate to the defenders that such person claimed as next of kin of the deceased. The defenders were not only well aware, before resolving to prefer the deceased's widow to the said sum of £100, that she was not, and did not claim as one of the next of kin of the deceased, but were also aware that the pursuers were his only next of kin."

The defenders admitted that the pursuer's father had died as averred by them, and that he had complied with the conditions of the advertisement. They further admitted that they had decided that Mrs Law was the next of kin of the deceased and had refused to admit the pursuers' claim, and that she had been paid. The defenders' answer to cond. 6 was "Denied," and in their statement of facts they stated,—(Stat. 4) "By the defenders' system of insurance, and under the terms and conditions thereof, as stipulated by them, it is not contemplated or intended that the benefits of the insurance should be confined to the nearest blood relations of the deceased, and in coming to the decision that the deceased's widow was the party entitled to the £100 payable on the deceased's death as aforesaid, and in making payment of that amount to her, the defenders acted in perfect good faith, in accordance with their usual practice, and also in accordance with the provisions of the advertisement founded on by the pursuers."

The pursuers pleaded;—(1) The defenders having contracted with the deceased Robert Law to pay the sum of £100 to his next of kin in the

* The following was the advertisement,—“£100 will be paid by the Ocean Accident and Guarantee Corporation, Limited, 40, 42, and 44 Moorgate Street, London, E.C., to the person whom the proprietors of *Tit-Bits* may decide to be the next of kin of anyone who is killed in a railway accident in the United Kingdom, provided a copy of the current issue of *Tit-Bits* is found upon the deceased at the time of the catastrophe, or if it is proved that he or she is a subscriber through a newsagent or through the publishers. This sum will not be paid in the event of an accident to a railway servant when on duty, nor of a suicide. No claim will be paid in the case of the death of a child under ten years of age.”

event as such has occurred, all as condescended on, and the pursuers, No. 202. being the sole next of kin of the deceased, are entitled to decree against the defenders for payment thereof, with interest and expenses, as craved. July 17, 1894.
Law v. George
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(2) The defenders having illegally and wrongfully paid, or caused to be paid, the said sum of £100 to a person not being one of the next of kin of said subscriber, the pursuers are entitled to decree, as concluded for, with interest and expenses.

The defenders pleaded;—(1) No title to sue. (2) The pursuers' averments are irrelevant. (3) Under the conditions of the insurance in question the defenders were entitled to pay the amount insured to the deceased's widow, and having in good faith decided that she was the party entitled to the said payment, and paid the amount to her, they have discharged their obligation under the said insurance.

On 21st February 1894 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"Sustains the second plea in law for the defenders, and assoilzies them from the conclusions of the action."*

The pursuers reclaimed, and argued;—The contention of the defenders came to this, that they were entitled to pay this £100 to any person whom they chose to select and to call the next of kin of the deceased. That contention was ill-founded. The advertisement here, coupled with the purchase of, or subscription to, the paper constituted a contract on the part of the defenders to pay £100, in certain events, to the next of kin of one who was killed by a railway accident.¹ In using the well-defined technical term "next of kin," the defenders must be held to have had something more in view than their own arbitrary choice. No doubt the advertisement ran "to the person whom the proprietors may decide to be the next of kin." That qualification supplied a rough and ready method of determining who in fact were the next of kin, but it did nothing more.² If, for example, the defenders decided that so-and-so was the next of kin, and someone came forward alleging that he was nearer of kin, or that he also was of the next of kin, he would probably have no action. But the defenders were not entitled to give the money to one who was not, and never could be, next of kin of the deceased, as they had done, in giving the money to the widow here. A wife, as such, was not of kin to her husband, and, consequently, never could be his next of kin—either by the law of Scotland or by the law of England. At all events, assuming that, in the absence of a claim by the next of kin, the

* "OPINION.— . . . I am of opinion that the pursuers have no title to sue, or at least, that their title is excluded by the decision of the defenders in favour of the widow. The defenders' obligation was not to pay to the next of kin but to such persons as the defenders might decide to be the next of kin. *Prima facie*, therefore, their decision was a condition precedent of the right to sue, and although it may probably be true that if they delayed or refused to decide, or decided in bad faith, or otherwise acted in the matter dishonestly, the next of kin might have a right of action to enforce the contract, there is plainly no room in the present case for any suggestion of that kind. The widow was certainly not the next of kin, or one of the next of kin according to the law of Scotland, or, so far as I know, according to the law of England; but the question after all was what the defenders meant by the expression as used in their advertisement, and of that they reserved to themselves to be the sole judges. They decided in favour of the widow, so far as appears from no interested motive, and quite honestly, and that being so, they cannot, in my opinion, be required to pay over again to the pursuers. I propose, therefore, to find that the pursuers' statements are irrelevant, and assoilzie the defenders from the action."

¹ *Carlill v. Carbolic Smoke Ball Company*, L. R. [1892], 1 Q. B. 256.

² *Synnington's Executor v. Galashiels Co-operative Store Company, Limited*, Jan. 13, 1894, *supra*, p. 371.

No. 202. proprietors might decide in favour of the widow of the deceased, they were not entitled to do so in face of a claim by the next of kin. That was what they had done here. If the facts were in dispute there ought to be a proof.

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Argued for the defenders ;—The pursuers had no title to sue. Under the advertisement, it was a condition precedent of an action upon the contract that the pursuer should produce the decision of the proprietors of *Tit-Bits* that he was next of kin of the deceased.¹ This the pursuers had not done. Nor could it be said that the defenders had not acted *bona fide* in preferring the widow, who if she was not strictly next of kin of the deceased was at all events one of his heirs *in mobilibus*.² It was not therefore necessary for the defenders to maintain that they were entitled to prefer anyone whom they chose, but, upon a construction of the advertisement, they maintained that their discretion was absolute, and consequently that the pursuers' averments were irrelevant. They did not, however, object to a proof before answer, if there were any matters of fact in dispute. They raised no question as to its being the Ocean Insurance Company, and not themselves, who ought to have been called as defenders.

On 15th March 1894 the Court allowed a proof before answer.

The evidence, which was led before the Lord Justice-Clerk, shewed that a claim was lodged on behalf of Mrs Law on 8th August, that after making inquiries into the circumstances attending the death of the deceased, and as to his having been a regular subscriber to *Tit-Bits*, the defenders, through their managing director, intimated to Mrs Law, on 19th August, that, "after full inquiries have been made into the circumstances attending the sad accident which caused the death of your husband at Tay Bridge Station, it has been found you are entitled to the benefits of the *Tit-Bits* system of insurance. A cheque for £100 will be sent you during the course of next week." A notice to the same effect was inserted in the next issue of *Tit-Bits*. The first intimation to the defenders of the pursuers' claim was made on 21st August. The cheque for £100 was sent to Mrs Law on 23d August. English counsel deponed that, according to English law, a wife was in no sense whatever of the next of kin of her husband, unless related to him by birth.

After further hearing the Court made *avizandum* with the cause.

At advising,—

LORD JUSTICE-CLERK.—The defenders in their weekly newspaper announced that £100 would be paid by the Ocean Accident and Guarantee Association to "the person whom the proprietors of *Tit-Bits* may decide to be the nearest of kin of anyone who is killed in a railway accident" in the United Kingdom, provided a copy of the current number of their paper was found upon the deceased, or that the person was proved to be a subscriber. The deceased Robert Law was killed in such circumstances, and his widow applied for payment of the insurance. The proprietors of *Tit-Bits*, through their managing director, decided in her favour, and so intimated. After he had done so, and before the money was paid, the children of the deceased by a former marriage intimated a claim. The defender, however, considering, it may be presumed, that having given his decision the matter was ended, gave effect to his decision by forwarding a cheque to the widow. The children now sue him for the £100.

¹ Caledonian Insurance Co. v. Gilmour, Dec. 16, 1892, 20 R. (H. L.) 13; Ramsay v. United Colleges, St Andrews, 23 D. (H. L.) 8; Martins v. MacDougall's Trustees, Dec. 5, 1885, 13 R. 274; M'Donald v. M'All, June 17, 1890, 17 R. 951.

² Tronsons v. Tronson, Nov. 2, 1884, 12 R. 155.

The proprietors were entitled, in advertising such an insurance as they did, No. 202. to prescribe their own conditions, and these, as described, imply that there were to be no elaborate proceedings, but that the decision was to be that of the proprietors acting upon their own judgment. They could not be required to wait for any indefinite time, or to advertise for claims, or anything of that kind, but were entitled to proceed in their own way. Here a claim did reach them from the widow, they considered the claim, and gave a decision on the claim. That decision is admittedly erroneous from a legal point of view, but the question is, Can those who, in law, hold the place of next of kin, come forward and sue for the amount merely on the allegation that they are the next of kin, and that the person decided to be the next of kin was not so in reality? I have come to be of opinion that they cannot. The proprietors, having kept the power of decision in their own hands, exercised it, and although in doing so they must be held to have blundered grievously in their judgment, the question is, Can they be called to account in a Court of law, and, because they have blundered, be decreed to pay the money over again? I think that they cannot. I do not think that the pursuers could have any relevant ground for reducing what was done. But this is not a case of reduction but one of demand by persons who have not been decided by the proprietors of *Tit-Bits* to be nearest of kin to compel them to pay £100 to them because they are in that position. They are not, as I think, entitled to such a judgment. I am in favour, therefore, of adhering to the Lord Ordinary's interlocutor.

July 17, 1894.
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LORD YOUNG.—I am disposed to concur in the result at which your Lordship has arrived. The defenders do not, of course, raise any question regarding their liability to pay to the person decided by themselves to be the next of kin of the deceased, for they have paid over the money. But I must say that I have myself very great doubts—although it is not necessary to decide the question in this case—as to the validity of an insurance effected in the way here described,—I do not refer to any question under the Stamp Act. The pursuers seek to deal with the advertisement *plus* the fact of subscription to the newspaper as a policy of insurance effected by onerous contract between the proprietor of the newspaper and the deceased, the payees—that is, the creditors under the policy—being the next of kin of the deceased according to the law of Scotland. The pursuers' first plea in law is to the effect that the defenders, having contracted with the deceased to pay the sum of £100 to his next of kin in the event of his being killed by a railway accident, are liable to the pursuers as creditors in that obligation.

Now, I am of opinion that there is here no such contract. I should think that if anyone made a contract with an insurance office, or with any person willing to insure, that a certain sum should be paid to his next of kin in the event of his death, the amount so due under the policy would be part of his estate, and liable for his debts. I cannot think that doubtful. The next of kin could not gratuitously take anything which was due under an onerous contract with the deceased, although made payable to his next of kin, without being liable, to that extent, for his debts. But, apart from that consideration, I do not think that there was anything of the nature of a contract undertaken by the proprietors of *Tit-Bits* here. My own strong inclination is that the only sanction of their undertaking was the credit of the paper. The purpose of the advertisement, which need not be in their own paper at all, I think, is to further the

No. 202. interests of the paper. They wish thereby to induce people to purchase *Tit-Bits*, and I suppose it is successful in that result, or otherwise they would not continue to insert it. Now, the credit of the paper will depend, so far as this advertisement is concerned, upon the proprietors honestly and honourably fulfilling their undertaking, and would be hurt by a discreditable failure on their part. And accordingly, when an accident coming within the terms of the advertisement occurs, and they pay £100 to anyone, they do not fail to announce the fact in their paper. And if they did not pay in circumstances which would make their refusal discreditable to them, and against the good faith of the undertaking, that would be made public somehow, and would be disadvantageous to the paper, just as, on the other hand, the announcement of proper payment is advantageous. I am doubtful if it can be made more of than that. I hesitate to allow to pass without an expression of doubt the idea which is presented to us by this case, that there is here a valid contract or obligation by the law of Scotland to pay £100,—that it is a valid policy of insurance. That question was not argued to us, and we have no occasion to decide it here, but I have felt it to be my duty, when the question is involved in the case presented to us, to indicate, and to indicate pretty decidedly, the doubt which I experience.

Apart from these considerations I am of opinion that there is here no undertaking by the proprietor of *Tit-Bits* to pay £100 to those who are the next of kin of the deceased according to the law of Scotland. The Lord Ordinary says in his note, quite accurately, that the widow of the deceased is not his next of kin according to the law of Scotland, and he does not know,—has no reason to know,—that she is his next of kin, or one of his next of kin, according to the law of England. But the obligation here is not to pay to the next of kin according to the law of Scotland, or according to the law of England, or of Ireland, or according to the law of the domicile of the deceased, which might be anywhere, because he might be a foreigner. It is to pay to the person who shall be determined by the proprietor of *Tit-Bits* to be the next of kin of the deceased. That is a condition of the obligation, assuming that there is an obligation,—an enforceable obligation,—at all. Now, I cannot see that there is anything reprehensible, in any point of view, anything discreditable to the paper in any way, in the proprietor of *Tit-Bits* saying, “We think that the widow is next of kin; we are deciding nothing according to the law of Scotland, or according to the law of England, or of Ireland, or any other country where the domicile may be, but we think the widow is next of kin, and that she is the most proper person to receive the money.” It is sufficient for the decision of this case to indicate these views, and to say that there is, certainly in my opinion, no obligation upon the proprietor of *Tit-Bits* which can be enforced by those who are the next of kin by the law of any country, and I therefore agree that the defenders are entitled to absolver from the conclusions of this action, and with expenses.

LORD RUTHERFURD CLARK.—This action is laid on a contract of insurance which the deceased is said to have made with the defenders, through an advertisement which they are in use to issue, and it is brought to recover the amount due under that contract.

The advertisement is in these terms :—“£100 will be paid by the Ocean Accident and Guarantee Corporation to the person whom the proprietor of *Tit-Bits* may decide to be the next of kin of anyone who is killed in a railway

accident," provided a copy of the newspaper is found on the deceased, &c. I No. 202.
doubt if the defenders undertake to make any payment. The obligation seems
to be to furnish the next of kin of the deceased with the means of obtaining July 17, 1894.
the money from the company above mentioned. *Law v. George*
Newnes,
Limited.

This point was not taken by the defenders. They have elected to satisfy any claim which could be made against the company. But in an action on the debt they have the same defences, and unless the pursuers can shew that they are entitled to recover against the company, I do not see how they can recover against the defenders.

In order to obtain payment from the company they were bound to produce the decision of the proprietors of *Tit-Bits* that they are the next of kin of the deceased. That was a plain condition precedent; for the decision of the proprietors is the only warrant on which the company could be required to pay. It is not the less a condition precedent in this action where the defenders have assumed the liabilities of the company, but have not surrendered any of their defences. The debt cannot be recovered unless the conditions precedent to the recovery are fulfilled. In so far, therefore, as the action is laid on the contract alone, I am of opinion that the defenders are entitled to absolvitor.

I do not say that the pursuers would be without remedy if the defenders refused to decide, or decided in bad faith. But their action could not be laid on the contract alone. It must be laid also on the wrong. Accordingly they aver that the defenders, in deciding that the widow was next of kin, acted in bad faith, and in the knowledge that the pursuers alone possessed that character. There is no other averment.

I am of opinion that this averment is not proved. The claim was not made by the pursuers until the decision was given in favour of the widow, and was intimated to her. I think that the decision was given in good faith, and that the money was paid in the honest belief that it was due to the widow by reason of the decision in her favour.

The Lord Justice-Clerk intimated that LORD TRAYNER, who was absent, but had been present at the hearings, concurred in the judgment of the Court.

THE COURT pronounced this interlocutor:—"Refuse the reclaiming note, adhere to the interlocutor reclaimed against, and decern."

GRAY & HANDYSIDE, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY AND ANOTHER,
Complainers (Reclaimers).—*Salvesen—F. T. Cooper.*

No. 203.

LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF GLASGOW,
Respondents (Respondents).—*Lees—Ure.*

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Road—Public Road—Water-pipe—Compulsory Powers—*Ultra vires*—Railway—Statute—Construction—Water-Works Clauses Act, 1847 (10 and 11 Vict. cap. 17), secs. 28 and 29.—Public water commissioners had statutory authority to lay a line of water-pipes along a road which passed over two girder bridges belonging to a railway company. Held, upon a construction of secs. 28 and 29 of the Water-Works Clauses Act, 1847 (rev. judgment of Lord Low), that it was *ultra vires* of the commissioners to carry the pipes through the stone abutments of the bridges and to sling them from the girders.

In September 1893 the Glasgow and South-Western and the Cale-2^D Division.
donian Railway Companies, as joint owners of the Glasgow and Paisley
Joint Railway, brought a note of suspension and interdict against the Lord Low.

No. 203. Lord Provost, Magistrates, and Town-Council of Glasgow, as Commissioners under the Glasgow Corporation Water-Works Act, 1855, and subsequent Acts, praying for interdict against the respondents "interfering in any way with the structure of the bridges (or either of them) carrying the street or road known as Helen Street, in the parish of Govan and county of Lanark, over the complainers' main line of railway between Glasgow and Paisley, and over the complainers' fork line of railway leading from their Govan Branch Railway in the direction of their said main line, and from laying on or beneath said bridges, or either of them, water pipes, and that until the respondents shall have obtained the complainers' consent to the laying of said pipes, or otherwise until the complainers and respondents shall have agreed on plans in accordance with which such water-pipes shall be laid, and failing agreement between the complainers and respondents, until their respective rights in the premises have been determined in conformity with the provisions of the Water-Works Clauses Act, 1847," &c.*

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On 17th October the Lord Ordinary (Low) recalled an interim interdict formerly granted, and passed the note without caution. Thereafter a record was made up.

The action arose in the following circumstances, as disclosed by the admissions of the parties:—The bridge first mentioned in the prayer for interdict—that over the main line—was constructed of longitudinal girders, resting on stone abutments on each side of the railway and joined by transverse girders, between which were iron plates extended so as to

* The case turned upon the following clauses of the Water-Works Clauses Act, 1847 (10 and 11 Vict. cap. 17), which was incorporated in the Commissioners' special Acts:—

Sec. 3. "The following words and expressions, both in this and the special Acts, and any Act incorporated therewith, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction (that is to say) . . . The word 'street' shall include any square, court or alley, highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act. . . ."

Sec. 28. "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service-pipes, and other works and engines, and from time to time repair, alter, or remove the same, and, for the purposes aforesaid, remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits. . . ."

Sec. 29. "Provided always that nothing herein contained shall authorise or empower the undertakers to lay down or place any pipe, conduit, service-pipe, or other work in any land not dedicated to public use, without the consent of the owners and occupiers thereof, except that the undertakers at any time may enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act or any other Act of Parliament, and may repair or alter any pipe so laid down."

Sec. 31. "No such street, bridge, sewer, drain or tunnel, shall . . . be opened or broken up, except under the superintendence of the persons having the control or management thereof, or of their officer, and according to such plan as shall be approved of by such persons or their officer, or in case of any difference respecting such plan then according to such plan as shall be determined by two Justices. . . ."

form the floor of the bridge, the roadway being laid above. The bridge over the fork line was also constructed of longitudinal girders, resting on stone abutments, but without transverse girders, arc plates being placed between the longitudinal girders and thus forming the floor of the bridge and the basis of the roadway. Both bridges were the property of the complainers, but the complainers admitted that the roadway on each of the bridges was dedicated to the use of the public as being part of the roadway of Helen Street, which was a public street. In virtue of their Acts the respondents were authorised to lay down a line of water-pipes along Helen Street, the bridges in question, together with the railway below them, being within the limits of deviation as shewn on the deposited plans. The complainers admitted that the respondents were entitled to remove the earth forming the roadway down to the iron plates and girders so as to obtain a trench in which to lay their pipes, but this earth was not deep enough to admit of the pipes (which were 18-inch pipes) being laid above the plates and girders without projecting above the surface of the roadway. In consequence, what the respondents proposed to do—and had, in fact, carried out before the action came to be decided—was to carry the pipes through the stone abutments supporting the bridges, and, obtaining access to the space between the girders by removing the iron plates, to suspend the pipes from the girders underneath the plates, but so that the pipes were not below the girders and thus did not diminish the headway of the bridge. These operations were carried out in accordance with plans approved of by two Justices in terms of section 31 of the Water-Works Clauses Act, 1847.

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The complainers maintained that, notwithstanding the existence of the public right of way over the bridges, the iron and stone work of the bridges remained their property, not dedicated to public use, and consequently that the respondents' operations, not being with the consent of the complainers, were outwith the statutory powers of the respondents, and therefore that interdict fell to be granted. The complainers, however, stated they were "willing to adjust plans, and allow the respondents to execute the works as proposed by them, on condition that they enter into an agreement with the complainers for their protection . . . but they decline to agree thereto."

The respondents admitted that they had declined to enter into any agreement with the complainers, and pleaded;—(1) The complainers' statements are irrelevant, and insufficient to support their pleas. (2) The respondents' operations being within their statutory rights, the note should be refused, with expenses. (3) The said street called Helen Street, and the bridges carrying the same over the complainers' railways having been dedicated to public use, the respondents are not bound to obtain the consent of the complainers before laying their mains or pipes in or over the same, or to enter into any agreement with the complainers before proceeding to lay these mains or pipes. (4) The pipes of the respondents having been laid across the said bridges in accordance with a plan approved of by the Justices in terms of section 31 of the Water-Works Clauses Act, 1847, the present action should be dismissed, with expenses. (5) The surface of the roadway over said bridges and the girder work of these bridges being "land" dedicated to public use in the sense of the Water-Works Clauses Act, 1847, the note should be refused.

On 27th April 1894 the Lord Ordinary (Low) pronounced this interlocutor:—"Sustains the defenders' pleas in law; refuses the prayer of the note," &c.*

* "NOTE.— . . . Helen Street is now a public street and dedicated to public use, and the bridges in question are part of Helen Street, because by

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The complainers reclaimed, and argued;—They did not dispute that the respondents were entitled to lay their pipes, if they could, on the roadway of the bridges, that was to say, on the earthwork above the plates and girders, the plates and girders being available to support the pipes as they supported the roadway itself. Beyond that the right of the respondents did not extend. Their right under section 28 of the Act was limited by that of the public, and the only right which the public had was a right of passage across the bridge. The bridge remained the absolute property of the complainers, and they were responsible for its proper maintenance.¹ In any case, the respondents were not within their statutory authority in doing what they had done. Section 28 was their only warrant, and what that section authorised was the breaking up of "the soil and pavement." All the subsequent powers conferred by the section had reference to and were merely intended to facilitate the exercise of that leading power. The defenders' operations went far beyond that. It might be that, looking to the date of the Act, girder bridges such as the present were not in the contemplation of the Legislature, but that was not a ground for extending the operation of the Act to cases not within its legitimate construction. Further, it was possible to carry the pipes through the roadway by increasing the depth of the earth. That might entail a considerable additional expense, but statutes empowering a public body to take private property were to be strictly construed, and a mere saving of expense was not a reason for allowing the public body to do something not expressly authorised by their Act.² The fact that the plans had been passed by two Justices was irrelevant to the present

means of them that street is carried across the railway lines. The respondents, therefore, were entitled to lay a pipe in Helen Street, and I did not understand the complainers to dispute that they would also have been entitled to lay the pipe over the bridges, if it had been possible for them to lay the pipes under the surface of the roadway and above the floor of the bridge. But the complainers attempted to draw a distinction between the roadway of the bridge and the girders underneath and supporting the roadway. They argued that, although the roadway might be land dedicated to public use, the girders underneath were private property which the respondents could not interfere with or use.

"In my judgment the complainers' contention is not well founded.

"The sections of the Act which I have quoted appear to me in effect to provide that Water Commissioners may lay down pipes in streets and bridges within their district, and may perform such operations in the way of opening and breaking up the streets and bridges as are necessary to effect that object. I do not think that it is possible to construe the sections as excluding from the operations a public bridge which is constructed in such a way that there is not room for a pipe between the surface of the roadway and the floor of the bridge. In such a case I think that it is quite competent for the Commissioners to attach the pipe to the girders which support the roadway. Where, as here, a bridge has been built for the purpose of carrying a street over a line of railway, I think that it is impossible to say that the under surface is private property, and that only the upper surface is dedicated to public use. They are both parts of the same bridge, which forms a public way over the railway line.

"I am therefore of opinion that the respondents were entitled to lay the pipe across the bridge in question, and the pipe having been laid in accordance with plans approved of by two Justices in terms of the 31st section of the Act, the note falls to be refused."

¹ Lancashire and Yorkshire Railway Co. v. Mayor, &c. of Bury, 1889, L. R., 14 App. Ca. 417.

² Morris v. Tottenham and Forreest Gate Railway Co. [1892], L. R., 2 Ch. 47; Lamb v. North London Railway Co., 1869, L. R., 4 Chanc. App. 523; Simpson v. South Staffordshire Railway Co., 1885, 4 De G., Jon., and Sm. 679.

question. The application to the Justices assumed that the operations were *intra vires*, and all that the Justices had to settle was the proper way of carrying out the operations. The complainers, therefore, were entitled to interdict; but they had no desire to prevent the respondents from having their pipes laid as they had been laid. The complainers merely desired to have an arrangement which should protect their own interests for the future, *e.g.*, if they should have occasion to alter the bridge, or if any accident should happen to the pipes. No. 203.
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Argued for the respondents;—The complainers admitted that the respondents were entitled to lay their pipes in the road which crossed this bridge. But road or street in such a question as the present meant more than the mere surface; it meant the surface and so much beyond as was required for the ordinary purposes of a street, including the laying water and gas pipes, or sewers.¹ If therefore the respondents were entitled to make use of this bridge at all—and it was admitted that they were entitled to make some use of it—they were entitled to pass the pipes under it as they had done. Under the Act they had power to do “all acts necessary for the purposes foresaid,” and among these purposes was the laying down of pipes. The case of the *East London Water Company*² shewed that projections above the level of the street were *intra vires* if necessary for the supply of water; the case of projections below the level of the roadway was *a fortiori*, the danger being so much less. [LORD RUTHERFURD CLARK.—But does that case shew more than that water commissioners may do all acts necessary for the supply of water assuming the pipes to be in the place authorised by the Act? Here the question is, whether your pipes are in the place authorised by the Act.] They were entitled to lay their pipes so as to carry out the water supply for which they had powers, and all acts necessary for that end were *intra vires*. Here the method adopted was the only practicable method of carrying the pipes across the railway, and was therefore necessary. The statute ought not to be construed so as practically to take such bridges as the present out of its scope, seeing that such bridges were unknown at the date of the statute.

At advising,—

LORD JUSTICE-CLERK.—The complainers are the owners of a bridge which crosses their joint railway line, and which joins two sections of Helen Street in Govan parish. The surface of this bridge is a public roadway. The Water Commissioners of Glasgow desire to carry a pipe for public water supply by this bridge. Their powers to use bridges for such a purpose are contained in the 28th section of the Water-Works Clauses Act, by which power is given to “break up the soil and pavement” of bridges within the limits of the special Act, and to “open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service-pipes,” &c., and “to remove and use all earth and materials in and under such streets and bridges.”

The bridge in question was an iron bridge, of modern construction, consisting of several flat girders with spaces between them. Small transverse girders are placed across these main girders, and support plates which form a floor on which

¹ Fareham Local Board v. Smith, 1891, 26 Weekly Notes, 76; Wandsworth Board of Works v. United Telephone Co., Limited, 1884, L. R., 13 Q. B. D. 904.

² East London Water Co. v. Vestry of St Matthew, Bethnal Green, 1886, L. R., 17 Q. B. D. 475, per L. J. Bowen, at p. 482.

No. 203. the material for the roadway is placed. This arrangement gives the bridge a very thin skin, within which there is not sufficient space to lay the water mains. Accordingly the respondents, for the purpose of carrying the mains across the railway cutting spanned by the bridge, maintain that they are entitled to remove the iron sole-plates, and thus obtain access to the space between the main girders, and to hang their water-pipes by iron bars attached to the cross girders. This, of course, renders it necessary that at each side of the cutting the pipes should pierce the stone abutments which form the solid ends of the bridge on either side of the cutting.

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The complainers maintain that the respondents have no right thus to support their pipes below the level of the upper sides of the main girders. They admit that the respondents have the control of that part of the bridge which forms the roadway, to the effect that they may open it up, remove the pavement, earth, or other material, and lay their pipes in the space which constitutes the filling up of the bridge, as distinguished from the weight-bearing part of the structure. But they maintain that they are not required by the statute to submit to have works carried on within the bridge, as distinguished from the roadway supported by the bridge, and that if this is to be done it can only be by agreement with them. I think that if their objection is sound in law it cannot be said to be unreasonable. For the maintaining of the supporting structure in a safe condition is a duty imposed upon them, and the safe conduct of the traffic along the lines below the bridge is an important interest which they are entitled to protect.

The question therefore is, whether it is within the powers conferred upon the respondents by the section of the Water-Works Act referred to that they should open up the structure and suspend their water-pipe from the main girders as they shall see fit, for the working of their water supply? I confess that I was at first inclined to think that as the statute was evidently intended to confer very general powers in aid of so important a public service as water supply, although the words of the Act were suitable only to the class of bridges in use to be constructed at its date, it might reasonably be held to apply, as the Lord Ordinary has held it to do, to bridges such as these in question, as entitling the respondents to break into the bridge and place their pipes, provided they do not interfere with the headway, and, of course, execute their works in a safe and sufficient manner. My inclination was to read the words of the Act as descriptive of the kind of operation then known to be necessary, and that such operations as might be necessary in consequence of a change of the character of bridges introduced by the progress of engineering invention, might be reasonably held to be included, although not in exact accordance with the words used in the statute. But after further consultation with your Lordships I am convinced that this view cannot be taken. I think that if the change in the structure of bridges had only been the substitution of a material different from soil below the roadway or of a different material at the surface from what is ordinarily called pavement, it might still be held that the powers of the respondents might be applied to such substituted materials. But this is not a case of that kind. It is a proposed application of a power, which does not relate to the weight-bearing part of the structure, to that part. The contention is that the respondents have power to cut through the cross girders, and lower their pipes into the space occupied by the weight-bearing structure, and to pierce the abutments which support the ends of the bridge and uphold the embankment on each side of the railway line, so as to introduce their pipes. This, I have come

to be of opinion, is not within their powers; it is a case not contemplated by No. 203. the Act.

It would of course be against public interests if the improved construction of bridges should stop the economical and convenient passage of water supply along public streets. If it is found to have this effect the Legislature would probably provide a remedy. But I gather from the prayer of the petition that the complainers have no such desire, but properly recognising the public interests, only desire to be protected as regards their own interests in the matter of the safety of the public line. If the Lord Ordinary's interlocutor is recalled, as I propose it should be, the course thereafter to be followed will depend upon what is proposed by the parties.

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LORD YOUNG.—My impression on this case was rather in accordance with the Lord Ordinary's judgment, but I have not such a clear opinion that I would be justified in dissenting from what I know to be the unanimous opinion of your Lordships, including Lord Trayner, and therefore I may be taken as concurring.

I wish, however, to say that it appeared to me that the requirements of the railway company, that all reasonable precautions should be taken by the town authorities that the presence of this pipe should not have a prejudicial effect upon the railway, seemed to me so reasonable that I was surprised the town should have hesitated to agree to them, because, taking the view most favourable to them, this use of the bridge for supporting their water-pipe could only be reasonable if proper precautions were taken, and I should have thought that the town would have been willing to take every proper precaution that neither the railway nor any person using the railway should receive injury.

LORD RUTHERFURD CLARK.—A street or road called Helen Street in or in the neighbourhood of Glasgow is carried over the complainers' railway by an iron bridge. The bridge is formed by longitudinal girders which rest on abutments on either side of the railway. The spaces between these girders are covered by iron plates, on which the roadway is made up.

The respondents have carried a pipe through the abutments and between the longitudinal girders. It is supported partly by the abutments and partly by being slung from the cross girders, by which the longitudinal girders are tied. Its lowest point is higher than the lowest point of the longitudinal girders. The pipe therefore does not diminish the headway of the bridge.

The pipe has been constructed on the authority of the 28th section of the Water-Works Act of 1847. It is apparent enough that the Legislature had not under their consideration bridges of the class which I have described. But it may not the less be true that the operations of the respondents are authorised by the Act. We cannot, however, extend it by any analogy. Nothing is authorised which cannot be brought within the words of the Act according to a fair and liberal construction. For, having regard to the purpose of the Act, I am of opinion that it ought to be liberally construed.

The leading words of the 28th section are that "the undertakers may open and break up the soil and pavements of the several streets and bridges within the limits of the Act." They enable the undertakers to form a trench on the roadway of the bridge, in order to lay the pipe therein. They do nothing more.

The section further empowers the undertakers "to open and break up any

No. 203. sewers, drains, or tunnels within or under such streets or bridges." It is plain, and indeed admitted, that the respondents can take no benefit from these words. They have not broken up any sewer, drain, or tunnel in or under the bridge. The section then proceeds,—“and lay down and place within the same limits pipes, &c., and from time to time alter or remove the same.” I read these words as meaning that the undertakers may lay their pipes in the places which they have made for them under the authority of the Act. It is not a power to lay down pipes anywhere within the limits of the special Act, and if it be not, the only legitimate construction is that these pipes are to be laid in the trenches which the undertakers are empowered to make, and in no other place.

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The statute then goes on to say,—“And for the purposes aforesaid, remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits.”

The argument of the respondents was mainly founded on the power given to use the materials on and under the bridge. They said that the pipe in question was hung from the bridge, and that this was a use of the materials of the bridge within the meaning of the Act.

To my mind, the argument leaves out of account the earlier words of the section. The power is given “for the purposes aforesaid,” and for no other purpose. The words which give this power do not enlarge the enactment, except in the sense of giving facilities for doing what the statute has already permitted to be done. If the purposes aforesaid are, as the respondents contend, limited to the laying down of pipes, &c., they must be limited to pipes which are laid down in the site permitted by the Act. Before they can take any benefit from the words on which they found, the respondents must shew that the Act enables them to lay a pipe elsewhere than on the roadway of the bridge. If it is not a purpose of the Act to lay the pipes within the structure of the bridges, and for that purpose to pierce the abutments on either side, the right to use the materials in and under the bridge cannot give that power.

The respondents did not found on the general words at the close of the section, and it is plain that they can take no benefit by them.

I am therefore of opinion that the complainers are entitled to the interdict which they ask. I have been willing, as I have said, to adopt the most liberal construction, but I cannot bring the act done by the respondents within the authority of the statute.

The Lord Justice-Clerk intimated that LORD TRAYNER, who had been present at the hearing, but was absent at advising, concurred in the judgment.

THE COURT sent the cause to the Long Roll, to give the parties an opportunity of settling, if so advised.

HOPE, TODD, & KIRK, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 204.
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Burnett v.
Burnett's
Trustees.

MRS ALICE BURNETT, Pursuer (Respondent).—*Mackay—Sym.*
CHARLES JOHN BURNETT AND OTHERS (Miss Burnett's Trustees),
Defenders (Reclaimers).—*C. J. Guthrie—Craigie.*

Succession—Testament—Construction—Accretion of liferent.—In her trust settlement a testator appointed her trustees to pay over the yearly interest of the residue of her estate to her three brothers, Charles, George, and Stuart,

equally among them, and to the survivors and survivor of them, and at the death of the survivor to divide the residue among three of her nieces. In a codicil, upon the narrative that George, one of the brothers, had died since the date of the settlement, she provided,—“I hereby recall the bequest made by me therein to George of a share of the residue of my estate, being one-third thereof, and ordain my trustees to pay over the said share which would have fallen to him had he not so predeceased me to his widow.” The testatrix died in 1890, and her brother Stuart died in 1893.

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In an action raised by George's widow against the trustees, *held* (assuming that by share of residue the testator meant share of income of residue) that the pursuer was entitled not only to the third share of income, but also to one half of Stuart's share to which under the settlement her husband would have been entitled.

MISS MARY ERSKINE BURNETT, residing at Balbithan House, Aberdeen-shire, died on 25th April 1890, leaving a trust-disposition and settlement, dated 3d August 1883, in which, after providing for payment of debts and certain legacies, she appointed her trustees “to pay over the yearly interest or profits arising on the whole remainder and residue of my estate . . . to my brothers, Charles John Burnett, George Burnett, and Stuart Mowbray Burnett, equally among them, and share and share alike, and to the survivors and survivor of them . . . but for their liferent use alienably.”

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Ld. Kyllachy.

On the death of the survivor of the liferenters the testatrix directed the trustees to divide the residue among her three nieces.

By codicil, dated 12th March 1890, Miss Burnett, *inter alia*, provided,—“And considering that since the date of my said trust-settlement my said brother George has died, I do hereby recall the bequest made by me therein to him of a share of the residue of my estate, being one-third thereof, and ordain my trustees to pay over the said share which would have fallen to the said George Burnett, had he not so predeceased me, to Mrs Alice Stuart or Burnett, his widow: And with these alterations thereon I hereby confirm my said trust-disposition and settlement in every other respect.”

Miss Burnett died on 25th April 1890, and thereafter the trustees paid to each of Charles John Burnett, Stuart Mowbray Burnett, and Mrs Alice Burnett, one-third of the free yearly interest of the residue of the estate.

Stuart Mowbray Burnett died on 9th January 1893.

Mrs George Burnett, on 30th September 1893, raised an action against the trustees for declarator that, in virtue of the provisions of the settlement and codicil, she was entitled from and after the death of Stuart Mowbray Burnett to the yearly interest or profits arising on the residue of Miss Burnett's estate along with Charles John Burnett, equally between them during their joint lives, and to the whole of said yearly interest or profits in the event of her surviving him, and further, to have the defenders ordained to pay her the said yearly interest or profits yearly and share and share alike with Charles John Burnett during their joint lives, and the whole to the pursuer in the event of her surviving him.

Defences were lodged for the trustees, who maintained that Charles J. Burnett was entitled to two-thirds of the income, and that on his death, although the pursuer were alive, two-thirds of the residue would be payable to the fiars, who were not called.

The defenders pleaded;—(1) All parties not called. (3) On a sound construction of said trust-disposition and settlement and relative codicil the pursuer is only entitled to one-third of said yearly interest.

The pursuer subsequently by minute amended the summons by

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restricting the declaratory conclusion to a conclusion that from and after the death of Stuart M. Burnett she and Charles John Burnett were entitled equally to the yearly profits of the residue during their joint lives, and restricting the petitory conclusion in a similar way.

On 14th March 1894 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds, decerns, and ordains in terms of the conclusions of the summons, as amended in terms of minute No. 11 of process: Finds the pursuer entitled to expenses: Allows an account to be lodged, and remits," &c.*

The trustees reclaimed, and argued;—The language of the codicil was inconsistent with the pursuer's contention. The testatrix had obviously used the words of recall in order to emphasise the fact that she desired that the pursuer should only receive what was given her by the codicil, *i.e.*, one-third of the interest of the residue. Where either by express provision or by the operation of the *conditio si sine liberis* children of a predeceasing legatee took their parent's share, that share was held not to cover accreting shares in which the parent would have been entitled to participate had he survived.¹

Argued for the pursuer;—On a sound construction of the codicil the intention of the testatrix was to recall the provision in favour of George, and to substitute the pursuer in his place. The words "being one-third thereof" applied to the bequest which the testator was clearing out of the

* "OPINION.—In this case I think I may hold that the restriction of the pursuer's summons obviates sufficiently the plea that all parties are not called. There can now be no judgment except with respect to the income of the fund during the survivance of the defender, Mr Charles John Burnett, and as to that income the only persons interested are the pursuer and Mr Burnett himself.

" . . . I think the question is not without difficulty; but it is, after all, simply a question as to the truster's intention, and I have come to the conclusion that according to the just construction of the codicil of 12th March 1890, the pursuer, Mrs Burnett, is entitled to be put exactly in the same position as her husband would have held if he had survived. That is to say, she takes up not only the original share, but also the accruing share to which, under the settlement, her husband would have succeeded.

"I do not think that much help is to be derived from the analogy of the law applicable to conditional institution of children either expressed or implied. The cases on that subject no doubt establish a rule of construction which, whether artificial or not, is well settled. But it is not a rule which I should desire to extend, and in the present case it is, I think, enough to say that the codicil under construction does not operate a conditional institution at all. The position just is that the original legatee having died before the testator, his widow, the pursuer, is by the codicil in question instituted in his place.

"Again, I am not disposed to lay the stress which the defenders do upon the language in which the codicil recalls the bequest to Mr George Burnett. No doubt the bequest recalled is described as 'the bequest made by me therein to him of the share of the residue of my estate, being one-third thereof.' But it is, I suppose, certain that the recall applied to the whole interest bequeathed to the deceased. Had Mr George Burnett been alive, and had it been desired in surviving to substitute his wife in his place, the language of the codicil would or might have been just the same, and yet I think it would in that case have been difficult to contend that Mrs Burnett should get the original share, while Mr Burnett should remain entitled to the share which accrued on his brother's death. I think therefore it is not doubtful that the words of recall cover the whole bequest, and that being so, it appears to me that the words which follow, and by which the pursuer is instituted, must be read in the same sense.

"I shall therefore grant decree in terms of the summons. . . ."

¹ Henderson v. Henderson's Trustees, Jan. 9, 1890, 17 R. 293; cf. McCulloch's Trustees, May 14, 1892, 19 R. 777.

way, and accurately described the amount of residue which George Burnett would have taken, both at the date of the codicil and also at the date of the death of the testatrix. The only inaccuracy in the description lay in the fact that the third was capable of expanding according to circumstances into something larger. The language of the codicil was inaccurate in other respects, *e.g.*, in describing the bequest as a "share of the residue," whereas it was only a share of the interest of the residue, but complete accuracy was not to be looked for in a loosely drawn deed of the kind. The inaccuracy of describing the pursuer's share as "one-third" did not amount to *falsa demonstratio* so much as to imperfect description, but even if it did, the Court would give effect to the obvious meaning of the testator.¹

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LORD PRESIDENT.—I think the Lord Ordinary is right. The words of recall, which are somewhat superfluously introduced, must be read as relating to what follows, but the words of bequest are contained in the words "I ordain my trustees to pay over the said share which would have fallen to the said George Burnett, had he not predeceased me, to Mrs Alice Stuart or Burnett, his widow."

In the first place, I think Mr Mackay is right in saying that the words which purport to be a recall of the prior bequest import a total recall,—that is to say, the theory on which this lady finds it necessary to recall the provision made in the settlement is that she wants to clear the ground of the bequest to her brother George Burnett. Then it is to be observed that the thing recalled is somewhat loosely described as "a share of the residue" instead of "a share of the income of the residue," and that prepares one for the rest of the codicil not being expressed with complete accuracy of definition. Then we find that the testatrix, dealing with the bequest to her brother George of a share of the residue, puts in the words "being one-third thereof." I think the argument of Mr Mackay is sound, that these words are merely descriptive of the right which the testatrix was clearing out of the way, and it is to be noted that at the time when she was writing, and at the date of her decease, the amount quite accurately described the amount of George's share, because the decease of the other brother had not then taken place, and George's share was therefore one-third.

When, then, we go over the various points in the description of this bequest, it appears to me that the sound view is that the testatrix, having in mind and dealing with the bequest made to her brother George, which at the time was a bequest of one-third of the yearly interest of the residue, gives that to his widow. I do not think it necessary to say that the words are inaccurate—they are rather inexhaustive, but it appears to me sufficiently clear that the gift to George Burnett's widow is made to square with the lapsed gift to her deceased husband.

As regards the plea of "all parties not called," the limitation in the summons makes it impossible that our judgment should be *res judicata* against the testator's nieces.

LORD ADAM.—The language of this codicil is inaccurate, and requires construction. In the first place, the testatrix says that she recalls the bequest

¹ Macfarlane's Trustees v. Henderson, &c., Dec. 3, 1878, 6 R. 288; Forbes' Trustees v. Forbes, Jan. 13, 1893, 20 R. 248; Whitfield v. Clemment, 1816, 1 Merivale, 402; Theobald on Wills, p. 94.

No. 204. made to her brother George, and that is an inaccurate way of speaking, because the bequest to her brother had lapsed, and a lapsed bequest requires no recall. Then she describes the bequest to George as a share of the residue, and that is, strictly speaking, inaccurate, because it is not a share of the residue with which she is really dealing, but a share of the revenue of the residue.

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All this shews that the words of bequest must receive construction, and I do not entertain any doubt that the intention of the testatrix was just to substitute the wife for the husband. When she says that in consideration of her brother George's death she recalls the bequest made to him, I have no doubt that she intends to deal with the lapsed bequest and nothing else, and having so dealt with it she ordains her trustees—leaving out the words “being one-third thereof”—to pay over the said share, which was in fact a third of the yearly interest of the residue with its incidents,—that is to say, its capacity for becoming more. At the date of the codicil and the death of the testatrix it was a third.

LORD M'LAREN.—I agree substantially in the views expressed by your Lordships, but although it is immaterial I wish to say that I am not sure that I concur with the observation made by Lord Adam that the testatrix is inaccurate in saying that she recalls the bequest which she had previously made. If there was any inaccuracy it was only in using the equivalent word “recall” in place of the word “revoke,” because I think that when in consequence of the death of one of the original objects of a testator's bounty it is desired to put some other person in his place, it is quite correct conveyancing, and conduces to clearness, to begin by saying, “I revoke the bequest.” It has this advantage, that however expressed, it always corrects the testamentary bequest by stating what part of it has been displaced in order to make room for the bequest which the testator is about to bring in.

I agree in other respects that this codicil is not strictly accurate in its language. “A share of the residue” is not what is given, and this cannot be said to be merely an abbreviated mode of dealing with a share given to the mother in liferent and the family in fee, because that is not the scheme of the provision. So we begin with a codicil which is not expressed in strictly accurate terms. But if it had provided simply that the liferent share intended for the brother of the testatrix should go to his widow, or had bequeathed to the widow “the liferent of a third of the residue given to my brother George,” I would have held without difficulty that no right of accretion was carried by a bequest in these terms.

My first impression of this case differed from the view taken by the Lord Ordinary, but my difficulty has been entirely removed by considering, first, what was pointed out by Lord Kinnear during the discussion, that the reference to the share given to George as a third was descriptive of the interest which he would have taken as at the date of the codicil; and second, that the bequest does not stop there, but goes on,—“I ordain my trustees to pay over the said share which would have fallen to the said George Burnett, had he not so predeceased me,” to his widow. These are very comprehensive words, and although it is true, as is pointed out by the Lord Ordinary, that in some cases a bequest to children of the share which their parent would have taken has been held not to cover accreting shares in which the parent would have participated, that has been because the general scheme of disposition otherwise shewed that such was not the intention of the testator. In the present case the words are

adequate to include the whole right and interest which George Burnett would have taken had he survived. No. 204.

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LORD KINNEAR.—I also agree with the Lord Ordinary for the reasons his Lordship has given, and for the further reasons which your Lordships have added. *Burnett v. Burnett's Trustees.*

THE COURT adhered.

SCOTT MONCRIEFF & TRAIL, W.S.—DALGLEISH, GRAY, & DOBBIE, W.S.—Agents.

THE COMMISSIONERS OF THE CALEDONIAN CANAL, Pursuers (Reclaimers).— No. 205.

J. Wilson.

THE COUNTY COUNCILS OF INVERNESS AND ARGYLL, Defenders
(Respondents).—*Johnston—Graham Stewart.*

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Company—Railways and Canals—Whether “company” includes commissioners—Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), secs. 20 and 21.—Section 21 of the Valuation of Lands (Scotland) Act, 1854, enacts that “The Assessor of Railways and Canals under this Act shall, on or before . . . inquire into and fix *in cumulo* the yearly rent and value in terms of this Act of all lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking.”

Held (rev. judgment of Lord Stormonth-Darling) that the words “canal company” in the section applied to a body of statutory commissioners who were charged with the administration of a canal when the Act was passed.

ON 29th January 1894 the Commissioners of the Caledonian Canal, incorporated by Act 11 and 12 Vict. c. 54, entitled “an Act for incorporating the Commissioners of the Caledonian Canal, and for vesting the Crinan Canal in the said Commissioners,” brought an action against the County Councils of Argyllshire and Inverness-shire, *inter alia*, for declarator that the two canals formed part of one undertaking within the sense and meaning of section 21 of the Valuation of Lands (Scotland) Act, 1854* (17 and 18 Vict. c. 91), and fell to be valued and assessed as one subject. *1st Division. Lord Stormonth-Darling.*

The pursuers averred that in 1848 the Caledonian and Crinan Canals were vested in them for purposes of administration and management by the incorporating Act, and subsequently by the Act 23 and 24 Vict. c. 46, and that from 1848 down to the present time the two canals had been managed by them as one undertaking.

The comparing defenders, the County Council of Argyllshire, denied that the two canals formed one undertaking, and averred that the pursuers were neither a railway nor canal company within the meaning of the 21st section of the Act of 1854, their powers *quoad* the Crinan Canal, being merely administrative. The canal, therefore, fell to be assessed as part of the county, and not under section 21 of the Act.

The defenders pleaded, *inter alia*;—(3) The pursuers being neither a

* The Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), sec. 20, enacts,—“In order to the making up of valuations and valuation-rolls of lands and heritages in Scotland belonging to or leased by railway or canal companies, and forming part of the undertakings of such companies, it shall be lawful for Her Majesty to appoint, as occasion requires, a fit and proper person to be Assessor of Railways and Canals for the purposes of this Act.”

Section 21 enacts that “the Assessor of Railways and Canals under this Act shall on or before the 15th day of August . . . inquire into and fix *in cumulo* the yearly rent and value in terms of this Act of all lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking.”

No. 205. canal nor a railway company within the meaning of the 21st section of the Valuation Act, 1854, the declaratory conclusions fall to be dismissed.

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(4) The canals in question being separate undertakings in the sense and for the purposes of the Valuation Acts, these defenders should be assoltized from the declaratory conclusions of the summons.

On 23d June the Lord Ordinary (Stormonth-Darling) assoltized the comparing defenders from the conclusions of the summons.*

* "OPINION.—The Commissioners of the Caledonian Canal desire by this action to establish that the Caledonian Canal and the Crinan Canal, which are vested in them for public purposes, both form part of their undertaking within the sense and meaning of section 21 of the Valuation Act of 1854, and ought to be valued and assessed as one subject, with the result that the valuation would be *nil*, the loss on the Caledonian Canal more than extinguishing the profit on the Crinan Canal.

"The defenders dispute the proposition that the two canals form one undertaking, but they state another plea which requires to be considered *ante omnia*, because it strikes at the root of the declaratory conclusions of the summons. It is to the effect that the 21st section of the Valuation Act applies only to lands and heritages belonging to or leased by railway and canal companies, and that the pursuers are neither the one nor the other.

"I have given anxious consideration to this plea, because, if well founded, it unsettles the practice, which has long prevailed, of having these two canals valued by the Assessor of Railways and Canals, and also because one cannot help seeing that it must lead to highly inconvenient consequences. If a subject like a canal, running through a succession of assessment areas, is to be valued by the ordinary assessor of the county, instead of by the Assessor of Railways and Canals, the valuation must be made without the aid of all those elaborate provisions of the Act of 1854, and amending statutes, which have been enacted for the guidance of the special officer. The inconvenience in this particular case is somewhat diminished by the fact that the Caledonian Canal is situated wholly in the county of Inverness, and the Crinan Canal wholly in the county of Argyll. But there are other cases where the inconvenience would be very great. By section 23 of the statute water companies and gas companies, and any other companies having continuous lands and heritages, liable to be assessed in more than one parish, county, or burgh, may elect to have their assessment made by the Assessor of Railways and Canals, and I was informed at the debate that this privilege had been largely taken advantage of. Now, if water-works, like the Glasgow Water-works, which run through several counties, cannot be assessed in this way because they happen to be vested in commissioners and not in a company, it is obvious that they cannot get the benefit of the uniform mode of valuation provided for other undertakings of a similar description, and that the assessors of each of the counties through which they pass may all differ as to the proper mode of valuation. Moreover it is plain that the reason for having a special officer and a special mode of valuation for all such undertakings had nothing to do with the kind of body in which they happened to be vested, but arose entirely from their having a continuous line of property running through a succession of assessment areas. I have therefore had every disposition to come to the conclusion that Canal Commissioners might be held to be included under the phrase 'Canal Companies.'

"I have, however, found myself unable to come to that conclusion, consistently with what I believe to be the true principles applicable to the construction of statutes. The pursuers are not a company in any legal sense. They were in existence as a body of statutory commissioners when the Act of 1854 was passed. The Act omitted to notice them, and I must conclude either that the omission was intentional, or that it was accidental. I believe that it must have been accidental; but even in that case it is, I think, beyond the function of a Court of law to supply the omission. That must be done by the Legislature itself.

"A question not unlike the present arose in England in 1870, on a construc-

The pursuers reclaimed, and argued;—It had been decided in 1872¹ No. 205. that these canals were liable to assessment. That being so they fell to be assessed by the special officer appointed by the 21st section of the Act of 1854. The Lord Ordinary had needlessly narrowed the meaning of the word “company” as occurring in that section. It was not confined to a joint stock company engaged in trade, but must be construed in its largest ordinary or popular sense as an association of persons concerned in some common object—a definition which would include a body of commissioners such as the pursuers.²

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Argued for the defenders;—The Lord Ordinary’s construction of the word “company” was right. It must be construed in its ordinary technical and legal sense as an association engaged in trade. This definition is not applicable to the pursuers, who were merely administrators, and could not make gain out of the undertaking.

LORD PRESIDENT.—The Lord Ordinary has lucidly set out the considerations which predisposed him to come to the conclusion that Canal Commissioners may be held to be included in the phrase “canal companies.” Those are strong considerations, and I think they are well founded both in the facts which they narrate and the principle which they presume. But his Lordship has felt himself constrained to decide in an opposite sense owing to the limited interpretation which he places on the word “companies.”

Now, it is to be observed, that we are considering an Act passed in the year 1854, and the question we have to determine is, what is meant not by the word “companies” now, but by the words “canal companies,” and I would interpolate “in Scotland, in 1854.” To take the word “company” by itself, I think it will be found that that word has acquired a rather more limited interpretation now than it possessed forty years ago. But Mr Stewart very frankly admitted that if you are to take the word “company” even now in the ordinary or popular sense, that would include such a body as “commissioners.”

I think that is a perfectly fair and accurate concession. I think that the word “companies,” as ordinarily used, does not now, and did not then, limit the mind of the reader to companies formed for trading purposes, but includes

tion of section 55 of the Local Government Act of 1858, which enacts that the occupier of any land used only as a railway constructed under the powers of any Act of Parliament for public conveyance shall be assessed in the proportion of one-fourth part only of its net annual value. The question was whether this provision could be construed so as to cover the case of a railway originally constructed without any Parliamentary powers, and afterwards sold to a railway company under an Act of Parliament, and used for public traffic under the general Railway Statutes. The Court of Queen’s Bench decided that it could not, and Lord Chief-Justice Cockburn, in giving judgment, said,—‘I cannot see my way to putting such a construction upon section 55 as would meet the equity of the case, and include a railway like the present, though I have no doubt the Legislature would have drawn the clause so as to embrace the present case, had such a case been present to their minds.’ The reference is *North-Eastern Railway Company v. Leadgate Local Board*, L. R., 5 Q. B. 157.

“It follows that the Crinan Canal must, in my opinion, be valued by the ordinary Assessor for Argyllshire, and that the defenders are entitled to absolver.”

¹ Commissioners of Supply for Argyll v. Commissioners of Caledonian Canal, March 19, 1872, 10 Macph. 639.

² Smith v. Anderson, 1879, L. R., 15 Ch. Div. 247; Hughes v. Overseers of Chatham, 1843, 5 Manning & Granger, 54, per Ld.-J. Tyndal, p. 80.

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any organisation of men who are concerned in some common purpose. But then, as I have said, we need to consider what was meant by the Legislature in 1854 by "canal companies," and as the Act applies to Scotland alone, by "canal companies in Scotland." Now, we are told that at that date there were five canals in Scotland. Of these, two were those now in question—the Caledonian and Crinan Canals—and these two large undertakings were in the hands of those self-same Commissioners incorporated in 1848. The other canals can hardly be said to compare, although three in number, in importance with the two which I have named. That leads us to this curious result that if the argument of the respondents in this reclaiming note be right, the Legislature intended, when prescribing the mode of valuation and the officer to be engaged in the valuation of canals, to have made this distinction, that some of the canals were to go to the Assessor of Railways and Canals, and other canals were to remain under the County Assessor.

It had been found that there were manifest inconveniences in the original way of getting canals valued, and those inconveniences applied quite as much to canals in the hands of commissioners as to canals in the hands of companies. Now, the difference in the proprietorship between those two is apparently irrelevant to the considerations which made a change in 1854 expedient and advisable. Therefore I think that it is an exceedingly hard contention which is urged upon us by the respondents in the reclaiming note, that the Legislature in taking the word "companies" deliberately intended to make that artificial and unreasonable distinction between the two bodies.

It was suggested as a last resort by Mr Stewart that it might be intended to confer a favour upon canals as trading companies by transferring the valuation to the Assessor of Railways and Canals. That there should be any favour in that operation is not manifest, and does not appear on the face of the Act of Parliament. And what is more, I am at a loss to conceive why undertakings vested in the hands of commissioners should be put to a disadvantage over undertakings vested in the hands of trading companies. In short, to assign any reasonable ground to the limitation which is proposed to be effected seems to me entirely to fail. Then it is said, "Oh, but we are not to enlarge an exception." I do not think that any principle of that kind applies to this case; so far as can be discovered it is the nature of the undertaking itself which led to a change in the mode of valuation, and it is rather to create an exception to say that canals held by statutory commissioners are not to be valued in the same way as other canals. Therefore, all these things considered, it seems to me that the argument of the respondents fails, and that there is no reason to confine the word "companies" to that very narrow and artificial limitation. I am glad to say that in reversing the Lord Ordinary's interlocutor we are giving effect to the conclusion which his Lordship would fain have arrived at, and it seems to me to be the one most consonant with the manifest purpose of the Act and also with its real object.

LORD ADAM.—I am of the same opinion. The question arises under the 21st section of the Valuation Act of 1854, which provides that the Assessor shall inquire into and fix the rate or value of all lands and heritages in Scotland belonging to railway and canal companies. It is argued to us—and the view is supported by the Lord Ordinary—that these words "belonging" to a railway

or "canal company" must be read in a restricted and limited sense. It is said **No. 205.**
 that this applies only to railways and canals which are the property of companies in the sense of being engaged in trade, but not to canals or railways which are vested in the hands of commissioners. The distinction between the two is no doubt very wide, because, as was pointed out, commissioners holding for a public purpose have no personal interest in what is called the stock, and make no gain. And on the other hand there are companies which, of course, exist wholly for gain.

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Now, we know of our own knowledge, and it has been brought out at the bar, that ever since the passing of the Valuation Act of 1854 canals, railways, water-works, and all those undertakings which are now vested in statutory commissioners, have all been treated as falling under the provisions of the Act. It was never hinted that the one being vested in directors and the other in commissioners would make any distinction. I can see no reason why those principles of valuation which are referred to as being proper and effective in the case of railways and canals belonging to private companies should not equally be applied to railways and canals when they are in the hands of commissioners. There is no suggestion made why there should be a distinction drawn in those two cases. Now, it is in that state of circumstances that we come to consider this question, and with this further admission, as your Lordship pointed out, and which I think is a very proper admission, that the word "company" in its ordinary and popular sense is quite sufficient to include commissioners as well as directors of other companies. Why should not we give effect to that? I agree with your Lordship that we should, and therefore I think that the Lord Ordinary's interlocutor should be recalled.

LORD M'LAREN.—This question arises in an action brought for the purpose of determining whether the undertaking of the Caledonian and Crinan Canals ought to be valued separately or as one subject. A question has been raised by the County Council of Argyllshire to the effect that the valuation of these public undertakings does not fall within the series of clauses beginning at the 20th of the Lands Valuation Statute of 1854.

The ground of the objection is, that according to the respondents' contention the Commissioners in whom are vested the management of these undertakings do not constitute a company in the sense of the Act.

It is important to notice, I think, that in the first and leading clause, the 20th, the word "company" is only used as part of the description of the undertaking, because the clause begins "in order to the making up of the valuation-rolls of lands and heritages in Scotland belonging to or leased by railway and canal companies." That is a familiar way of describing not only the whole railways and canals in Scotland, but the whole of the undertakings associated with these subjects.

Now, I agree with your Lordship that the word "companies" is to be taken in the ordinary and not in a technical meaning. In its most extended meaning the word "company" is an association of persons for a lawful purpose; and it has also received a more restricted meaning by which is understood a body incorporated by statute for trading purposes. But according to the usage in Scotland there does not seem to be any fixed term for describing an association of persons for trading or public purposes. In the case of profes-

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sions we have the association of professional persons variously described as faculties, societies, and colleges, these just being the English translation of the well-known terms of description of corporations and private societies; and the usage of the country admitting a varied phraseology in the description intended to be taken by companies, whether in trade or not in trade.

I think it is impossible, consistently with any sound reading or construction, to confine the meaning of this word "company" to trading companies, when we see that such a limited meaning is not consistent with the purposes expressed in the clauses establishing a new form of valuation of subjects which extend over more than one parish or county.

Then the meaning of a word in an Act of Parliament, I think, must be fixed just like the meaning of a word in a contract, or in any other written instrument which the Court may be called upon to construe. One of the best guides in ascertaining the meaning is the contemporary use by persons interested in such undertakings when the Act was passed, the word used being a word of popular signification. I should think that the uniform practice extending over a period of more than forty years under which these public undertakings not carried on for profit had been valued by the Assessor of Railways and Canals is very strong evidence of the meaning attributable to the words at the time when the Act was passed. I agree with your Lordship in thinking that the existing method of valuation ought not to be disturbed.

I think the Lord Ordinary has stated the construction in a way to which no exception can be taken; but his Lordship has not given sufficient weight to the practice, or rather to the history of the past usage following upon the Act.

LORD KINNAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the third plea for the defenders, and remitted to the Lord Ordinary to proceed in the cause.

JAMES HOPE, W.S.—M'NEILL & SIMS, W.S.—Agents.

No. 206.

July 19, 1894.
Soutar v.
Carrie.

CHARLES SOUTAR, Petitioner.—*Strachan*.
JAMES CARRIE, Respondent.—*Findlay*.

Parent and Child—Custody—Repayment of costs of upbringing of child—Custody of Children Act, 1891 (54 Vict. c. 3), sec. 2.—The Custody of Children Act, 1891, sec. 2, enacts that "if at the time of the application for a writ or order for the production of the child the child is being brought up by another person . . . the Court may in its discretion, if it orders the child to be given up to the parent, further order that the parent shall pay to such person . . . the whole of the costs properly incurred in bringing up the child, or such portion thereof as shall seem to the Court to be just and reasonable, having regard to the circumstances of the case."

In a petition by a father for the custody of his daughter, six years of age, the respondent, the child's maternal grandfather, stated that he had brought up the child from its birth, and that he was willing to deliver up the child on payment of £85, which he had expended on its aliment.

In pronouncing an order for delivery of the child the Court, considering that the petitioner was in humble circumstances, and that the respondent had failed to shew that a larger sum was reasonable, ordained the petitioner to pay to the respondent £15, in monthly payments of 5s.

IN December 1893 Charles Soutar, bootlicker, Edinburgh, presented a petition to the Court for the custody of his daughter, Annie Carrie Soutar, about six years of age, then living with James Carrie, dairyman, Arbroath, her maternal grandfather. No. 206.
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James Carrie lodged answers, in which he, *inter alia*, stated that the child had been born in his house, and had been brought up by him; that the child was extremely delicate, and had required exceptional care and treatment, and that the sum expended by him on her maintenance exceeded £85. He therefore craved that he should not be called upon to deliver up the child until he had received payment from the petitioner of the outlay expended by him, or that at anyrate the order of delivery should be made conditional on payment or consignment of the amount of his claim. 1ST DIVISION.

It was explained at the bar that the petitioner was a man of limited means, but that he was willing to pay £15 in instalments of 5s. a-month if the petition were granted.

The respondent was unable to state particularly how the sum of £85 had been expended.

LORD PRESIDENT.—The section assumes that, where an order is made for payment, an order for delivery of the child to its natural guardian is being pronounced at the same time.

The respondent asks us to order payment of £85, and he is met by an offer of £15 to be paid in instalments of 5s. a-month.

We have not got the material here, and the respondent is unable to give us material enabling us to arrive at a decision of what larger sum would be reasonable. We are entitled to take into account the position and income of the person who is called upon to make payment, and in the circumstances I think we should pronounce an order for payment of £15, not because that is the sum offered, but because the respondent has not supplied us with anything tangible or definite leading us to arrive at a different conclusion.

LORD ADAM.—I concur.

LORD MACLAREN.—I do not read the section of the Act as providing that the whole sum expended in aliment must necessarily be given, but that a sum should be awarded as compensation to the person deprived of the custody of the child. The circumstances and position of the person liable to make the payment should be taken into account, and I agree with your Lordship as to the amount, and on the same ground, namely, that nothing has been said shewing that a larger sum ought to be awarded than the sum offered.

LORD KINNEAR.—I agree.

THE COURT pronounced this interlocutor:—"Grant the prayer of the petition: Find that the petitioner is entitled to the custody of Annie Carrie Soutar, the child of the marriage between him and Annie Carrie mentioned in the petition, and decern and ordain James Carrie, dairyman, 66 Abbey Park, Arbroath, forthwith to deliver up the said child to the petitioner or to those having his authority, and further decern and ordain the petitioner to pay to the respondent the said James Carrie the sum of £15 sterling at the rate of 5s. per month until the sum of £15 shall have been paid."

T. F. WEIR & ROBERTSON, S.S.C.—DUNCAN SMITH & MACLAREN, S.S.C.—Agents.

No. 207. MRS AMELIA DOWIE AND OTHERS, Petitioners.—*Johnston—D. Dundas.*

MRS AMELIA VALENTINE HAGART, Respondent.—*Jameson—Salvesen.*

July 19, 1894.
Dowie v.
Hagart.

Judicial Factor—Averments of facility and undue influence—Compelency—Marriage-contract—Provisions to children.—A petition for the appointment of a judicial factor on the estate of a widow eighty-six years of age was presented by all her children, except her youngest son. The petitioners stated that upon a sound construction of their parents' marriage-contract and other deeds the children of the marriage were entitled to an equal share of their mother's estate upon her death, and that their mother was not entitled to defeat their rights by gratuitous alienation; that their mother owing to her great age and impaired health was facile and unable to resist the importunities of her youngest son, and that in consequence she had made advances to him largely in excess of his just share, and that the estate was in danger of being wholly dissipated by her. They did not aver that she was incapable of managing her affairs apart from undue influence.

The widow lodged answers, in which she denied the averments as to her health and facility and as to the conduct of her youngest son, and stated that her estate belonged to her absolutely, and that she was entitled to dispose of it as she pleased.

The Court *dismissed* the petition in respect (1) that it was not clear upon the deeds what the rights of the petitioners were, and that the petition was not an appropriate process for their ascertainment; and (2) that the other averments as to the widow's liability to undue influence were not relevant to support an application for the appointment of a judicial factor.

Observations (per Lord M'Laren) on the circumstances in which the Court would appoint a judicial factor.

Observations (per Lord M'Laren and Lord Kinnear) upon the effect of a conveyance in a marriage-contract of property which was to belong to one of the spouses at the date of his or her death, and upon *Wyllie's Trustees v. Boyd*, July 10, 1891, 18 R. 1121.

1ST DIVISION.

ON 21st June 1894 a petition was presented for the sequestration of the estates of the deceased Mr James Valentine Hagart and of his widow, Mrs Amelia Straton or Valentine Hagart, and for the appointment of a judicial factor thereon.

The petition was presented by Mrs Amelia Dowie and others, the whole children of the marriage of Mr and Mrs Hagart with the exception of Francis the youngest son.

The petitioners stated that Mr Hagart died on 14th August 1869, and that his trustees, including Mrs Hagart, proceeded to administer his estate, which consisted, *inter alia*, of improvement expenditure on the entailed estate of Glendelvine belonging to Mrs Hagart; that this estate was subsequently disentailed (and afterwards sold), with consent of the eldest son John, now deceased, and of the two next heirs, two of the petitioners, who agreed to accept much less than the actuarial value of their interests on condition that the equal division of the father's and mother's estates among the family, provided for by the marriage-contract and by their father and mother's mutual settlement, should be fixed and irrevocable; that in consequence of this agreement it became unnecessary to separate the two estates. "The whole has been treated as one joint estate, and managed as such, and Mrs Hagart has enjoyed the whole income, Mr Hagart's trust being practically allowed to remain in abeyance."

The petitioners further averred (art. 11) that upon a just construction of their parents' marriage-contract and of their mutual settlement of 1861 the whole children of the marriage had a *jus crediti* in the estate of their father to the effect of entitling them or their representatives

to receive payment of the capital thereof in equal shares upon the death of their mother, subject only to her proper liferent. Further, that upon a sound construction of these deeds,* *et separatim*, in respect of the transaction and agreement with reference to Glendelvine, the whole children "had and have a right to receive at the death of their mother, in equal shares, the capital of her estate, and Mrs Hagart was and is not entitled to alienate or dissipate the said capital by gratuitous gifts *inter vivos*, and particularly by gratuitous gifts *inter vivos* to one of her said children, in fraud of the said deeds and of the said transaction and agreement, to the prejudice of the petitioners, as the other members of her family."

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The petitioners further stated (art. 13) that their mother was over eighty-six years of age; that her son Francis "has for some years past, and at all events from 1888 onwards, acquired a dominating influence over his aged mother, which she has been and is quite unable to resist, and which he has repeatedly exercised to his own pecuniary advantage. Owing to her great age and impaired health she is and has been, during the said period, facile in mind and completely subservient to the will of her said son, and unable to resist his importunity, or to exercise an independent will or judgment when he is present, or in regard to affairs in which he is concerned. . . . Mrs Hagart's said weakness and facility, and the domination and ascendancy of her said son over the mind and will of his mother, have rendered her incapable, and will in the future render her still more incapable of resisting his demands, however exorbitant, unjust, and unreasonable."

The petitioners further stated that Francis had already received from his mother sums of money largely in excess of the amount to which his just share could possibly amount.

Answers were lodged for Mrs Hagart, in which she denied the material averments in the petition. The last article was as follows:—"The respondent submits that the present application is incompetent, and that the statements made in support of it are entirely irrelevant. She does not claim to be entitled to expend any part of the estate which belonged to her deceased husband; but in point of fact no such estate exists, with the exception possibly of the house, which she is entitled to enjoy in liferent under contractual provision in her contract of marriage. As regards her own estate, the respondent claims that she cannot be deprived of her right to administer and to dispose of same in the manner which she considers best. She therefore submits that the petition should be refused."

Argued for the petitioners;—Although there was no precedent for the present proceedings, the petitioners' interests must, in the peculiar circumstances averred, be in some way protected, and the appointment craved was within the powers of the Court in the exercise of its equitable jurisdiction. (1) If it could be shewn that by the marriage-contract, mutual disposition, and subsequent transactions, Mrs Hagart had bound herself to an equal division of her estate among her children at her death, then it seemed to follow that she could be restrained from defeating her obligation by making *inter vivos* gifts to her youngest son to the dis-

* By the marriage-contract Mrs Hagart assigned, disposed, conveyed, and made over to and in favour of Mr Hagart in liferent, in the event of his surviving her, and to the child or children of the marriage, whom failing, to her own nearest heirs and assignees in fee, All and Sundry other lands and heritages, debts, sums of money, heritable and moveable, real and personal, and all goods and gear of whatever denomination, including household furniture and plenishing that might belong to her at the time of her death.

No. 207. July 19, 1894. *Dowie v. Hagart.* appointment of the just expectations of her other children. The terms of her obligation under the marriage-contract were that she should at her death divide among her whole children equally, share and share alike, such estate as might belong to her at the time of her death. Gifts *inter vivos* were in fraud of this obligation.¹ [LORD M'LAREN.—The cases of *Buchanan's Trustees*,² *Macdonald*,³ and *Wyllie's Trustees*,⁴ settle that where a parent has by marriage-contract settled the estate "then belonging or which might belong to him at the time of his death" upon his children, he is free to dispose of property acquired by him in the interval.] These cases would only seem to shew that marriage-contracts may be so worded as to admit of gratuitous alienation during marriage by a parent to a third party of property acquired during marriage. They did not support the view that a parent could, as in the present case, defeat by *inter vivos* gifts the rights of children who had a protected *spes successionis* in his estate. Lord Curriehill's *dictum* in *Champion's*⁵ case was not borne out by the authorities. Then again, the provisions in the marriage-contract here in the case of the wife were in marked contrast to those in the case of her husband. She had bound herself to equal division among her children without reservation of any power of appointment. In the disposition of 1861 the subject of her obligation was an equal division not only of what she might possess at her death, but of what then belonged to her. It bore to be revocable by either spouse *quoad* his or her estate, but it was a mutual deed, and the death of the husband barred the widow from revoking. She was also barred from interfering with the equal division of her estate at her death by the transactions and agreement when the estate of Glendelvine was sold. The petitioners were entitled to have her restrained from gratuitously alienating her estate, in which they had a *jus crediti*. (2) Apart from the deeds, they were entitled to the remedy sought upon their averments as to the respondent's facility and the dominating influence exercised over her by her son. The averments on this matter were relevant, and, if established, clearly entitled them to the remedy. There was no room for the appointment of a curator bonis. A person facile and subject to undue influence was not necessarily a person who could be cognosced or to whom a curator bonis could be appointed.⁶ It was not essential to establish general facility, or such as would amount to incapacity to manage one's own affairs, but only facility with regard to the particular matter which was under reduction, or with regard to the particular individual who was exercising a dominant influence.

¹ Fraser on Husband and Wife, vol. ii. p. 1369; Edmonston v. Edmonston, July 20, 1706, M. 3219; Campbells v. Campbells, Dec. 16, 1738, M. 13,004; Ponton v. Ponton, Feb. 14, 1837, 15 S. 554; Arthur and Seymour v. Lamb, &c., June 30, 1870, 8 Macph. 928, 42 Scot. Jur. 542; Greenoak v. Greenoak, Jan. 12, 1870, 8 Macph. 386, 42 Scot. Jur. 178; Gillon's Trustees v. Gillon *et al.*, Feb. 8, 1890, 17 R. 435; Champion, &c., v. Duncan, &c., Nov. 9, 1867, 6 Macph. 17, per Lord Curriehill, p. 22, 40 Scot. Jur. 17; Moir's Trustees v. Lord Advocate, Jan. 7, 1874, 1 R. 345; Lowden's Trustees v. Lowden, &c., June 1, 1881, 8 R. 741; Cowan v. Young and Reid, Feb. 9, 1869, M. 12,942; Cairns v. Cairns, Jan. 31, 1705, M. 12,862; Frazer v. Frazer, Feb. 13, 1677, M. 12,859.

² Buchanan's Trustees v. Whyte, Feb. 25, 1890, 17 R. (H. L.) 53.

³ Macdonald v. Scott, L. R. [1893], App. Cases, 642, per Lord Watson, p. 655.

⁴ Wyllie's Trustees v. Boyd, July 10, 1891, 18 R. 1121.

⁵ Champion, &c., v. Duncan, 6 Macph. 22, *vide supra*, note 1.

⁶ Morrison v. Maclean's Trustees, Feb. 27, 1862, 24 D. 625, 34 Scot. Jur. 311.

Argued for the respondent;—(1) The petitioners' averments were irrelevant. Under the deed founded on by them there was no *jus crediti* in her estate secured to them. There was nothing in the marriage-contract to deprive the respondent of her power of dealing with her own estate as she pleased. She was *fiar* now, and could act accordingly, although she was ultimately bound to leave such estate as happened to belong to her at her death in a particular way. A *fiar* could disregard a prohibition against alienation.¹ The mutual deed was testamentary, and she could defeat it by another deed if she chose.² The averments as to transactions with the petitioners were irrelevant. (2) The application was incompetent. It was not averred that the respondent's mental capacity was impaired by age, so that she was incapable of managing her own affairs, in which circumstances the proper remedy would have been the appointment of a curator bonis. There was no precedent for the appointment of a judicial factor in such circumstances.

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LORD ADAM.—This is a petition for the sequestration of the estates of the now deceased James Valentine Hagart and of Mrs Amelia Straton or Valentine Hagart, and for the appointment of a judicial factor to receive the income of these estates. The petitioners are the whole of the children and the representatives of the children of Mr and Mrs Hagart except one, the youngest son Francis David Valentine Hagart, and the respondent is Mrs Hagart herself. Now, the estates which it is sought to sequester, it will be observed, are two estates. The first mentioned is the estate of the late Mr James Valentine Hagart, and the second is the estate of Mrs Hagart herself. With reference to the latter of these two estates it will be observed that Mrs Hagart has all along—certainly from the death of her husband in 1866—been in the entire management and sole possession and disposal of the estate—that is to say, for some thirty odd years—and it is proposed that her estate should now *de plano* be sequestered, and the management and disposal thereof be taken out of her hands. The immediate grounds upon which this is sought are set forth in the 13th article of the petition. It is there said, stated shortly, that Mrs Hagart is a very old lady, now nearly eighty-seven years of age; that she is weak and facile and easily imposed upon; that her youngest son Francis is a man of loose and disorderly habits, and that taking advantage of the dominating influence which he has acquired over her, he has obtained from her, through threats, fraud, and misrepresentation, large sums of money, which large sums of money are, it is said, much more than would be his proper share of the estates of his father and mother, because these estates are to be equally divided among the children. That is the immediate ground for making this application.

Now, it will be observed that that proceeds upon the footing that, apart from her being tampered with, she is in a perfectly able and fit state of mind to manage and administer her own estate. For if she had not been so—if there had been any averment that she was unable from her great age or otherwise to properly manage and administer her estates, the proper remedy would not have been the remedy which is sought to be adopted here. The proper remedy would have been the appointment of a curator bonis to her, who would in that case have administered and managed the estate for her benefit, just as she had been managing and administering it for her own benefit in the past. There is

¹ Mickel's Judicial Factor v. Oliphant, Dec. 7, 1892, 20 R. 172.

² Mitchell v. Mitchell's Trustees, June 5, 1877, 4 R. 800.

No. 207. no such application here, and we were told that there were no grounds for such an application, because it was impossible to say that she was not in a perfectly competent state of mind to manage and administer her own affairs, apart from undue influence.

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Now, I must say that I think that a petition for the appointment of a judicial factor in such circumstances would be altogether incompetent. No authority for such a proceeding was mentioned to us, and I know of none. But it is said that there are special circumstances in this case which would lead to a different conclusion. The circumstances and all the deeds which raised the question are set forth at length in this petition, but I need not go through them in detail, because the results of them as maintained by the petitioners are set forth and condensed in the 11th article of the petition. And what is there set forth is this—that, upon a just construction of the various deeds, which I need not particularise, the children were entitled “to receive payment of the capital of these estates in equal shares upon the death of their mother, and subject only to her proper liferent of the same. Further, that upon a sound construction of the said deeds, *et separatim*, in respect of the said transaction and agreement and of the actings of parties narrated in articles 8, 9, and 10 hereof, the whole children of the marriage or their representatives had and have a right to receive at the death of their mother, in equal shares, the capital of her said estate, and Mrs Hagart was and is not entitled to alienate or dissipate the said capital by gratuitous gifts *inter vivos* to one of her said children, in fraud of the said deeds and of the said transaction and agreement.” It is said that if we do not give this remedy there would be no other; because, if proper means were not to be used against Mrs Hagart disposing of her property to this son Francis, it might be dissipated and could not be recovered. That may be so, but I would point out to your Lordships that these averments on the part of the petitioners are denied on the part of the respondent. On the contrary, the respondent’s counsel maintains stoutly that she is now and has been during the whole of her life, as she was entitled to be, the sole and unlimited fiar of her own property, and accordingly that is the question which is raised upon the construction of these deeds. One of the parties says that Mrs Hagart is unlimited fiar, and would be entitled to act on that footing till the day of her death, and that the petitioners will be entitled to a share equal or otherwise after her death of their father and mother’s estates, and, as I have said, the opposite proposition is maintained on the other side. Now, if it had been clear upon these deeds that the petitioners were right in their construction, and had acted upon that footing, that would have been an important matter; but we heard a long argument upon the subject, and all I need say at present is that the position of Mrs Hagart and the rights of her children are by no means clear; they are anything but clear. Now, it appears to me that a proceeding of this kind and in this shape is not a proper proceeding for settling incidentally these important questions. I think we must look to the existing state of possession, because Mrs Hagart has for the last thirty years had undisturbed possession and management of her own estate, which has always been in her own possession, management, and administration, and I certainly see no reason whatever, upon the suggestions which have been made, and a sufficient consideration of the deeds which passed between the parties to this case, for saying that Mrs Hagart is to be in this manner ousted from the possession which she has so long retained. I do not think that there

is any ground for disturbing her possession of the estate, and therefore I am of No. 207.
opinion that, so far as her estate is concerned, we should dismiss the petition.

But then, as your Lordships will see, there is the estate of her husband which July 19, 1894.
has been for thirty years and more mixed up and administered by her along with Dowie v.
her own. Her position in regard to it is not the same as in regard to her own. Hagart.
No doubt she has been in possession of it all along, but she is in possession of
it apparently by the consent and with the approval of the beneficiaries of the
estate, and of the trustees whom Mr Hagart appointed. In that way her posi-
tion with reference to this estate is different from her position with reference to
her own. I did not understand the petitioners to say that if we were to award
sequestration of the whole estates, both hers and his, they would desire a separate
appointment of a judicial factor over his estate. In fact I understood the con-
trary, and I also understood—but as to this I am not quite sure—that we were
informed that the surviving trustees have already taken possession in order to
vindicate that estate if necessary. In these circumstances I am of opinion that
we should pronounce no order unless we are told that there is a separate ground
for appointing a judicial factor on Mr Hagart's estate.

LORD M'LAREN.—The power which the Court has exercised, and as to which
there is no longer any doubt, that of appointing factors for the administration
of estates, is a very comprehensive power. It would certainly apply to any case
where there is an estate for which no owner can be found, or where the owner
is not capable of administering his estate, and it also applies to cases where there
is disputed possession, or where the owners are unable to agree in regard to the
administration of their estate, as sometimes happens in cases of joint ownership.
But whatever be the nature of the case which necessitates the appointment of a
manager by the Court, it is always in its nature an interim appointment. I do
not think that there is any case in which that power has been exercised unless
upon grounds which would eventually entitle the party for whose benefit the
appointment was made to a judgment in an ordinary action for vindicating the
property. I do not say that there may not be cases where the Court would
appoint a factor upon an estate which was subject to marriage-contract obligations.
We may suppose, for example, that a parent had bound himself by antenuptial
marriage-contract to convey certain lands to trustees in order that they might take
infetment in his lifetime, and thereby secure the estate to the heirs of the mar-
riage in such a way as would prevent it being carried off by the parent's creditors.
If that obligation were unfulfilled, and if there was a danger of the estate being
carried away or made over by gratuitous alienation, that would be a case where
an application for sequestration would deserve the most favourable consideration,
but the ground there would be that the children would have had a right by
action in which they would eventually succeed, according to the hypothesis of
the case, in compelling the parent to grant and deliver a conveyance to the
trustees. But then in the present case, not only is there no obligation to infet
trustees in the lifetime of either parent, but, so far as relates to Mrs Hagart's
property, the subject of the obligation is only such estate as the lady might
have at her death—whatever "might belong to her at the time of her death."

It was argued in support of the application that this was equivalent to a general
conveyance of *acquirenda*, and I think it was felt by counsel that the establish-
ment of that proposition was—if not a necessary element—at least a very
important element—in their case. Now, it is of course possible that a question

No. 207. arising upon this destination may arise after the death of Mrs Hagart, and nothing that we say now could prejudice that question. But at the same time it is quite necessary, in considering whether a case has been made out for the appointment of a judicial factor, that we should also consider whether any grounds have been shewn in support of the position taken up by the children, that this is their property—a property to which they have a *jus crediti*. When the authorities are examined they appear to be all clear in the opposite direction. I may refer especially to the judgment delivered by Lord Kinnear in the case of *Wyllie's Trustees v. Boyd*, 18 R. 1121, in which this very point was distinctly raised, and where his Lordship, with the concurrence of the other members of the Court, laid down that under such a destination the children have right only to the property of the parent at the date of the marriage, and to whatever might be found to be his property at the date of his death, which of course implies that the parent is free to deal with *acquirenda* as he pleases during his lifetime. I may perhaps take occasion to qualify my adherence to that opinion upon another point—I refer to the sentence immediately preceding the one to which I have adverted, where Lord Kinnear, in distinguishing the destination that we were dealing with from a general conveyance of *acquirenda*, characterises the effect of a conveyance of *acquirenda* as if it deprived the father of all right of property and all power of control over property that might come to him during the intermediate period. Now, I think his Lordship there had in view the case of a conveyance to trustees which was intended to take effect during the subsistence of the marriage, and if so I assent to the proposition. But if the plan of the contract is that the obligation is not to be perfected by a conveyance until after the dissolution of the marriage, then I should hesitate to say that the father even in such a case could be deprived of the control and administration of his estate during his lifetime. I make this observation because it appears to me to be relevant to the other branch of the present case—that relating to Mr Hagart's conveyance—which is a conveyance in more comprehensive terms than that made by his wife. I think that the opinion of Lord Kinnear would support this proposition, that a parent who makes a general conveyance of *acquirenda* is liable to be restrained from acts of gratuitous alienation which would prejudice the heirs of the marriage, but that in all other respects, unless he has bound himself to infest trustees or to put them in possession of moveable subjects, he is the uncontrolled owner of his estate.

On the first question I am clearly of opinion that no ground has been shewn for appointing a judicial factor to administer Mrs Hagart's estate, because the children have not satisfied me that they have any right to the estate, or what is substantially the estate in question—the proceeds of the sale of the heritable property—until their parents' death.

Then as to Mr Hagart's estate, if there were here a body of trustees administering the estate, I should say that they ought to be left to carry out the will, there being no reason for displacing them. It is said that the trustees have never acted, and that with the consent of the family the two estates have been massed together and left in the hands of Mrs Hagart during her viduity. Well, if that has been done with the consent of the family—and I think that consent may be presumed—so long a period has elapsed without challenge of Mrs Hagart's right, that I do not think we ought to interfere in this summary mode to alter the existing state of possession.

We are given to understand that there is an action in dependence for consti-

tuting this trust, and it may be that if the trustees were to refuse to act it would be necessary to appoint a factor, but that case has not yet arisen. Therefore, I am of opinion that the application ought not to prevail even in regard to the father's estate, in which apparently the children have a certain immediate interest. I agree with Lord Adam that the petition ought to be dismissed.

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Hagart.

LORD KINNEAR.—I am of the same opinion. I think it clear that we cannot deprive this lady of the administration of her estate upon the grounds alleged by the petitioners, which are personal to herself—that is to say, upon their statement that she is of great age and in impaired health, and ready to give way to the importunities of one of her children. If it had been said that she was incapable of managing her affairs in consequence of her age and infirmity, the proper course would have been to apply for the appointment of a curator bonis, by whom her affairs would be managed for her; but that is not alleged, and it was made very clear by the statement of counsel at the bar that they did not intend to aver that this lady was incapable of managing her own affairs in any such sense as would justify the appointment of a curator. Now, if she is capable of managing her affairs, then I am unable to see any ground which would justify the Court in depriving her of the administration of her estate. And I confess that I see very great difficulty, even if there were such grounds, in giving effect to the prayer of the petition for the appointment of a judicial factor, because I am unable to tell—and counsel were unable to tell me—what the powers and duties of a judicial factor would be. The duties of a curator bonis are perfectly well fixed, and they are founded upon the incapacity of his ward. The duty of a judicial factor who holds estate vested in somebody else for her, and I suppose for her only, except in so far as her children have certain greater or lesser rights of succession, would appear to me to be a very difficult thing for one to understand. If Mrs Hagart is entitled, notwithstanding the conditions of her marriage-contract, to dispose of her estate during her life at her pleasure, then I am unable to see how a judicial factor could prevent her from doing so, or could refuse to give effect to her conveyances if she granted them, unless the appointment were made on the footing of her being incapable of managing her own affairs for herself. I am therefore of opinion that that part of the petition cannot possibly be granted.

With reference to the other ground, I agree with Lord Adam and Lord M'Laren, and I do not think it necessary to add anything at all except with reference to what Lord M'Laren has said upon the case of *Wyllie*, and as to that I quite concur in his Lordship's observations. I do not think we intended in that case to lay down any rule in opposition to the settled rule that a conveyance—a general gift of *acquirenda*—in a marriage-contract would not deprive the husband of the power of administration during his life. The point which required attention in that case was the distinction between a conveyance of profits—of *acquirenda*—and an undertaking to give not everything that the husband might acquire or the wife might acquire during their life, but only what might be left at the time of his or her death. Therefore, I quite agree with what Lord M'Laren has said.

The LORD PRESIDENT concurred.

THE COURT dismissed the petition.

HAGART & BURN MURDOCH, W.S.—BRUCE & KERR, W.S.—Agents.

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WILLIAM JAMES DAVIDSON AND OTHERS (James Davidson's Trustees),
Pursuers (Reclaimers).—*Dickson—G. W. Burnet.*
THE CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—
C. J. Guthrie—D. Dundas.

Railway—Compulsory purchase—Omission to give notice to treat through mistake or inadvertency—Lands Clauses Consolidation Act, 1845 (8 Vict. cap. 19), sec. 117.—The 117th section of the Lands Clauses Consolidation Act, 1845, enacts, that if at any time after the promoters of the undertaking shall have entered upon any lands which they were authorised to purchase, any person should appear to be entitled to any estate, right, or interest in or charge affecting such lands which the promoters should, "through mistake or inadvertency," have failed or omitted duly to purchase, or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters should be entitled to purchase such omitted estate, &c., the purchase-money to be settled by arbitration in like manner as if the promoters had purchased the omitted estate, &c., before entering upon the lands.

Held that this enactment did not apply to cases in which the promoters did not, prior to the expiry of the period allowed for compulsory purchase, intend to acquire the omitted estate, right, interest, or charge.

2d DIVISION.
Ld Stormonth-
Darling.

In January 1891 the Caledonian Railway Company, acting under the powers of the Acts 51 and 52 Vict. cap. xciv. (Glasgow Central Railway Act), and 52 Vict. cap. xii., gave notice to the trustee of the late Thomas Allan to treat for the compulsory purchase of two small pieces of ground at Maryhill, near Glasgow, for the purposes of their intended line. In the course of the negotiations for the purchase, but after the period allowed by the Acts for giving notice for compulsory purchase had expired, it came to the knowledge of the railway company that Allan's titles reserved to the superior "the whole coal, ironstone, freestone, and other metals and minerals" in the ground feued, with full power to the superiors to work the same, subject to certain rights in Allan of working the freestone not necessary to be here detailed. Accordingly, the conveyance by Allan's trustee to the company (which was dated 26th July 1892) bore that the mines, metals, and minerals were conveyed to the company "in so far and to such extent only" as the disponent himself had right to the same.

Thereafter, in December 1892, the superiors, the trustees of the late James Davidson, of Ruchill (upon whom the railway company had not served a notice to treat for the purchase of the minerals), brought an action against the railway company, concluding for declarator that they were sole proprietors of the whole coal, ironstone, freestone, and other metals or minerals in the lands taken, and that the defenders had no right therein, and for payment of £16,000 as damages for freestone alleged to have been removed by the railway company.

In defence the railway company maintained, on grounds not necessary to be here specified, that they were within their rights under the conveyance by Allan's trustee in taking such freestone as they had taken, and further, in January 1894, they obtained leave to amend their defences, by averring that if decree should be pronounced in terms of the declaratory conclusions, then the omission to serve a notice on the pursuers was occasioned by mistake or inadvertence on the part of the defenders, and that they were entitled, and intended, to take the minerals as an omitted interest under and in terms of the 117th section of the Lands Clauses Consolidation Act, 1845,* and to pay compensation therefor as the same

* The Lands Clauses Consolidation (Scotland) Act, 1845 (8 Vict. cap. 19),

might be fixed by arbitration, in terms of the Lands Clauses and the Companies Clauses Consolidation Acts, 1845; and they therefore pleaded, *inter alia*, that, in the event of their being so entitled, the petitory conclusions of the summons were incompetent. No. 208.

The pursuers averred that the defenders did not omit to purchase the minerals through mistake or inadvertence, and pleaded, *inter alia*;—(8) The defenders not having omitted, through mistake or inadvertency, to purchase the rights and interests of the pursuers in the said freestone, and the powers of compulsory purchase conferred upon them by their statutes libelled having now expired, are not entitled to acquire the said freestone, or to have the pursuers' present claims against them in respect of having taken the same determined by arbitration under the Lands Clauses Consolidation (Scotland) Act, 1845.

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A proof was allowed. The evidence shewed that freestone appeared to be the only metal or mineral in the lands. The defenders had excavated all the freestone above the authorised formation level of the line, but down to December 1893 they never intended to take and, except to a slight extent, had not in fact taken the freestone below the authorised formation level, their evidence regarding the freestone taken being in conformity with their original defence, that they were within their rights under the conveyance by Allan's trustee in taking all the freestone above the formation level, and so much below as was necessary to the proper construction of the line.

On 1st June 1894, the Lord Ordinary (Stormonth-Darling) pronounced an interlocutor granting decree of declarator and finding that the defenders, under the 117th section of the Lands Clauses Consolidation (Scotland) Act, 1845, were entitled to purchase or pay compensation for the pursuers' estate, right, and interest, in the minerals in question, on the terms and in the manner set forth in the said section.*

sec. 117, enacts,—“If at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special Act, or any Act incorporated therewith, they were authorised to purchase, and which shall be permanently required for the purposes of the special Act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands which the promoters of the undertaking shall, through mistake or inadvertency, have failed or omitted duly to purchase, or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed, then, within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase, or pay compensation for the same . . . and such purchase-money or compensation shall be agreed on or awarded and paid in like manner as, according to the provisions of this Act, the same respectively would have been agreed on, awarded, or paid, in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such lands, or as near thereto as circumstances will admit.”

* “OPINION.— . . . The next question is, whether the defenders have brought themselves under the 117th section of the Lands Clauses Act. If so, they say on record that they are willing, and intend, to purchase, the pursuers' minerals (by which I understand they mean the whole minerals), and to pay compensation therefor, as the same may be ascertained in terms of the statutes.

“On that part of the case I am with the defenders. The purpose of the 117th section is to provide that when promoters have entered on lands which

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The pursuers reclaimed, and at the hearing conceded that, with respect to the minerals above the authorised formation level, the rights of the parties fell to be settled by arbitration in terms of the statutes.

LORD JUSTICE-CLERK.—The pursuers' counsel having stated that they are willing that any question which may be between the parties regarding the minerals above the authorised formation level of this line of railway may be reserved to be settled by arbitration, we are now in the position of having to deal solely with the question regarding the minerals under the authorised formation level. The railway company say that through inadvertence they did not include such minerals in their notices, and that they wish to get the benefit of the clause in the Act which provides for such cases of inadvertence. Now, I am unable to see that there has been any inadvertence here. I am unable to see that there is anything to shew that the railway company intended to take the minerals below the authorised formation level. Indeed in the course of the debate we were practically told that, so far from the company having any intention of taking the minerals, they have never taken them at all. That was part of their case as regards the minerals below formation level,—that if anything below the formation level has been taken it is something very trifling, and was taken solely because of the bad character of the strata at the particular point. There was thus no inadvertence, and the company's powers of taking are expired. Therefore the question now is, if they have taken any such minerals, how compensation for these minerals is to be decided. They had their rights under their notice to Allan, and the superior has his rights subject to Allan's rights, and subject to such rights on the part of the railway company as Allan gave them by transfer. Beyond that they got nothing. I think, therefore, that the proper course is to allow a proof in regard to the minerals below formation level.

LORD YOUNG concurred.

they were authorised to take, and have discovered that there is some estate, right, or interest in such lands which by mistake or inadvertence they have omitted to purchase, they shall nevertheless remain in undisturbed possession, provided they purchase or pay compensation for the same within a prescribed time. The time varies according as they admit or dispute the estate, right, or interest so emerging. In the present case the defenders have disputed it, for they have maintained to the last that they themselves acquired the minerals (down to formation level) by their purchase of the surface. Still, the Act says they shall have the right of purchasing within six months after the right has been finally established by law. It seems to me that all the conditions are present which are required by the Act. The defenders had entered on the lands before they knew anything about the pursuers' interest in the minerals. They did not actually know till June 1892, when they examined the titles. They might, no doubt, have known two months earlier, because the titles were sent to them in April. But long before that earlier date they had begun to work the freestone, and that seems to me enough to let in the 117th section. . . . I do not quite understand why" the pursuers "resisted the defenders' case of 'mistake or inadvertency.' They cited two English cases—*Martin*, 1 Ch. App. 501, and *Stretton*, 5 Ch. App. 751, in which the plea of mistake was held not to have been made out. *Martin's* case, I confess, I do not follow, but *Stretton's* was a case of something very like fraud, because the company knew perfectly well before they entered on the lands that the claimant was proprietor of a portion of the land on which they were entering. It is therefore quite distinguishable from the present case, where the mistake was a perfectly honest one."

LORD RUTHERFURD CLARK.—I am clearly of opinion that the railway company never manifested any intention, while their compulsory powers existed, of taking anything below the formation level, and consequently I think that there is no case of inadvertence under the 117th section. The result is that they must pay for the minerals below the formation level which they may have taken, and we must allow a proof upon that matter, and also of any facts necessary to shew the extent of the use they have made under their title.

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LORD TRAYNER concurred.

THE COURT pronounced the following interlocutor :—" Having heard counsel for the parties on the reclaiming note for the pursuers against Lord Stormonth-Darling's interlocutor of 1st June 1894, recall the said interlocutor. . . . Find that the pursuers are sole proprietors of the whole coal, ironstone, freestone, and other metals or minerals in the two pieces of ground mentioned in the summons, subject to the rights conferred upon Thomas Allan, and conveyed by his trustee to the defenders: Allow both parties a proof of their respective averments on record in regard to the freestone and other minerals situated in the said pieces of ground so far as lying below the authorised formation level of the railways to be constructed thereon by the defenders, in terms of the Act 51 and 52 Vict. cap. 194: Reserving to the pursuers any claim they may have for the value of the coal, ironstone, freestone, and other metals or minerals in the said lands above the authorised level of said railway, to be determined by arbitration in terms of the statute," &c.

CAMPBELL & SMITH, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

COUNTY COUNCIL OF ROXBURGH, Pursuers (Respondents).—*Johnston—J. J. Cook.* No. 209.

MRS CATHERINE DALRYMPLE AND OTHERS (Dalrymple's Trustees) AND OTHERS, Defenders (Reclaimers).—*Jameson—Cullen.* July 19, 1894.

Sheriff—Appeal—Competency—Statutory declaration of finality—Competency of appeal from Sheriff-substitute to Sheriff—Reduction of Sheriff's interlocutor—Road—County Council—Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), secs. 3, 42, and 43.—The Roads and Bridges (Scotland) Act, 1878, sec. 42, empowered road trustees (by the Local Government Scotland Act the County Council) to declare that any highway within the county should cease to be a highway within the meaning of the Act, and by sec. 43 enacted that such a determination by the road trustees should be final and not subject to review by any proceeding whatsoever unless three ratepayers, who were dissatisfied with the determination should appeal to the Sheriff, "who shall hear and determine the appeal in a summary way, and the decision of the Sheriff shall be final and not subject to review." By sec. 3 "Sheriff" was declared to include Sheriff-substitute.

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A County Council having determined that a particular road should cease to be a highway, three ratepayers appealed to the Sheriff, pleading (1) that it was incompetent for the County Council to declare that the road should cease to be a highway in respect that it was part of a road which extended beyond the confines of the county; and (2) that if competent, the determination of the County Council was, in the circumstances, an injudicious exercise of their powers and one which would cause public inconvenience. A record having been made up, the Sheriff-substitute appointed parties to debate on the "preliminary pleas," and thereafter pronounced an interlocutor repelling the pleas in law for the pursuers and "dismissing" the action. The pursuers appealed

No. 209. to the Sheriff, who recalled the foregoing interlocutor and appointed the case to be heard by himself. The County Council then brought a reduction of the Sheriff's interlocutor.

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The Court (*rev.* the judgment of Lord Kyllachy) *dismissed* the action as incompetent, holding further that the Sheriff had acted within his powers in recalling the Sheriff-substitute's interlocutor and appointing the cause to be heard before himself, in respect that the Sheriff-substitute had not disposed of the merits of the appeal from the determination of the County Council, and that the question of competency was in any event subject to appeal.

2d DIVISION.
I.d. Kyllachy.

ON 25th October 1892 the County Council of Roxburgh, at a general meeting, passed the following resolution:—"Declare, in virtue of the powers conferred by section 42 of the Roads and Bridges (Scotland) Act, 1878, that the following highway shall cease to be a highway within the meaning and for the purposes of the said Act, that is to say,—part of the road No. 21 on the list of highways for Melrose district, from where it crosses the railway bridge on to Gala Water Ford."*

On 7th November the trustees of James Dalrymple of Langlee, and two other ratepayers in the parish of Melrose, presented a petition in the Sheriff Court at Jedburgh against the County Council of Roxburgh, praying to have the defenders ordained to retain on their list of roads, highways, and bridges, the piece of road above mentioned, and restrained from declaring that it should cease to be a highway within the meaning of the Roads and Bridges Act, 1878.

A condescendence and pleas in law were annexed to the petition, and the defenders lodged answers with a separate statement of facts and pleas in law, and a record was made up.

The pursuers averred that the piece of road in question was part of a road which was not wholly in the county of Roxburgh, and consequently not wholly within the defenders' jurisdiction, part being in the burgh of Galashiels and part in the county of Selkirk; that (cond. 5) the defenders had not complied with the requirements of sec. 42 of the Roads and Bridges Act, 1878, in respect that they had not posted up notices on the doors of churches in parishes outwith the county of Roxburgh through which the road passed, and that the closing of the piece of road which the defenders proposed to close would cause much public inconvenience.

The pursuers pleaded;—(1) Under the 42d section of the Roads and Bridges (Scotland) Act, 1878, when construed along with the other sections thereof, it being incompetent for the defenders, acting by themselves alone, to declare that the road in question shall cease to be a highway.

* The Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), sec. 42, enacts that the road trustees may after certain procedure (including the affixing of notices on the door of each church in every parish, "in which any part of such . . . highway is situated,") declare "that any highway shall cease to be a highway within the meaning and for the purposes of this Act."

Sec. 43 enacts,—". . . The determination of the trustees under the preceding section shall be final, and not subject to review in any Court or in any process or proceeding whatsoever, unless any three ratepayers who shall be dissatisfied with such determination shall, within fourteen days after the date thereof, appeal to the Sheriff . . . who shall hear and determine the appeal in a summary way, and the decision of the Sheriff shall be final, and not subject to review, and the expenses of such appeal shall be in the discretion of the Sheriff. . . ."

By section 3 of the Act it is provided, *inter alia*, that "'Sheriff' shall include Sheriff-substitute."

The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 11, subsec. 2, transferred to the County Council of each county the whole powers and duties of the county road trustees.

the prayer of this petition should be granted. (2) They not having fulfilled the requirements of the said 42d section the prayer of this petition should be granted. (3) The pursuers, for the reasons stated in their condescendence, having good cause for being dissatisfied with the defenders' determination, the prayer of this petition should be granted.

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The defenders denied that the closing of the road would cause public inconvenience, and pleaded;—(4) The defenders being vested with the sole management and control of the said road, and having acted in the proper exercise of their statutory powers as condescended on, are entitled to absolvitor. (6) The averments of the pursuers, so far as material, being unfounded in fact, the defenders are entitled to be assolizied.

On 15th December 1892 the Sheriff-substitute (Speirs) pronounced this interlocutor:—"Appoints parties' procurators to debate the case on the preliminary pleas."

Thereafter, having heard parties' procurators, and made avizandum, but without any further procedure, the Sheriff-substitute, on 23d January 1893, pronounced this interlocutor:—"Finds in point of fact that the part of the road in question which the County Council of Roxburghshire desired to close as a highway, is entirely situated in the county of Roxburgh: Finds in point of law that the said County Council have no powers or jurisdiction without the county of Roxburgh, therefore repels the pleas in law for the pursuers, and dismisses the action: Finds the pursuers liable to the defenders in expenses; allows an account thereof to be given in; remits the same to the Auditor of Court to tax when lodged and report, and decerns."*

The pursuers appealed to the Sheriff (Hope), who, on 25th February

* "NOTE.—This is an action in which the Court is asked to prevent the County Council from closing that part of the byroad 'leading from the Railway Bridge to Gala Ford.' As has been already stated, this portion of the road is in the county of Roxburgh (the Gala being the boundary between that county and the county of Selkirk): The Roxburgh County Road Trust (and hence the County Council) have nothing to do with the continuation of this byroad on the right bank of the Gala; it is outside the confines of their jurisdiction; they cannot even order notices to be placed on the doors of the Parish Church at Galashiels as suggested (condescendence 5), and in my opinion are therefore perfectly entitled, under sections 42 and 43 of the Roads and Bridges (Scotland) Act, 1878, 'acting by themselves alone,' to declare that the road in question shall cease to be a highway (subject, of course, to the veto of the Sheriff). I have therefore repelled pleas in law Nos. 1 and 2 for the pursuers. With regard to the 3d plea in law, I think the pursuers have utterly failed to shew, by 'the reasons stated in the condescendence,' that there is any good cause for recalling the determination of the County Council. The truth is that the real objectors live in Selkirkshire and Galashiels, and it is for their benefit that the County Council of Roxburghshire are asked to spend their ratepayers' money. The defenders do not appear to have acted in a high-handed or capricious manner; the question has been thoroughly investigated by a local committee, afterwards under consideration of the County Council; and that council have come to the conclusion that the exigencies of the case do not justify them in spending more money on a road which was so damaged by a flood in September 1891 that an almost new roadway would be required. The County Council have not actually closed this road; and judging from their offer of £60 towards the proposed bridge, I have no doubt they would meet the Selkirkshire authorities in a friendly spirit; and if the latter really think the road is required they might reconstruct it themselves, and then ask the Roxburgh County Council to maintain it in proper order. It is not perhaps for me to suggest this solution of the difficulty; I will only add that I thoroughly concur with the determination arrived at by the defenders."

No. 209. 1893, pronounced an interlocutor appointing the parties to be heard, and on 10th March pronounced the following interlocutor:—"The Sheriff, having considered the process, after hearing counsel on the pursuers' appeal, recalls the interlocutor of 23d January last; repels" certain "pleas in law for the defenders; and *quoad ultra* appoints the case to be heard by him on a day to be afterwards fixed, reserving the question of expenses."*

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On 6th April 1893 the County Council of Roxburgh brought the present action against Dalrymple's trustees and the two other pursuers of the action in the Sheriff Court, and also against the Sheriff of Roxburghshire, concluding for reduction of the note of appeal, and of the Sheriff's two interlocutors of 25th February and 10th March following thereon.

The pursuers set forth the procedure in the Sheriff Court action and pleaded, *inter alia*;—(1) In virtue of the provisions of the Roads and Bridges (Scotland) Act 1878, the interlocutor of the Sheriff-substitute [of 23d January 1893] was final, and not subject to review by the Sheriff-principal. (2) In respect that the Sheriff-principal had no jurisdiction, the said note of appeal, and his interlocutors thereon, are incompetent and inept, and decree of reduction thereof falls to be pronounced, as concluded for.

The defenders, other than the Sheriff of the county, lodged answers,

* "NOTE.—It was maintained for the respondents that the interlocutor of the Sheriff-substitute is not appealable, but I am of opinion that this contention is not sound. It has been held in similar cases that, where the decision of a Sheriff-substitute does not dispose of the merits, there is a right of appeal to the Sheriff. The case of *Leitch v. The Scottish Legal Burial Society* (October 21, 1870, 9 Macph. p. 40) was very similar to the present. . . . Following the case of *Leitch*, I must hold that the decision referred to in the provision just quoted [Roads and Bridges Act, 1878, sec. 43] means a decision on the merits, and that the interlocutors of the Sheriff-substitute did not dispose of the merits, and are appealable. The case of *Bone v. The School Board of Sorn* (March 16, 1886, 13 R. p. 768) is also in point, although there was there no dismissal of the action by the Sheriff-substitute. The Court held that the Sheriff did not exceed his jurisdiction in recalling interlocutors of the Sheriff-substitute which did not dispose of the merits, although one of the Judges thought that the appeal was irregular, as well as the previous procedure." (After quoting from the opinions of Lord Shand and Lord Adam in that case)—"These opinions are at variance with those of Lord Justice-Clerk (Moncreiff) and Lord Cowan in the case of *Leitch*, who held that, in such cases as the present, even decisions on the merits by a Sheriff-substitute were appealable to the Sheriff. It is unnecessary, however, in this case to determine what is the state of the law in regard to this point, because there has not yet been any decision on the merits. It would seem from his note as if the Sheriff-substitute intended to decide the merits of the case, but the interlocutor has not that effect. The action is only dismissed. There is no absolvitor. Moreover, it was premature to decide the merits. The debate was only ordered on the preliminary pleas, and the parties did not renounce probation. . . . An appeal then being competent, and a record having been irregularly made up, the question arises, What is now to be the procedure? Is the case to be concluded in the usual way followed in an ordinary action, or is it now to be dealt with in a summary manner? It seems to me that the latter is the most competent and expedient course to follow. . . . I think that the averments as to the inconvenience caused by the road in dispute not being repaired and maintained are relevant, and quite sufficient to entitle the pursuers to have an opportunity of leading proof. This will not be a written proof, but it may be understood that at the hearing—which, I think, is the proper thing to order in a summary case—the parties will be at liberty to examine witnesses. . . ."

in which they pleaded, *inter alia*;—(1) The action is incompetent. (3) No. 209. The pursuers' statements are irrelevant, and insufficient to support the conclusions of the summons. (4) The interlocutor of the Sheriff-substitute, not being a decision on the merits of the question raised by the appeal from the determination of the County Council, was not final, and was competently appealed to the Sheriff; or, *separatim*, the Sheriff on having the cause brought before him was entitled to recall the incompetent and irregular procedure that had taken place before the Sheriff-substitute, and to proceed to deal with the cause himself *de novo*. (5) If the Sheriff-substitute's judgment falls to be regarded as a decision on the merits it was competently recalled by the Sheriff, in respect that it was incompetent and contrary to justice, and was pronounced without hearing parties on the merits, and without any proof having been led or any opportunity given to these defenders of leading proof in support of their averments. (6) The interlocutors of the Sheriff having been competently pronounced in virtue of his jurisdiction, are not liable to be reduced.

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On 9th June 1894, the Lord Ordinary (Kyllachy) pronounced decree of reduction as concluded for.*

* "OPINION.— . . . The present action is brought by the County Council to reduce this interlocutor of the Sheriff, along with the note of appeal on which it proceeded, and a previous interlocutor by which he appointed parties to be heard.

"The ground of reduction is that the Sheriff-substitute and the Sheriff having under the statute a co-ordinate jurisdiction, either had jurisdiction to dispose of the case, and that the Sheriff-substitute having taken it upon himself to decide it, no appeal to the Sheriff was competent. The answer made is that the Sheriff-substitute did not decide the case, or at least did not decide it on its merits, and that until he did so it was open to the Sheriff to take it up and deal with it as he has now done. The defenders' case is very distinctly stated in the note of the Sheriff. It is founded on the decisions and *dicta* in the cases of *Fleming v. Dickson*, 1 M. 188, *Leitch*, 9 M. 40, and *Bone*, 13 R. 768.

"I quite agree with the Sheriff that if the Sheriff-substitute had merely dealt with preliminary matters—as, for example, the citation of the defenders, the appointment of a hearing, or the ordering of a proof—the authorities are in favour of the Sheriff's right to interpose and take up the case if he chose to do so. It may perhaps also be conceded upon the authorities that the same result follows where the Sheriff-substitute, without deciding the merits of the dispute, refuses on some technical ground to entertain the action. But I have not been able to agree with the Sheriff that the present case belongs to either of those categories. I do not say that the terms of the Sheriff-substitute's interlocutor are quite free from ambiguity; but I cannot read it otherwise than a decision of the cause and a decision upon its merits. The petition is dismissed, the whole pleas of the pursuers (the present defenders) being repelled; and one of the pleas so repelled is to the effect that the pursuers having, for the reasons stated in the condescendence, good cause for being dissatisfied with the defenders' determination, the prayer of the petition should be granted. I take it that, when the Sheriff-substitute repelled this plea, he in effect found that the pursuers' grounds of appeal were irrelevant, or were excluded by the admitted facts; and I suppose there is no doubt that when an action is decided upon relevancy it is as much decided upon the merits as if decided after a proof. That this was the Sheriff-substitute's view is, I think, manifest from his note, and I am not disposed to attach importance to the fact that he dismissed the petition instead of refusing it. I do not think that either of these expressions is such a *vox signata* as to be incapable of construction.

"But if this be so, it seems conclusive of the question as to the competency of the appeal to the Sheriff. It is said, no doubt, that the *procedure* before the Sheriff-substitute was irregular, because it ought to have been summary, whereas in fact a record was made up and closed. It is also said that if the Sheriff-substitute

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The defenders reclaimed;—The arguments of the parties sufficiently appear from the opinions of the Lord Ordinary and of the Court.*

At advising,—

LORD JUSTICE-CLERK.—Under the Local Government (Scotland) Act of 1889 a county council as coming in the place of the road trustees has authority to shut up roads within the county which they in their discretion may consider unnecessary, but their discretion in this matter is not final, because any three ratepayers in the county, if they are dissatisfied with the decision, are entitled to appeal to the Sheriff of the county, and he is entitled to review what the council have done as a matter of discretion, and his judgment is final.

In regard to such an appeal the statute provides that it is to be dealt with in a summary way, and also that it may be brought either before the Sheriff or before the Sheriff-substitute, because the Act says that the expression "Sheriff" includes "Sheriff-substitute."

In this case the Sheriff-substitute took up the appeal, and having heard parties upon what he called the preliminary pleas, he repelled the pursuers' pleas in law, and dismissed the action. The form of the interlocutor by which the Sheriff-substitute thus disposed of the action is certainly extraordinary, but I do not say more about it than that I do not understand how he arrived at the result he did, because while the interlocutor is one dismissing the action upon the merits of the case, the hearing was merely upon the preliminary pleas. Now, if the Sheriff-substitute deals with the matter in such a way that the interlocutor which he pronounces is not a proper interlocutor for the purpose, there must be some means of putting it right. Here the parties appealed to the Sheriff. When the matter was brought before the Sheriff he proceeded to deal with the matter as if it had come before himself at first, and put aside the Sheriff-substitute's interlocutor altogether as being nugatory, and so unsatisfactory that it could not possibly stand. I think the Sheriff was entitled to take that course in this case. If the Sheriff-substitute had entered thoroughly into the matter and given a proper decision upon it, the Sheriff would not have been entitled to deal with the matter at all, but the result at which the Sheriff-substitute arrived was so unsatisfactory, and the procedure so irregular, that I think the Sheriff took the right course.

A further question was raised in the Sheriff Court action, which was not merely whether the County Council had used their discretion in a satisfactory way in ordering this road to be shut up, but whether in the circumstances it was within the competency of the County Council to order this road to be shut up at all. I think that the pursuers, who thought themselves aggrieved by the action of the County Council, were entitled to have a decision whether it was

decided the merits, he did so after a hearing, which at least, according to the interlocutor appointing it, was a hearing upon preliminary pleas. But, assuming that these were irregularities, and irregularities which were serious, and which affected the result, it does not, so far as I can see, follow that the Sheriff-substitute's decision became thereby appealable to the Sheriff. Assuming it to be a decision, it was a decision which, while it stood, foreclosed any appeal. Whether it was or may yet be open to challenge by way of reduction, is a question which I do not require to consider. As the case stands, I think I am bound to hold that the case has been decided by the Sheriff-substitute, and therefore that the appeal to the Sheriff was incompetent, and that the pursuers are entitled to decree in terms of their summons, with expenses."

* Authorities cited as in the Lord Ordinary's opinion.

within the competency of the Council or not to shut up this road, and that as in an ordinary action between them and the Council, and not as an appeal under this particular Act. I give no opinion at all upon the question of competency, but I think that the parties were entitled to bring it up for the decision of a Court of law.

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Lastly, what the Sheriff did when the appeal was brought before him was to set aside all the proceedings that had taken place, and commence *de novo*. All that he did, however, by the interlocutor now objected to was to appoint parties to debate the case before him on a day to be afterwards fixed. The Sheriff has given no deliverance upon the question of the competency of the Council or as to the manner in which they used their discretion in shutting up the road. It is certainly a new thing that the interlocutor of a Sheriff appointing parties to be heard on the question before him should be brought before this Court by way of reduction, and I do not think that it is a competent course.

Upon all these grounds I am of opinion that the interlocutor of the Lord Ordinary should be recalled.

LORD YOUNG.—This is a reduction of an interlocutor pronounced by the Sheriff of Roxburghshire, and the first and leading question is whether the reduction is competent. The interlocutor which the pursuers seek to have reduced is an interlocutor recalling an interlocutor of the Sheriff-substitute, and appointing parties to be heard, and it is pronounced in what is in form an ordinary Sheriff Court process, with a prayer, a condescendence, and statement of facts and answers by the parties. Now, it certainly is a novel thing to have an interlocutor of a Sheriff, appointing the parties before him to be heard, made the subject of an action of reduction in this Court. If the Sheriff has gone wrong, his decision may ultimately be reviewed here in the ordinary way, but it is usual for us to wait until the Sheriff has disposed of the case before reviewing what he has done, although I do not say that there may not be cases in which we would interfere at an earlier stage to prevent the Sheriff from going on with the case.

The action in which this interlocutor was pronounced was an appeal regarding the procedure of the County Council of Roxburgh in declaring that a certain highway within their jurisdiction should cease to be a highway, and it was brought under the 43d section of the Roads and Bridges Act of 1878. Under the preceding sections of that Act, the County Council may proceed to declare in their discretion that any highway in their jurisdiction should cease to be a highway. That decision is not final, because the 43d section provides that there may be an appeal to the Sheriff, and in this appeal the matter may be taken up either by the Sheriff or by the Sheriff-substitute, but whichever of them takes up the appeal and determines the matter, his decision is declared by the Act to be final and not subject to review. But it is a conceivable case, and it is according to the averments here, that the County Council may think that it is within their competency to declare that a particular highway should cease to exist, when in truth it is not within their competency so to declare, and I think that any person interested in having the road kept open may have that question of competency tried, and tried at common law. Whether the Sheriff Court is a proper Court in which to have that question tried we are not called upon here to determine, but it is certainly a question which may be tried in a competent Court, so that it may be raised in the Sheriff Court, if that

No. 209. Court is competent, then brought here by way of appeal, and finally, if the parties so desire it, taken to the House of Lords, unless there is a statute which imposes finality on the judgments of any of the Courts below, but there is no suggestion of that sort here.

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Now, when the County Council came to the determination that this road should be shut up, certain ratepayers expressed their dissatisfaction with this determination, and that upon two grounds, both of which they stated in the action in the Sheriff Court. The first ground was, that it was not competent for the County Council of Roxburgh, acting by themselves alone, to shut up this road within their county, because it was in truth only a part or fraction of a larger road which extended into an adjoining county. I give no opinion upon the merits of that question, but I think that it was a question which those who were dissatisfied with the determination of the County Council were entitled to raise and to have decided in a Court of law. Then the other ground of objection was, that assuming the objectors to be wrong on the question of the competency of the County Council to close this road, it was not a judicious act on the part of the County Council, in the exercise of their discretion, to close it, and the objectors accordingly desired to have the opinion of the Sheriff on that question as well as on the larger legal question of competency, and they brought both questions before the Sheriff in a petition under this statute, within the time allowed by the statute for appealing to the Sheriff. In that petition, a record having been made up, the Sheriff-substitute, on 15th December, issued an interlocutor in which, by an excusable use of language, he spoke of the legal question of competency as preliminary, and the pleas in law relating to that question as preliminary pleas, because it was necessary to dispose of the question of competency before deciding as to the manner in which the County Council had exercised their discretion, and he appointed the parties to be heard on those preliminary pleas. Then, after hearing the parties, the Sheriff-substitute, on 23d January, pronounced an interlocutor in which he repelled the pursuers' pleas to the competency of what the County Council had done, and then dismissed the action without having heard any argument on the question which arose when the question of competency was disposed of, namely, whether the Council, assuming that they had acted within their competency, had acted with propriety and discretion in closing the road. The pursuers appealed to the Sheriff, and I cannot for a moment doubt that they were entitled to appeal to him on the question of competency. The Sheriff recalled the interlocutor of the Sheriff-substitute and appointed parties to be heard, and I understand from his note that if after hearing the parties he should have come to be of opinion that it was within the competency of the County Council to close this road, looking to its relation to other roads, he would then have taken up and disposed of the question whether they had well exercised their discretion in ordering it to be closed. I have no doubt as to the propriety of that course. I do not doubt that the Sheriff was entitled to take up the appeal on the question of competency, and I think also that he was entitled to hear and determine the question of discretion as well, seeing that the Sheriff-substitute had not disposed of that question, and that the Act provides that the appeal should either be to the Sheriff or to the Sheriff-substitute. I am of opinion, accordingly, that the interlocutor of the Sheriff is a perfectly competent and proper interlocutor, and to bring a reduction of such an interlocutor, pronounced in an action which is before the Sheriff upon a closed record, appears to me to be a most extravagant

proceeding, for which I know of no precedent. I think that this action of No. 208. reduction is quite incompetent, and I am therefore of opinion that we should dispose of it by sustaining the first plea in law for the defenders and dismissing the action. July 19, 1894.
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I do not know what may be the future course of the action in the Sheriff Court, but I assume that the Sheriff will deal with the question of competency in the first place, and then, if he is of opinion that it was within the competency of the County Council to close this road, he will also decide as to the discretion and propriety of their conduct. Whether there may be an appeal to this Court is a matter not now before us, but I see no objection to an appeal on the question of competency; on the other hand, if the Sheriff disposes of the question of discretion, I do not suppose that either of the parties will maintain that his judgment on that matter is not final.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, sustained the first plea in law for the defenders, and dismissed the action.

PRINGLE & CLAY, W.S.—KINMONT & MAXWELL, W.S.—Agents.

JAMES MORRISON, Petitioner.—*Young—Gunn.*
WILLIAM QUARRIER, Respondent.—*Ure—Clyde.*

No. 210.

Minor and Pupil—Religion of orphan children—Wishes of deceased father— July 19, 1894.
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Minor's choice of religion.—Two orphan children, a brother and sister, twelve years of age, were placed by their brother, thirty years of age, in a charitable institution not Roman Catholic. A short time afterwards he presented a petition to the Court to have them restored to his custody, averring that they were not being brought up in the Roman Catholic faith, which he alleged to be that of their father, and that the children wished to be removed. The Court appointed a curator ad litem to the children. The Court being satisfied, on a statement made by him, that the children were well provided for in the Home, that the girl, a minor pube, was desirous of remaining where she was, that both children were averse to being separated, and that the father's conduct shewed that he wished to have them brought up as Protestants, *refused* the petition.

Opinions (per Lord Adam and Lord M'Laren) that the wishes of a deceased father with reference to the religious training of his children, though entitled to weight, are not conclusive on the subject, the paramount consideration being the interests of the children themselves.

(SEQUEL of case reported *supra*, p. 889.)

On 16th July 1894 Mr Lee, the curator ad litem for the children, lodged a minute, in which he stated, *inter alia*, that the wards were both healthy and happy looking children, and were evidently well fed and cared for, and that Margaret unhesitatingly said that she would rather stay where she was than go back to Dundee, or live with the Browns.

"The ward Alexander confirmed his sister's statements, and expressed substantially the same views as she did. He looked and professed himself to be very happy in his new home.

"The wards seemed to have a great affection for each other, and desired that in any event they should not be separated. . . .

"The curator has satisfied himself, from the statements of his wards and from other reliable and more detailed information laid before him, that it would not be to the moral or physical advantage of the children that they should return to the custody of the petitioner.

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"A third alternative was suggested by the petitioner, *videlicet*, that the wards should be removed to a Roman Catholic institution at Smyllum, Lanark, . . . and the curator cannot doubt that, were there any evidence to suggest that his wards had been brought up as Roman Catholics, or that their severance from that religion would in any way alienate them from their relatives, this would be a highly suitable place for their upbringing."

The passages of the minute bearing on the question of religion were as follows:—"The ward Margaret further stated that while in Dundee she had never attended any church except the Hilltown Mission. When she was nearly nine years of age, a lady, who visited her mother on her deathbed, recommended that the children should go there, and from that time they were taken there regularly, or at least frequently, by their father until the time of his death; since the father's death they had never been to church. She also stated that her father had sent them to a Protestant school, which she described as 'Mr Dickson's school,' and that after his death, when they were living with the petitioner, they remained at this school until the petitioner got out of work and sent them to the Homes. She could not remember that her father ever went to church before they began to go to the Hilltown Mission, nor could she remember that the petitioner or his wife ever went to any church for long before she left Dundee.

"The curator does not doubt that the parents of his wards were married as Roman Catholics, and the wards themselves were baptised by the Reverend Patrick Crotty, Roman Catholic clergyman, on 7th March 1891, when they were nine years old. Both parents before their death received the last rites of the Roman Catholic Church. The curator, however, has been unable to find any evidence that they were ever regular attendants at the services of any Roman Catholic church, or that their children, Margaret and Alexander, ever attended a Roman Catholic church at all. On the other hand, the curator has seen several persons connected with the Hilltown Mission, which is carried on in connection with Panmure Street Congregational Church, and has by their evidence verified the statement of the wards. The father of the children attended with considerable regularity, for a period of fully two years immediately prior to his death, the evening services at this mission, being frequently accompanied by his children Margaret and Alexander, who also attended the children's forenoon service. The father also occasionally attended the Panmure Street Congregational Church. When applying for assistance from the parochial board on 14th November 1892, and also in prison so late as 1st May 1893, the father represented himself as being a Protestant, though on other similar occasions he had stated that he was a Roman Catholic. . . .

"The curator, while he believes that the wards' family is Roman Catholic, has been unable to find any indication that the wards were ever truly brought up in that faith; on the contrary, after careful consideration of all the information he has been able to obtain, he is convinced that any religious instruction the children ever had was from Protestant sources, deliberately chosen and acquiesced in by their father."

On the Court resuming consideration of the cause, counsel for the petitioner stated that the only point he now insisted in was that steps should be taken to secure that the children should be brought up as Roman Catholics.

Argued for the petitioner;—The parents having both been Roman Catholics, and the children having themselves been baptised into and brought up in that faith, they should not now be trained as Protestants.

The father had a right to determine the religion of his children, and it was not doubtful that the father here had selected the Roman Catholic faith. Apart from evidence of his desire, there was a strong presumption in favour of his religion being that of his children.¹

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Argued for the respondent;—The report made it clear that the interests of the children demanded that they should be left where they were. The girl being a *minor pubes* was entitled to speak for herself not only as regarded her residence but also as regarded her religion,² and it would be most inexpedient to separate the two children. The father had left no express direction on the subject of his children's religion, and the inference from his conduct in this connection was rather that he preferred for them the Protestant to the Roman Catholic faith.³

LORD PRESIDENT.—In this case the two children are orphans, the mother having died in 1891 and the father in October 1893. They are at present in an establishment called the Orphan Homes of Scotland, and from the report of the curator it appears that they are living in comfort and content, and are getting suitable instruction so far as secular education is concerned. The sole ground for this petition is, that they are not being brought up in the Roman Catholic faith. The father survived the mother, but died, as I have said, last year. Now, it is necessary for the petitioner, on his own view of the law, to make out that it was the wish of the father that the children should be brought up in the Roman Catholic faith, and that there are means available for their being so brought up without detriment to their general interests. As regards the last point I am willing to assume, what the reporter seems to be satisfied of, that the Roman Catholic establishment called the Smyllum Orphanage is one in which the children would be well attended to and properly taken care of. I am willing to assume that, and the case must be taken on that footing. But then the proposition which has to be made out is that it would be according to the wish of the father that the children should be taken from the place in which they are well cared for at present and sent elsewhere, solely in order that they may be brought up in the Roman Catholic faith. Now, I agree that, if there were nothing to the contrary, the fact that the father and mother were Roman Catholics, and died members of the Roman Catholic Church, would raise a strong presumption that the wish of the father was that the children should be brought up in the Roman Catholic faith. I agree with what was said in the case of *Magrath*,—"The wishes of the father, if not clearly expressed by him, must be inferred from his conduct. If the father be dead it will be naturally inferred that, in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion,—that is, the religion which he professed." But the question here is, whether there is not sufficient evidence to rebut the presumption arising from that fact, whether, in place of our having to depend on inference from the father's choice of religion for himself, we have not sufficient evidence otherwise of his choice of religion for his children.

The facts stand thus: It is true that the children are baptised members of the Roman Catholic Church, but then it must not be left out of sight that they

¹ *Austin v. Austin*, 1865, 34 L. J., Ch. 499; *Hawksworth v. Hawksworth*, 1871, L. R., 6 Ch. Ap. 539; *In re Scanlan*, 1888, L. R., 40 Ch. D. 200; *In re Agar Ellis*, 1878, L. R., 10 Ch. D. 49; *The Queen v. Barnardo*, L. R. [1891], 1 Q. B. 194.

² *Flannigan v. Inspector of Bothwell*, June 21, 1892, 19 R. 909, at p. 912.

³ *In re Magrath*, L. R. [1893], 1 Ch. D. 143, at p. 148.

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were not baptised until 1891, and accordingly that they were not brought up from their birth as members of the Roman Catholic Church, but were baptised at an unusually late age, and under circumstances which are left to conjecture. But then what evidence is there of the father taking the children to any religious ordinances at all? There is none, as Mr Gunn quite properly admitted, of his having taken them to a Roman Catholic church himself, and there is clear evidence that he took them to a Congregational church regularly, or at least frequently, going with them himself. It is plain that he was a somewhat lax Roman Catholic, as he occasionally went to the Congregational church himself. But what we are concerned with is this, Is there not evidence of his having brought up his children in the Protestant faith, or at least of his having been tolerant of the Protestant faith, and of having conduced to the bringing up of his children in the Protestant faith? It seems to me that when we are asked to remove the children from a place where they are being otherwise well brought up, the petitioner's case fails, for he has to establish first that there is reasonable evidence to conclude that the father would have wished to place the children in a purely Roman Catholic establishment. Now, the inference naturally arising from the father's own religion is entirely displaced by the way in which he arranged for the instruction of his children, so far as religion was concerned; and the various circumstances mentioned in the curator's report lend an air of probability to the conjecture that the father not being himself a firmly-attached member of the Roman Catholic Church, thought it more to the children's advantage that they should be brought up as Protestants. Such, at least, is the inference I draw from his own conduct.

What I have said would apply only directly to the case of the boy, for he is a pupil. When we turn to the case of the girl Mr Gunn is confronted with a difficulty which, he frankly admitted, he did not see an answer to. What right has the Court of Session, on grounds such as are here put forward, to remove a girl who is a *minor pubes*, when there is evidence that she prefers to remain where she is? That itself, apart from other considerations, forms a supreme difficulty in the way of granting the petition, and, like Mr Gunn, I have not seen an answer to it. But when along with that I find that the petitioner's case, in point of fact, is negatived by the evidence, the evidence rather shewing that the father preferred a Protestant education for his children to a Roman Catholic education, I think there is no difficulty in disposing of the petition so far as the girl is concerned. As to the boy, the one ground of failure of evidence of the father's wish is sufficient for the disposal of the case, but it is also to be noted that the children are attached to one another and desire to be together, and that it is impossible to suggest that the interest of either would be subserved by the one being taken and the other left. I am for refusing the petition.

LORD ADAM.—I am of the same opinion. When the petition was before us on a former occasion, we felt, or at anyrate a majority of the Court felt, that the facts were not sufficiently before us to enable us to dispose of it satisfactorily. Accordingly, we took the step of appointing a curator to the children, and of obtaining through him a statement of the actual circumstances. We have now got a very careful and very excellent report from Mr Lee, the curator, which gives us all the necessary information.

We are dealing with two children who are twins, one of whom, being a girl, is in minority; the other is a boy, and is still a pupil. Now, I agree that the

wishes of a father may be the predominant consideration to be kept in view in these applications, but I may be allowed to say that I do not know that by the law of Scotland the same paramount weight is to be given to them as seems to be attached to them by the law of England, almost to the exclusion of the consideration of the interests of the children. I am not aware that the law of Scotland goes so far in that direction as the law of England. Apparently the latter ignores the wishes of the mother, and in other points also the laws of the two countries appear to me to be different. Now, here we have not got clearly what even in the law of England is so very prominent a consideration, viz., the desire of the father. There is no evidence of an express desire, and that being so, we must have recourse to an inference as to what would have been his desire. Now, if there were no acts or conduct of his to refer to, and if it appeared to us that the religion of the father and the mother was Roman Catholic, I should have been very willing to draw the inference that in such circumstances the father would have desired his children to be brought up in his own faith. But we know in this case how he regarded the matter; we know that the children did not attend Roman Catholic chapels, and that during his lifetime they were in the habit of going to a Protestant church. If the father were alive and were asked if it was his wish that the children should be educated as Protestants, it appears to me on the facts stated by Mr Lee that he would say "Yes." At anyrate, it is very clear to me that he would not express any strong desire that they should be brought up as Roman Catholics. Taking the case of the girl, who is a minor, and is entitled to express her own wishes in the matter (and she has done so very clearly), are we to overrule her desires? I think not. In England this girl would be an infant, and I do not know that even in the case of an infant of twenty years of age her wishes would be regarded (and this illustrates the manifest difficulty there is in the application of English cases to which I formerly adverted), but I am clear that we should not overrule the express desire of this minor. It is quite true that the boy is a pupil, but it is evidently undesirable, and not in their interests, that the children should be separated. I therefore concur.

LORD M'LAREN.—I agree with your Lordship in the chair, and I also desire, like Lord Adam, in case the question may afterwards arise, to reserve my opinion as to the supposed exclusive preference of the father's opinion in regard to the education of children who may have been left under the care of the mother, because under the Guardianship of Infants Act greater authority is now given to the mother than could formerly be claimed for her, and that is a consideration which I should not wish to overlook in dealing with any question such as this. I can conceive of cases where it would be very much to the advantage of children that they should be in the care and under the influence of their mother even where her opinions should happen to differ from those of a deceased father. Probably this does not very frequently arise, because there will generally be an understanding between parents on such subjects, but I should not wish to be understood as assenting to the doctrine that under all circumstances the wish of a deceased father must prevail in regard to the religious education of his children, irrespective of circumstances which he could not foresee.

LORD KINNEAR concurred.

THE COURT refused the petition.

JOHN MACKAY, S.S.C.—DOVE & LOCKHART, S.S.C.—Agents.

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No. 211.

MARGARET BROWN FISHER, Petitioner.—*Lees—Salvesen.*JAMES GLEN EDGAR, Respondent.—*Dickson—Christie.*July 20, 1894.
Fisher v.
Edgar.

Administration of justice—Contempt of Court—Parent and Child—Custody of child.—A father presented a petition for the custody of his pupil daughter, and obtained decree against an aunt of the child ordaining her to deliver the child to him. The aunt not having done so, the Court ordered her to attend personally at the bar, and on her failure to obey this order sequestered her estates.

Thereafter the aunt presented a petition for the recall of the sequestration. She explained that she had not received service of the order, and that the state of her health made it dangerous for her to attend, and by her counsel she submitted herself unreservedly to the judgment of the Court.

The father lodged answers to the aunt's petition, in which he submitted that the sequestration ought not to be recalled until she had handed the child over to him.

It appeared from a minute by a curator ad litem appointed to the child that the child, who had by this time attained the age of twelve years, had resided for nearly eight years with her aunt, and that she had a decided wish to remain with her.

The Court, without requiring the aunt's personal presence, and without requiring her to deliver up the child, *recalled* the sequestration.

1ST DIVISION. (SEE *Edgar v. Fisher's Trustees*, Nov. 10, 1893, *supra*, p. 59, and Dec. 20, 1893, *supra*, p. 325.)

On 13th June 1894 Miss Fisher presented a petition to the Court for recall of the sequestration of her estates and of the factory and the appointment of Mr MacLeod as factor thereon (see *supra*, p. 59), and also as factor loco tutoris to Everina Edgar (see *supra*, p. 325).

She made the following averments:—Everina Edgar was born on 26th May 1882. Her mother died on 16th June 1884, and in June 1886 the child was placed in the custody of the petitioner and her mother (who died in August 1893), and remained with the petitioner until 1st September 1893, when she was removed by her father. [These statements were not denied by the child's father, Mr Edgar, who lodged answers to the petition.] On 3d September the child returned to the petitioner, and the petitioner then left for England along with the child, being afraid that it would endanger the health of the child if she were restored to her father's custody.

The petition for custody had not been served upon her, and she had first heard of the proceedings on 8th September 1893. She had then endeavoured to persuade the child to go back to her father, but she had absolutely refused to do so. She had returned to Scotland in May 1894, when she heard for the first time of the sequestration of her estates. The child had attained the age of twelve years on 26th May 1894, and had since that date voluntarily written to her father stating that she had elected to stay with the petitioner, and the petitioner believed that it would be prejudicial to the child's health and welfare if she were compelled to reside with her father.

"The petitioner humbly craves your Lordships not to ordain her to appear at the bar of your Lordships' Court. She believes that her state of health would render it dangerous for her to be subjected to such an ordeal. . . . If necessary, the petitioner is prepared to produce medical testimony certifying her unfitness to appear before a Court in public, and the grave injury to her health to which she might thereby be exposed."

The respondent, James Glen Edgar, explained that he had reluctantly parted with his child in 1886 to gratify the wish of her grandmother

that she should live with her. He denied the petitioner's statement No. 211. that she did not know of the sequestration of her estates until May 1894, and averred that the letter written by the child since she had ceased to be a pupil was not a voluntary and uninfluenced letter. He submitted,—“That his said daughter is not entitled now to insist that her own residence should be away from him, and that she ought to be restored to his custody. There is no foundation for the statement that it would have been in September, or would now be, prejudicial to the child's health or welfare to reside with her father. The respondent is in a position to give her a happy home, where she will receive from him every kindness, and will have the society of her brother and sister. . . . The respondent respectfully submits that the sequestration, having been originally laid on because of petitioner's contempt of Court, ought not to be recalled until she has delivered the said child to the respondent. The appointment of Mr MacLeod as factor loco tutoris, *quoad* the estate, heritable and moveable, of the said Everina Burns Edgar, stands on a different footing, and the respondent respectfully asks the Court to refuse to recall this appointment. The respondent respectfully urges that the administration of his said daughter's whole estate, presently vested in Mr MacLeod, should be left with him as her curator bonis.”

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The Court appointed Mr Charles C. Maconochie, advocate, curator ad litem to Everina Edgar, and instructed him to report on the whole circumstances of the case.

He reported that he had had a meeting with his ward, and that she looked well and happy and well cared for.

“The ward was most distinct and emphatic in the expression of her wish to remain with her aunt, to whom she is evidently genuinely attached. This attachment is, it seems to the curator, the main cause of her wish to live with the petitioner; but she also seems to be satisfied that she would be more comfortable and well cared for in her aunt's house than in that of her father. For her father she seems to feel little or no affection. She would not say that he had ever been unkind to her, but says that she knows little about him, and her main objection to going to live permanently in his house appeared to be that, in doing so, she would be leaving ‘home,’ and going to live in a strange place.

“The view of the curator, that the ward is quite a free agent in the matter, was, if possible, strengthened by what he saw of the manner of the ward and petitioner towards one another during the time when both were in the room. He is satisfied that they are much attached to one another, and that the petitioner has used no other influence than that of affection and kindness to induce the child to express her wish to remain with her.

“On the whole matter, the curator has no hesitation in stating it as his opinion that it would be a real grief to the ward, and directly contrary to her genuine wishes, were she taken away from the petitioner's house and sent to live with her father.”

Argued for the petitioner;—1. The child had made her election. A minor was entitled to select her own residence against the wishes of a curator, and a father had no higher right in a question of residence than an ordinary curator.¹ He certainly had not an absolute right of control. The one consideration which would weigh with the Court was the well-being of the child herself. Now the reporter was satisfied that she was

¹ Bankton, i., 6, 4; More's Notes to Stair, p. 31; Fraser on Parent and Child, 65, 363; Simpson on the Law of Infants, 141; Harvey v. Harvey, June 15, 1860, 22 D. 1198, 32 Scot. Jur. 548.

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well cared for and happy with her aunt, and better with her than she would be with her father. Besides the child had not been withdrawn from the custody of her father. She had for most of her life been living with the petitioner.

2. The sequestration ought to be recalled without enforcing the petitioner's personal presence. That would seriously affect her health. She had not heard of the order of the Court until a month after the sequestration. She now submitted herself unreservedly to the judgment of the Court as regarded the custody of the child.

Argued for the respondent;—1. By virtue of the *patria potestas* a father had far higher powers than an ordinary curator, and he was entitled to control the residence of a minor child.¹ The legal presumption was in favour of his right, and it was only when there was a danger to the child's wellbeing, moral or physical, that the Court would deprive him of his right. That was the ground of the decision in *Harvey's case*.² But there was nothing of that kind suggested here. It would be far better for the child to associate with her father and stepbrother and sister than with an aunt whose health was extremely delicate.

2. The sequestration should not be recalled until the child had been handed over to her father.

LORD PRESIDENT.—It may be convenient first to consider the question which arises on the respondent's demand that this sequestration should not be recalled unless the child Everina Edgar be delivered over to him. Now, from the report of the curator ad litem it is quite clear that the girl has a preference, and an intelligent and distinct preference, for residing with her aunt, and that she is opposed to being removed from the society in which she has lived for a number of years, and being taken to her father's house. That being so, I suppose we have before us the primary consideration which has to be regarded, and there is no statement on the part of the respondent that this girl is being treated otherwise than with kindness in the home in which she has now for some time lived. Accordingly, so far as the interests and welfare of the child are concerned, it seems to me that they coincide with her wishes, because if she is well where she is, it would, at all events, *prima facie* be against her interests that she should be taken to a house with which she is not familiar, and to which at present she has a strong disinclination to go. Now the father asserts his right to have the child returned to him, and that upon a purely legal ground. I cannot say that we have here anything to shew that the father has so high a right as to override the choice of his minor daughter where the choice is quite sustained by the general wellbeing of the child. Therefore, I think the claim of the father cannot be given effect to.

As regards the sequestration, Miss Fisher has certainly been, to say the least, unfortunate in the predicament in which she has found herself placed. And it is to be regretted that her information about the steps which were being taken with regard to the child had not been more precise. We had to take against her the strong step of sequestering her estates and withholding any payments from these estates so long as she did not submit herself to the judgment of the Court in the matter of this child's custody. But she has done so now, and that unreservedly, and her counsel have stated considerations which I think are sufficient to make it proper that we should not insist upon her personal presence

¹ *Stair*, i. 5, 6, 8, 13; *Erskine*, i. 6, 53, 54, 55; *A v. B*, 42 *Scot. Jur.* 224.

² Note, *supra*, p. 1077.

at the bar. The statements of counsel are responsibly made, and must be regarded as her own. That being so, I think she has sufficiently purged her contempt to enable us to recall sequestration, and it would seem that the factory should follow the fate of the sequestration.

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LORD ADAM.—I entertain a strong opinion that the best place for a child is its father's house, and unless there be exceptionally strong circumstances I should be very unwilling to place a child in the custody of any other person. But I think with your Lordship that the circumstances here are sufficient to overcome that objection, and to lead us to do what would otherwise have been a matter of reluctance on my part. In point of fact, this child has for several years past been brought up by the aunt—at least by the grandmother and the aunt. The grandmother is now dead, and the result, and the very natural result of that is, as we see from Mr Maconochie's report, that this child has acquired a very strong affection for her aunt, and it would be a matter of grief, and probably at her age of lasting grief, to her to be now separated from her aunt and to go back to her father's house, where she has practically never lived, and to reside with her father, for whom, although he appears to be kind enough, she does not entertain any such affection as she probably would have entertained had she lived with him during her earlier years. In these circumstances, the question comes to be, are we to overrule the strongly expressed wish of this child, who is a minor, to stay with her aunt? I am not prepared to do that in this case, and therefore I concur with your Lordship.

LORD M'LAREN.—In considering this case we approach the question from this point of view, that the powers of a father over his minor child are certainly less than those which he possesses with reference to his pupil child, and are also, I think, higher than those of a mere curator chosen by the child after the father's death. It is plain enough that if the child has independent means, and at a suitable age desires to go to a college or school, or to be apprenticed to a business, the father could not insist on keeping the minor at home to dig in his garden, which seems to be Lord Stair's measure of a father's right, at least to the age of twenty-one. Without carrying the notion of *patria potestas* so far, I, for one, can subscribe to all that the late Lord President, when Lord Justice-Clerk, said in the case of *Harvey*, and I should be unwilling to suggest any doubt as to the legitimate control which a father must always have on the conduct, residence, and upbringing of his child during minority. But his powers are not absolute; they are liable to be restrained on an application to the Court on good and sufficient grounds, among which the reasonable wishes of the child are a material element. Now, here we begin with this state of circumstances induced by the act of the father himself. He had himself, after the death of his first wife, acquiesced in his daughter residing with her aunt, and now that his daughter has been brought to look upon her aunt's house as her home the father seeks to alter this arrangement, apparently without good reason, and against the wishes of his daughter. In these circumstances, I agree with your Lordship, there being no pecuniary question involved, that we cannot support this extreme exercise of the father's powers. We granted the prayer which he asked when the child was a pupil, but she has now attained minority, and that, of course, introduces a new element into the case, and entitles us to consult the wishes of the daughter herself. I agree that Miss Fisher, if she has not cleared herself of the imputation of having

No. 211. neglected to obey the orders of Court, has at least so submitted herself to the authority and judgment of the Court as to be entitled to have the sequestration which was formerly granted as a compulsitor against her recalled, and the factory terminated.

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LORD KINNEAR concurred.

THE COURT granted the petition.

MACPHERSON & MACKAY, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 212.

HORATIO ROSS MACRAE, Pursuer (Respondent).—*Johnston—Neil J. Kennedy.*

July 20, 1894.
Macrae v.
Assets Co.,
Limited.

ASSETS COMPANY, LIMITED, Defenders (Appellants).—*W. Campbell—Cullen.*

Teinds—Bona fide perception and consumption—Belief that teinds exhausted—Relevancy.—In an action at the instance of a proprietor of teinds against the proprietor of the lands for arrears of surplus teinds, the defender admitted that the pursuer was the proprietor of the teinds, but pleaded *bona fide* consumption, averring that he had regularly paid his proportion of the minister's stipend in the belief that the teind was thereby exhausted. *Held* that the defenders' statements were not relevant to support the plea of *bona fide* consumption.

1ST DIVISION.
Sheriff of the
Lothians and
Peebles.

IN January 1894 Mr Horatio Ross Macrae, judicial factor on the estate of the deceased Neil G. Buchanan, of Knockshinnoch, raised an action in the Sheriff Court at Edinburgh against the Assets Company, having their registered office in Edinburgh, for payment of arrears of free teinds from 1884 onwards, amounting to £25, 12s. 1½d., with periodical interest thereon.

The pursuer stated (Cond. 2) that he was proprietor of the teinds of Little Udston, in the county of Lanark, and that the defenders were the proprietors of the lands, their entry as such being in July 1884. (Ans. 2) "Admitted."

He further stated;—(Cond. 3) "The free teinds of the said lands are due and resting owing to the pursuer from crop 1864 to crop 1893 inclusive. . . . The free teind prior to crop 1864 was paid to the pursuer's predecessors." (Cond. 4) "The portion of the said free teind applicable to crop 1884, and subsequent crops, is due and resting owing to the pursuer by the defenders as intromitters with the stock and teinds of said lands. The said portion of free teind to crop 1892 amounts to £25, 12s. 1½d., which, besides interest thereon, is due and resting owing to the pursuer by the defenders."

The defenders averred;—(Answer to articles 3 and 4) "Admitted that the defenders have not paid any of the free teinds here specified since the date of their entry. . . . *Quoad ultra* not known, and not admitted. It is further explained (1) that the defenders, since the date of their entry, have regularly paid their proportion of stipend which they believed exhausted the teinds; (2) that no claim was made by the pursuers, or anyone else, against the defenders for free teinds until 11th January 1892, and that the pursuer had no title to uplift or discharge the teind till 5th November 1892; (3) that the defenders have regularly, since 1884, divided the whole available revenue of the company among the shareholders every half year, and that the free teinds now claimed have thus been consumed *in bona fide*."

The defenders pleaded;—The defenders, having *in bona fide* consumed the free teinds for the crops 1884 to 1891 inclusive, should be assoilzied

from the pursuer's claim therefor, and *quoad ultra* the petition is unnecessary, and should be dismissed, with expenses. No. 212.

On 7th February 1894 the Sheriff-substitute (Rutherford) repelled the defences and ordained the defenders to make payment to the pursuer of £25, 12s. 1½d., with interest thereon at five per cent from the date of citation. July 20, 1894.
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The defenders appealed, and on 7th March 1894 the Sheriff (Blair) dismissed the appeal.

The defenders appealed to the Court of Session, and argued;—The defenders had been in absolute good faith in believing that the teind was exhausted; that belief was induced by the pursuer's inaction since at least 1884, and in that belief the teind had been consumed. The claim for arrears was therefore excluded.¹ A reference to the titles shewed that the defenders were truly proprietors of the teinds; *a fortiori*, they had a colourable title to them.

Argued for the pursuer;—The argument on the titles was in the teeth of the defenders' admissions and statements, and there was no foundation for it on record. The only plea stated was *bona fide* consumption, and that was excluded, because the defenders did not aver either a colourable title or that they had consumed the teinds in the belief that they had a right to do so. They stated their belief to be that there was no free teind. But a mistaken notion as to the existence of teinds was not equivalent to a colourable title.

At advising,—

LORD ADAM.—The only plea stated on this record is that of *bona fide* consumption of the free teinds. Now, your Lordships will observe that it is admitted by the defenders that the pursuer is proprietor of the teinds in question, that they (the defenders) have intromitted with the teinds, and that they have not paid any free teinds to the pursuer since the date of their entry.

These admissions are sufficient to entitle the pursuer to decree, unless the defenders have set forth some relevant defence. The only defence they state is, as I have already said, *bona fide* consumption. That defence applies where a person not being the true owner of a subject, but being in the *bona fide* belief under some colourable title that he is, consumes the fruits. But in this case the defender does not aver that he was in the *bona fide* belief that he was the owner of the teinds, and that in that belief he consumed them. His defence is of quite a different nature, viz., that he thought that the stipend exhausted the teind, and that there was no free teind—that is to say, merely that they thought no debt was due. That does not appear to me to present a case for the application of the doctrine of *bona fide* consumption at all, and in my opinion is not a relevant defence. We had, however, a long argument on the construction and effect of the titles of the parties for the purpose of shewing not only that the defender had a colourable title to the teinds but was in fact the true owner. Not only, however, are there no averments on record to support any such pleas, but they are entirely contradictory of the defenders' own admissions and statements on record. We cannot, therefore, consider these pleas, and the defenders did not ask to be allowed to amend their record.

¹ *Stirling v. Feuars of Denny*, 1731, M. 1717, and 1 Cr. and S. App. 90; *Scott v. Heritors of Ancrum*, 1795, M. 15,700, Bell's F. C., 152 (Lord Braxfield); cf. *Lord Advocate v. Drysdale*, Feb. 24, 1872, 10 Macph. 499, Lord Justice-Clerk at p. 505, 44 Scot. Jur. 271.

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I am therefore of opinion that the interlocutors appealed from are right, and that the appeal should be dismissed.

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LORD M'LAREN.—I concur.

LORD KINNEAR.—I agree with Lord Adam. I think the statements of the defenders upon record necessarily exclude from our consideration the question argued at the debate. We had an argument on the appellants' title tending to shew (first) that the defenders have an absolute right to the teinds, and (second) if not an absolute right, such a *prima facie* right as to give them a colourable title to consume the teinds in good faith. Now, that position is excluded, in the first place, because there is an unqualified and absolute admission of the pursuer's right of property in the teinds, and in the second place, because while that admission still left open a plea of colourable title and *bona fide* consumption, that plea again is excluded by the defenders' answer to the 3d and 4th articles of the condescendence, because they say that they have regularly paid their proportion of stipend which they believed exhausted the teinds. Now, the plea of *bona fide* consumption means that the owner of the land has drawn and applied to his own purposes the free teinds not carried off for stipend, in the honest belief that his title gave him the right to do so. But the defenders do not say that they consumed the free teind on the faith of an apparent title, but that they did not know there was any free teind. They say that their belief was that the teinds were exhausted by the stipend. If this was a mistake there is nothing on record to suggest that the unexhausted teind could belong to anyone but the pursuer.

I quite agree with Lord Adam therefore that the defence is irrelevant.

LORD PRESIDENT.—I concur.

THE COURT pronounced this interlocutor:—"Dismiss the appeal: Affirm the interlocutor of the Sheriff-substitute dated 7th February 1894, and decern," &c.

MACRAE, FLETT, & RENNIE, W.S.—J. SMITH CLARK, S.S.C.—Agents.

No. 213. JAMES ROMANES (Liquidator of the Scottish Heritable Security Company, Limited), Petitioner.—*Macnochie*.

July 20, 1894.
Liquidator of
the Scottish
Heritable
Security Co.,
Limited.

Process—Loss of process.—In 1881 the Scottish Heritable Security Company, Limited, went into liquidation under the supervision of the Court. In 1894 the liquidator presented this note to the Court praying them, *inter alia*, to remit the winding-up to a Lord Ordinary in terms of sec. 6 of the Companies Act, 1886. Counsel for the liquidator stated that the whole process had gone amissing in the hands of the Clerk of Court, and moved the Court to deal with the note as a separate process. The liquidator lodged in the new process a print of the original petition for a winding-up order, copies of all the incidental notes in the process, and a copy of the interlocutor sheets. The Court thereupon pronounced the usual interlocutor ordering intimation, and remitting the cause to a Lord Ordinary to proceed.

MACKENZIE, INNES, & LOGAN, W.S., Agents.

A B, Pursuer.—*Jameson—Clyde.*
C D, Defender.—*Dickson—McClure.*

No. 214.

Process—Expenses—Time of lodging objections to the Auditor's report—A. S., July 20, 1894.
Feb. 6, 1806.—The Act of Sederunt, Feb. 6, 1806, enacts that “in case either party means to object to the report of the Auditor he shall immediately lodge with the clerk a note of his objections.” *Held* that, as a general rule, objections must be lodged within forty-eight hours, and that the forty-eight hours run from the date of the Auditor's issuing his report, and not from the date when the report is lodged in process.

Circumstances in which objections were allowed to be lodged on the eighth day after the report was signed.

In December 1893 A B brought an action against C D, her husband, for declarator of nullity of marriage. Proof in the case was fixed for the 24th May 1894. On the instructions of the defender two medical men were sent to London to examine the pursuer, with a view to their giving evidence at the trial.

On the 22d May the pursuer having lodged a minute of abandonment, the defender's account of expenses was remitted to the Auditor.

The Auditor's report was signed 3d July. On 4th July the defender's agents wrote to their client to ask instructions as to objecting to the Auditor's report, and received an answer on 6th July. Objections were lodged for the defender on 11th July, and the process and report were returned to the Clerk of Court on the same day.

The main objections were to the disallowance by the Auditor of £299, 5s., and £312, 18s., of fees of £315 and £323, 8s. charged by the defender for his medical witnesses.

The pursuer maintained that the objections were lodged too late.

On 14th July 1894 the Lord Ordinary (Wellwood) reported the matter to the First Division.*

* “NOTE.— . . . The pursuer maintains that the defender's objections were lodged too late, not being lodged till eight days after the report was signed by the Auditor.

“The defender maintains that there being no inflexible rule as to the time within which objections must be lodged, the delay—five days from receiving instructions—was in the circumstances not too great. He further maintains that, as the objections were lodged whenever the process was returned to the clerk they were timeously lodged, in other words, that the forty-eight hours which are allowed in practice, run not from signature and completion of the report but from the time when it is lodged in process. It is mainly in regard to this point that I report the case.

“No time within which objections must be lodged is fixed by statute or Act of Sederunt applicable to the Court of Session as is done in the Act of Sederunt of 10th July 1839, sec. 109, as to procedure in the Sheriff Courts, by which only forty-eight hours from the completion of taxation are allowed. The words of the Act of Sederunt are,—‘It shall be competent for either party within forty-eight hours after an account has been taxed, to lodge a note of specific objections to such taxation,’ &c.

“By the Act of Sederunt on 6th February 1806 the Auditor of the Court of Session, who was then for the first time appointed, was directed to examine and tax the account, and report thereon to the Court or the Lord Ordinary; and it was further enacted that ‘in case either party means to object to the report of the Auditor he shall immediately lodge with the clerk a note of his objections.’

“By the Act of Sederunt 11th July 1828, sec. 69, it was provided that ‘after the account is taxed the agent’—that is, the agent for the party found entitled to expenses—‘shall be entitled to get back the process in order to return the same to the clerk.’

No. 214. The defender argued;—By the Act of Sederunt 6th February 1806 objections were to be lodged “immediately.” That had been interpreted in practice to mean forty-eight hours, but it was uncertain whether the *terminus a quo* the forty-eight hours ran was the issuing of the report or the lodging of the report in process. The latter was the correct view and as here the objections were lodged within forty-eight hours of the lodging of the report in process, they were timeously lodged. In any view the Court had a discretion in the matter, and would not construe an Act of Sederunt so strictly as an Act of Parliament.¹ Here, looking to the relation of parties, and the magnitude of the sum involved, the defender’s agents were entitled to time to consult their client. After receiving instructions to object, Saturday and Sunday intervened before anything could be done. In the whole circumstances, therefore, there had been no real delay, and besides the pursuers had suffered no inconvenience. In *Stewart’s* case² there had been a delay of over a month.

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Argued for the pursuer;—The question was foreclosed, depending as it did on the Act of Sederunt, as explained by universal practice, which had construed “immediately” to mean within forty-eight hours from taxation. That was the rule expressly enacted in the Act of Sederunt dealing with the Sheriff Court.³ The Auditor was *functus* after the account was taxed.⁴ It was admitted that on special cause shewn the rule might be departed from, but no such cause had been shewn here.

LORD PRESIDENT.—The view I take, in the first place, is that the time from which the forty-eight hours run is the time at which the Auditor has returned his report in the sense of handing it back to the agent who has tendered it to him for audit; that the forty-eight hours run, in short, from the promulgation of the report, and not from the date at which it is lodged in process. Otherwise the date would be an entirely uncertain date, and one more or less determinable by a person whose interest might be to create delay.

In the second place, however, the case in hand appears to me to be a fair case for holding that the objections to the report are not too late. This was evidently a moot point in practice, and the circumstances mentioned at the bar would lead me to admit an extension of the usual period of forty-eight hours.

“No decision precisely in point has been cited to me. In the case of *Adamson & Gulland v. Gardner*, 15 S. L. R. 664, the late Lord President Inglis, in his opinion, spoke of the forty-eight hours allowed in practice as running from the time when the Auditor’s report was lodged with the clerk of Court. His Lordship’s words are,—‘In ordinary cases objections cannot be received more than forty-eight hours after the process has been returned from the Auditor.’

“The only other case referred to was the recent case of *Stewart & Company v. Johnstone*, 20 R. 832, decided by the First Division of the Court of Session. The argument proceeded on the assumption that, according to custom, the note of objections must in general be lodged within forty-eight hours. But the question here raised did not purely arise, because the note of objections was not lodged until a month after the taxation of the account, and probably long after the report was lodged.

“A considerable sum depends upon these objections, and as it is of some importance to remove doubt on the point of practice, I feel justified in reporting the matter to the Court.”

¹ *Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co.*, Nov. 16, 1888, 16 R. 104.

² *Stewart & Co. v. Johnstone*, June 17, 1893, 20 R. 832.

³ A. S. July 10, 1839, sec. 109.

⁴ A. S. July 11, 1828, sec. 69.

which, after all, is only the interpretation put by practice upon a clause in an Act of Sederunt. No. 214.

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LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT remitted to the Lord Ordinary to allow the objections to be received and to proceed.

LOCKHART THOMSON, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

JOHN LUNDIE, Pursuer (Respondent).—*Kennedy—Macaulay Smith.*
DAVID MACBRAYNE, Defender (Reclaimer).—*Abel.*

No. 215.

July 20, 1894.
Lundie v.
MacBrayne.

Reparation—Wrongous apprehension—Liability of master for act of servant—Relevancy—Issue—Malice and want of probable cause—Merchant Shipping Act Amendment Act, 1862 (25 and 26 Vict. c. 63), secs. 35 and 37.—Under sections 35 and 37 of the Merchant Shipping Act Amendment Act, 1863, it is lawful for the master or other officer of a passenger steamer to apprehend a passenger who has refused to pay his fare.

In an action of damages brought by a passenger against the owner of a passenger steamer, the pursuer averred that he had been wrongously apprehended by a purser in the employment of the defender, on the ground that he had refused to pay his fare, and proposed an issue whether the defender had “wrongfully and oppressively” caused the apprehension. The defender pleaded that the action was irrelevant, in respect that the purser alone was responsible for the act complained of, and that, in any event, the pursuer was bound to insert “malice and want of probable cause” in the issue. *Held* that the action was relevant, in respect (1) that the defender had a statutory power to arrest on the ground alleged, and (2) that, on the averments of the pursuer, the purser had acted within the scope of his employment as a servant of the defender, and an issue whether the defender had “wrongfully and illegally” caused the apprehension *approved*.

Reparation—Wrongous prosecution—Limitation of action—Summary Procedure Act, 1864 (27 and 28 Vict. c. 53), sec. 35.—By section 35 of the Summary Procedure Act, 1864, it is provided that,—“Every action against any . . . person on account of anything done in any case instituted under this Act shall be commenced within two months after the cause of action shall have arisen. . . .” In August 1893 a conviction was obtained, on a complaint under the Summary Procedure Act, against a passenger on a steamer for travelling without a ticket. On 23d January 1894 the conviction was quashed, on the ground that the complaint had been brought without the concurrence of the procurator-fiscal. On 30th January 1894 the passenger raised an action of damages against the shipowner for wrongous prosecution. *Held* that although the complaint had been quashed on account of defective instance, it was not the less a proceeding under the Act, and that by section 35 the action was *barred*.

On 30th January 1894 John Lundie, shoemaker, Maybole, and formerly residing at Fort-William, brought an action of damages against David MacBrayne, shipowner, Glasgow, for (1) illegal apprehension on 10th August 1893, and (2) illegal prosecution on 24th August 1893.

The pursuer averred;—“On 10th August 1893 the pursuer, who was taking a pony belonging to him from Oban to Fort-William, contracted with the defender’s agent at Oban for the carriage of said pony and for a steerage passage for himself per the said steamer ‘Chevalier.’ The freight charge was fixed at 5s., which pursuer paid, and received a receipt therefor. . . . He was not challenged by any of the defender’s servants for a pass when going aboard said steamer as aforesaid, nor was any demand made upon him until the steamer was within twelve miles of Fort-William, when John James Lawson, the defender’s purser, demanded his fare or a ticket. The pursuer in reply produced said receipt,

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explaining that that included his own fare. Lawson refused to accept this explanation, and without calling the captain or master, and making a demand for the fare through him, on the arrival of the steamer at Fort-William illegally, maliciously, and without probable cause, gave the pursuer in charge of a constable. . . . The pursuer was then taken in custody to the police-office at Fort-William, where he was detained for over half an hour and then liberated without any formal charge being made against him."

He also averred that on 24th August 1893 he had been subjected to a summary prosecution at the instance of the defender, under section 35 of the Merchant Shipping Act Amendment Act, 1862,* that he had been convicted, and sentenced to pay a fine of 5s., and that the whole of these proceedings were illegal. "They were carried out wilfully, maliciously, and without probable cause, to the loss and damage to the pursuer to the extent sued for."

He further stated that the conviction had been quashed on the 23d January 1894, on the ground that the complaint had been brought without the concurrence of the procurator-fiscal—21 R. (Just. Cases), 33.

The defender admitted that the pursuer contracted with the defender's agent at Oban for the carriage of a pony from Oban to Fort-William by the steamer "Chevalier." He denied that the pursuer was entitled to travel free, and stated,—“The pursuer was asked for his fare by the pursuer, but he refused, and had no money to pay it. His name and address were unknown to the pursuer, and also to the constable on the pier at Fort-William, but he said he was known to the inspector of police, and he offered to go to the inspector to be identified. He was accompanied there. He was not arrested nor detained. In the circumstances he might have been lawfully detained till tried, in terms of section 37 of the Act 25 and 26 Vict. cap. 63.”†

It was not disputed that the prosecution under the Merchant Shipping Act Amendment Act was instituted under the Summary Procedure (Scotland) Act, 1864.

The pursuer pleaded ;—(1) The pursuer having suffered loss, injury, and damage through the action of the defender, or those for whom he is responsible, in having him wrongously arrested and imprisoned, and afterwards prosecuted and convicted, the defender is liable in damages therefor.

The defender pleaded ;—(1) That the pursuer's statements were irrelevant, and (4) that the action was excluded by section 35 of the Summary Procedure Act, 1864.‡

* The Merchant Shipping Act Amendment Act, 1862 (25 and 26 Vict. cap. 63), enacts, sec. 35,—“The following offenders, that is to say, . . . (6) any person who travels or attempts to travel in any such steamer without having previously paid his fare, and with intent to avoid payment thereof . . . shall for every such offence be liable to a penalty not exceeding forty shillings ; but such liability shall not prejudice the recovery of any fare payable by him.”

† Sec. 37.—“It shall be lawful for the master or other officer of any duly surveyed passenger steamer, and for all persons called by him to his assistance, to detain any person who has committed any offence against any of the provisions of the two last preceding sections of this Act, and whose name and address are unknown to such officer, and to convey such offender with all convenient despatch before some Justice without any warrant or other authority than this Act ; and such Justice shall have jurisdiction to try the case, and shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender.”

‡ Quoted in rubric.

The pursuer proposed the issues quoted below.*

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On 5th June 1894 the Lord Ordinary (Stormonth-Darling) disallowed the second and third issues, and allowed the first issue, and appointed it to be the issue for the trial of the cause.†

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The defender reclaimed, and argued;—(1) The action was barred in both its branches by the limitation clause (sec. 35) of the Summary Procedure Act of 1864. The apprehension was with a view to proceedings under the Summary Procedure Act. The first issue must charge malice and want of probable cause, as the pursuer was acting under warrant of the Merchant Shipping Act, 1862, secs. 35 and 37,¹ but there could be no such thing as vicarious malice; the pursuer's own averments did not connect the malice with the present defender.² In the class of cases referred to in the Lord Ordinary's note, the proper criminal authorities

* “(1) Whether, on or about 10th August 1893, on board defender's steamer ‘Chevalier,’ at Fort-William, John James Lawson, an officer in the service of the defender, acting within the scope of his authority, wrongfully and oppressively caused the pursuer to be apprehended and taken in custody to the police-office at Fort-William, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 19th August 1893, the defender, or someone in his employment, and for whom he is responsible, by presenting a complaint to the Sheriff-substitute at Fort-William wrongfully and illegally caused the pursuer to be brought before the Sheriff-substitute at Fort-William on 24th August 1893, and tried on a charge at defender's instance of having refused to pay his fare from Oban to Fort-William, and convicted and fined 5s., with instant execution by arrestment and poinding, to the loss, injury, and damage of the pursuer? (3) Whether, on or about 30th August 1893, the defender wrongfully and illegally caused the pursuer's pony to be poinded and sold by a sheriff-officer, to the loss, injury, and damage of the pursuer?”

† “OPINION.—With regard to the second and third issues proposed for the pursuer, the defender's plea, founded on the 35th section of the Summary Procedure Act, seems to me conclusive. Both issues relate to something done in a case instituted under that Act. No doubt it turned out that the case had been badly instituted, for want of the concurrence of the procurator-fiscal. But it was a proceeding under the Act all the same, and therefore this action, so far as these issues are concerned, comes too late.

“If the wrong complained of in the first issue had been that the defender's officer gave the pursuer into custody for committing an ordinary crime, it is clear that the defender would not have been responsible, and the officer himself could only have been made liable by its being shewn that he acted maliciously and without probable cause. But the apprehension of the pursuer took place in respect of an alleged offence against the 35th section of the Merchant Shipping Act of 1862, and by virtue of the powers conferred on the master and officers of a passenger steamer by section 37. Now, I cannot distinguish between an act of that kind done under statutory powers by the owner's representatives, and for his behoof, and the detention of a passenger by the servants of a railway company, for an alleged contravention of the company's bye-laws. In the latter class of cases the company has been held responsible on the principle of implied authority, because the servant is appointed to do that among other things, and if he makes a mistake the company must answer. The officer's authority is not very distinctly averred on record, but I think any omission on that score is supplied by the defender's admitted adoption of his act. It seems to me, therefore, that the first issue must be allowed.”

¹ *Craig v. Peebles*, Feb. 6, 1876, 3 R. 441; *J. & W. Kinnes v. Adam & Sons*, March 8, 1882, 9 R. 698; *Rae v. Linton*, March 20, 1875, 2 R. 669.

² *Wilson v. Mackie*, Oct. 22, 1875, 3 R. 18, Lord President, p. 20; *Wardrope v. Duke of Hamilton*, June 24, 1876, 3 R. 876; *Fraser's Master and Servant*, p. 273.

No. 215. were never called in; everyone was in the pay of the company.¹ Probable cause was established by the pursuer's own statement and by the Sheriff.²
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Argued for the pursuer;—Sec. 35 of the Summary Procedure Act did not apply to either branch of the case; the apprehension did not take place under that Act, and the prosecution was not protected by the Act, as it was null *ab initio*. The pursuer having acted in the commercial interests of his employer, the defender was liable for his fault.³ It was not necessary to prove malice.⁴ There could be no probable cause for the execution of an illegal warrant.⁵

At advising,—

LORD KINNEAR.—The pursuer of this action complains of two distinct and separate wrongs, for both of which he maintains that the defender is responsible. In the first place, he alleges that he was illegally apprehended by the order of a clerk in the defender's employment, acting within the scope of his authority; and in the second place, that he was wrongfully subjected to an illegal prosecution at the defender's instance, under which he was sentenced to pay a fine of five shillings.

The Lord Ordinary has allowed an issue to try the question raised by the first complaint, but he has held that in so far as the action is based on the second ground it is barred by a provision in the Summary Procedure Act, 1864, for the limitation of actions on account of anything done in any case instituted under the Act.

I think his Lordship's judgment on both points is right. It is not disputed that the prosecution of which the pursuer complains was instituted under the Summary Procedure Act. It was not the less a proceeding under the Act, because of the defective instance in respect of which the conviction was quashed. But the action was not brought within two months after the cause of action had arisen, and is therefore excluded by the 35th section of the statute. It is said that this plea excludes the action on all its grounds, but this appears to me untenable.

As regards the alleged illegal apprehension, the defence is twofold; it is said, in the first place, that the pursuer's averment is not true, and that what really happened was, that the pursuer having refused to pay his fare, and his name and address being unknown to the defender's pursuer, he voluntarily offered to go to the inspector of police at Fort-William, to whom he said that he was known, in order to be identified; that he was accompanied to the inspector's office, but was not arrested or detained. In the second place, it was argued that even if the pursuer's statement is correct in fact, his detention was justified by the 37th section of the Merchant Shipping Act of 1862, which prescribes the manner in which offenders against the 35th section may be apprehended. Now, that may be a perfectly good

¹ Goff v. Great Northern Railway Company, 1861, 3 Ellis and Ellis, 672.

² Lundie v. MacBrayne, Jan. 23, 1894, 21 R. (Just. Cases) 33.

³ Lowe v. Great Northern Railway Company, 1893, 62 L. J. (Com. Law), 524; Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company, 1873, L. R., 8 C. P. 148; Goff v. Great Northern Railway Company, *supra*.

⁴ Strachan v. Monro, Feb. 8, 1845, 7 D. 399, 17 Scot. Jur. 198; Smith v. Green, March 10, 1853, 15 D. 549, 25 Scot. Jur. 321.

⁵ Bell v. Black and Morrison, June 28, 1865, 3 Macph. 1026, 37 Scot. Jur. 543.

defence if the facts support it. But to give the defender the protection of that enactment it must be shewn, in the first place, either that the pursuer was travelling in his steamer without having previously paid his fare, and with intent to avoid payment thereof, or else that he had failed when required by an officer of the steamer either to pay his fare or to exhibit such ticket or other receipt as is usually given to persons travelling by the steamer, and paying their fare. Secondly, that his name and address were unknown to the officer who gave him in charge; and thirdly, that being apprehended he was conveyed with all convenient despatch before a Justice. But all of these propositions are contradicted by the pursuer, and therefore it appears to me that the defence on both grounds depends on matter of fact, which must be ascertained in the ordinary way before the law can be applied.

But then it is said that if the pursuer was wrongfully apprehended by the pursuer that officer must be liable for his own wrong, and that the defender is not responsible. I agree with the Lord Ordinary that in this respect the case is undistinguishable from those in which it has been held that railway companies are responsible for wrongful arrests made by their inspectors for offences against the Railway Acts or bye-laws authorised by these statutes. The case of *Moore v. The Metropolitan Railway Co.*, L. R., 8 Q. B. 36, is an example. In that case a passenger travelling by the Metropolitan Railway from Moorgate Street to Notting Hill got out at Edgeware Road Station, which is a station short of Notting Hill. He was informed that he must pay an additional fare of twopence, which he refused to do unless a receipt were given him. He was thereupon given into custody by the inspector of the station on the charge of refusing to give up his ticket or pay his fare. The charge was dismissed, and the passenger brought an action of false imprisonment. It was held that as the railway company was empowered by the Railway Clauses Act to arrest persons committing frauds against the statute, and as the inspector was their representative at the station, it must be presumed, in the absence of evidence to the contrary, that he had authority from the company to arrest persons committing offences against the statute, and that if such an officer intending to exercise his authority makes a mistake and does an act which cannot be justified, the company are responsible because he is their agent. The case establishes that two things must be proved in order to make a railway company or a shipping company liable for a wrongous apprehension by one of its officers. First, the offence must be one for which, if it had been committed, the company had power to arrest, because it is not to be presumed that the company have authorised one of their servants to apprehend a person whom they themselves had no power to apprehend; and secondly, that the officer was acting within the scope of his authority. As to the first point there is very little question in this case, because the defenders claim the right under the statute to apprehend a person in the position of this pursuer. One averment in the pursuer's condescendence might throw some doubt upon the second point, for he says the pursuer gave him in charge without having first appealed to the captain. If this means that the right to apprehend offenders rested with the captain and not with the pursuer, it might be difficult for the pursuer to shew that the pursuer acted within the scope of his authority. But I think that this is not a fair construction of the averments, and that fairly read they disclose a *prima facie* case to go to a jury.

The only remaining question is as to the terms of the issue. I do not think it necessary that the pursuer should take an issue of malice and want of pro-

No. 215. bable cause. The defender and his servants have no privilege to give persons into custody except that conferred by the statute, and he cannot plead the statute unless he has observed its conditions. He may have a good defence on the merits. But if he has not, it is no answer to the pursuer's complaint that his officer was not acting maliciously. On the other hand, I do not think the word "oppressively," which has been inserted in the issue, is apposite. In *Mackay v. Grant*, June 14, 1865, 3 Macph. 944, where an issue in these terms was allowed, the Lord Justice-Clerk said,—“Where wrongfully is combined with oppressively, I think it is open to the pursuer to proceed either upon want of legal warrant or upon the oppressive use of a warrant in itself legal.” In the present case I cannot see that the pursuer has alleged any case of oppression in addition to or distinct from the illegality of the arrest of which he complains. If he committed an offence against the statute for which the defender's officer was entitled to apprehend him, and if in making the apprehension the officer acted in accordance with the provisions of the statute and not otherwise, I see no case of oppression. I do not know what is meant by that word as used in this issue, and I think there would be a risk of its misleading the jury if it was allowed to remain.

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I think the more appropriate form of issue is that approved in *Pringle v. Bremner & Stirling*, May 6, 1867, 5 Macph. (H. L.) 55, and I see no reason for departing from a style which has received the approval of the House of Lords.

I am of opinion, therefore, that we should affirm the judgment of the Lord Ordinary, but make this variation in the form of the issue.

LORD M'LAREN.—Judging from the narrative in this case, it would appear that some people imagine whenever they have been wronged they are entitled to hand over the person who has wronged them to a police-officer without a warrant.

I need hardly say that the constitution of this country confers no such right. It is a fundamental principle that no one can be deprived of his liberty or subjected to restraint without the warrant of a Judge or magistrate. An exception is admitted where the injured party has seen the crime committed, or has such evidence as is equivalent to personal observation. In that case he may detain the wrongdoer on condition of taking the person apprehended before a magistrate without delay, and he may, if necessary, call to his aid constables or officers of law.

This is not a case of a crime at common law, but an alleged contravention of a statute, and we must look at the statute to see the right of the person against whom the contravention has been committed. It is only where the address of the person alleged to have contravened the statute is unknown that his apprehension is authorised, and I think the pursuer is entitled to an issue of wrongful apprehension, because he avers that he, being a law-abiding citizen whose address was known to the officers of the steamer, was given into the custody of a police-officer by the defender's servant.

I agree with Lord Kinnear in his discussion of the authorities on this point, and also as to the form of issue which should be adopted.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT approved the following issue for the trial of the cause, viz :—“Whether, on or about 10th August 1893, on board defen-

der's steamer 'Chevalier,' at Fort-William, John James Lawson, No. 215.
 an officer in the service of the defender, acting within the scope
 of his authority, wrongfully and illegally caused the pursuer to be
 apprehended and taken in custody to the police-office at Fort-
 William, to the loss, injury, and damage of the pursuer? Damages
 laid at £250."

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JAMES ROSS SMITH, S.S.C.—GILL & PRINGLE, W.S.—Agents.

JOHN AUCHINCLOSS AND ANOTHER, Pursuers (Reclaimers).—

No. 216.

A. S. D. Thomson—Craigie.

WILLIAM DUNCAN, Defender (Respondent).—Abel.

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 Auchincloss v.
 Duncan.

Agent and Client—Negligence—Employment—Right in security—Duty of law-agent to complete title.—In an action of damages brought in 1893 against a law-agent the pursuers averred that in 1852, when they were in minority, their father held a sum of money belonging to them; that without consulting them he borrowed this sum; that the pursuers' mother voluntarily offered to give security over certain heritable subjects belonging to her in which she was not infeft, that their father, as their curator, and their mother, instructed the defender to draw up a bond and disposition in security; that the defender prepared a bond and disposition in security, but did not complete the mother's title by infestment; that the pursuers did not know of the granting of the bond till 1889; that it was the defender's duty to complete the mother's title, and that his failure to do so had resulted in the loss of the sum borrowed.

Held that as the pursuers did not aver that the defender had been instructed to complete the mother's title, the action was not relevant.

ON 14th November 1893 John Auchincloss and his sister, Catherine Auchincloss or Smith, raised an action against Mr William Duncan, S.S.C., Edinburgh, for payment to them of £130.

1ST DIVISION.
 Ld. Wellwood.

They made the following statements: Under the trust-disposition of James Mowat, their maternal grandfather, who died in 1829, they had, along with a deceased sister, become entitled to three *pro indiviso* shares of the residue of his estate. In 1852 the value of these shares was £65. (Cond. 3) "On 13th April 1852, when the pursuers and their said now deceased sister were in minority, their father, without any consultation with them, borrowed the said amount of their shares of their grandfather's estate. He, however, as curator for the pursuers and their said sister, employed and instructed the defender to draw up a bond in favour of the pursuers and their said sister for the sum borrowed, and further, he and his wife directed the defender to prepare for behoof of the pursuers and their said sister, in security, a disposition of certain subjects at No. 71 Rose Street, Edinburgh, belonging to Mrs Auchincloss. The defender prepared a bond and disposition in security as directed, in favour of the pursuers and their said sister. The pursuers' father, in employing the defender to draw up the said deed, was acting as the natural guardian of the pursuers, and his instructions to the defender were given for and on behalf of the pursuers and their said sister." (Cond. 4) "It was the defender's duty, acting on behalf of the pursuers and their said sister, who were at the time minors, and utterly ignorant of what was being done with their money, to take care that a good title was obtained for them to the property disposed to them in security for the loan to their father. This he entirely failed to do. The pursuers' father did all he could to give the pursuers a proper security for the money he had borrowed. The property given in security was of adequate value, and the pursuers' failure to recover the sum due to them was attributable solely to the neglect and fault of the defender, as after mentioned."

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They then went on to recite the titles of the Rose Street property—
“In 1852, when the said bond and disposition in security was granted to the pursuers and their sister, their mother held the subjects disposed in security on a personal title only. . . . In these circumstances, it was the defender's duty to have the bond recorded in the Register of Sasines *habili modo* to create a real security in favour of the pursuers and their said sister. This he failed to do. The defender retained the bond, and also Mrs Auchincloss's titles to the subjects which she had assigned by the bond to the pursuers and their sister in his possession. By the bond Mrs Auchincloss bound herself to complete, at her expense, a title to the subjects.* The defender, though holding the titles, never completed Mrs Auchincloss's title, and in the beginning of 1860 he gave up the titles to Mr Auchincloss. The bond was not recorded at all until 12th November 1860, when the defender, as law-agent for the pursuers and their said sister, put it on the Register of Sasines, without any deed being on the said Register to shew the right of Mrs Auchincloss to the subjects she had disposed in security. Mrs Auchincloss continued to hold the subjects on a personal title from the date of the bond till 31 May 1860, when she sold them to William Findlay. . . .” It was only in February 1889 “that the pursuer John Auchincloss first came to know of the bond in his favour, and the other pursuer was not aware of it until even later.” Thereafter, in 1892, the pursuers took action to try and recover the amount of the bond from the persons who had come to be in possession of the security subjects, but without success.

“The defender, as law-agent employed for the pursuers, then minors, was under the obligation to see that the security granted for their money was made valid and effectual. This he failed to do. He first delayed for eight years to record the bond in the Register of Sasines, and then he recorded it ineptly. The pursuers have consequently lost the sum now sued for, through the negligence of the defender.”

The pursuers pleaded;—(3) The defender having been employed as law-agent on behalf of the pursuers by their natural guardians during their minority, is liable to them in damages for loss sustained by them in consequence of his failure to perform properly his duties in that capacity.

The defender pleaded;—(3) No relevant case stated. (6) The defender not having acted as agent for the pursuers, he ought to be assoilzied.

On 1st March 1894, the Lord Ordinary (Wellwood) sustained the third plea in law for the defender, and dismissed the action.†

* The bond was produced. The only clause referring to the completing of the grantor's title was in these terms:—We “oblige ourselves, jointly and severally, for the expenses of completing the title of me, the said Rosina Mowat or Auchincloss, to the said subjects, and of granting and completing, assigning and discharging, this security, and on default in payment, grant power of sale.”

† “OPINION.— . . . In this action the pursuers seek to hold the defender, who is a Solicitor before the Supreme Courts, personally liable for alleged professional negligence, of which he is said to have been guilty upwards of forty years ago, in having failed to take care that a good title was obtained for them to certain heritable subjects for which a bond and disposition in security in their favour was granted by their father and mother in the year 1852. Amongst other defences, the defender pleads that the pursuers' averments are irrelevant, and also, (6) ‘That not having acted as agent for the pursuers, he ought to be assoilzied.’ I am of opinion that the pursuers have not relevantly averred that the defender was employed by them or on their behalf.

“It seems, from the pursuers' statement, that a legacy was left by James

The pursuers reclaimed. Before the hearing the pursuer John Auchincloss died, and, on 21st June 1894, his widow and sole executrix, Mrs

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Mowat, the pursuers' maternal grandfather, to the children of the marriage between the pursuers' father and mother. The pursuers' father obtained possession of the shares which fell to the pursuers, and apparently used them for his own purposes. The pursuers' statement is that he borrowed the amount of their shares while they were in minority; but they also say, and that is part of their case, that they were not aware of this until recently, and that they were not consulted in the matter at all. When he thus appropriated,—I do not use the word in a bad sense,—or used the shares, the pursuers' father, being anxious that the pursuers should have some security for the money, instructed the defender to prepare a bond and disposition in security in their favour, over certain heritable subjects to which the pursuers' mother had right. The bond was prepared by the defender, and executed by Mr and Mrs Auchincloss. The complaint is that whereas Mrs Auchincloss held the subjects disposed in security on a personal title only, the defender failed to complete her title as he was bound to do, and did not even record the bond until November 1860, by which time the property had been sold by Mr and Mrs Auchincloss to a Mr Findlay; the result of which was that it was ultimately held by the Court that the bond gave the pursuers no real security over the subjects. I assume on the question of relevancy that the defender was negligent in the respects alleged.

“The question is whether the pursuers have relevantly averred that the defender was employed by them, or on their behalf; in other words, whether, in order to support an averment of employment by or on behalf of a minor, it is relevant and sufficient to aver that the agent was instructed to do the work in question by the minor's curator, without the minor's knowledge, and for the purpose of giving security for a sum of money belonging to the minor, the use of which the curator had taken also without the minor's knowledge and permission.

“I do not think that such an averment is relevant. The powers of a father as administrator-in-law for his children are not in this respect different from those of any other guardian. A minor acts with consent of his curator, the curator cannot act by himself without the minor. Further, a curator cannot legally lend the curatorial funds to himself. Therefore, when Mr Auchincloss instructed the defender to prepare the bond, it cannot be said with propriety that he gave instructions for and on behalf of the pursuers, in the sense that in so doing he was acting as their curator. He was really acting as their debtor, and endeavouring to give them security for the money of which he had taken the use without their knowledge.

“If it had been averred that the pursuers' father employed the defender with their knowledge and consent, there might have been a case for inquiry. But the pursuers' case is that they knew nothing about it,—that they were kept in the dark. There is thus no room for implying authority from them to employ the defender. Such implied authority is negatived by their own statement.

“No doubt the defender was employed to prepare the bond for their benefit, but that is not enough. It was necessary that the pursuers should aver and prove that the defender was employed by them, or by their authority. This is clearly settled by the decision of the House of Lords in the leading case of *Robertson v. Fleming*, 4 Macq. 167. In that case there were facts alleged which apparently warranted an issue as to whether the agent was employed by or by the authority of the appellants. This appears from the terms of the judgment and remit, 4 Macq. 214. But the facts alleged were very different from those stated in the present case. A person named Hamilton, being desirous to raise money, applied for an advance to certain money-lenders, who agreed to make it on the borrower obtaining three cautioners. The three respondents agreed to become cautioners, being aware that Hamilton had leasehold property which, if properly secured for their benefit, would keep them safe. Their statement was that Hamilton agreed to complete the necessary

No. 216. Helen Chalmers or Auchincloss, was sisted as a party to the action in his room.

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Argued for the pursuers;—The pursuers' averments were to the effect that the defender was to prepare the necessary deeds, and it was his duty therefore to prepare a good security. That was a matter entirely in his hands. It did not matter that the mother was not a debtor in the loan; so far as the grantees were concerned, the transaction was onerous. It was of no importance who conveyed the instructions to the law-agent¹. Besides it was sufficiently alleged that the father was acting for behoof of—that was, for the benefit and by the authority of—the pursuers, in instructing the defender. The latter was the family agent, and knew the whole circumstances.

Argued for the defender;—The Lord Ordinary's reading of the record was right, viz., that the instructions were given by the father on his own account, and not by the authority of the pursuers, who indeed stated that they knew nothing about the transaction at the time. That being so, the defender was not employed by them, and they had no title to sue. Besides, the mother, to whom the lands belonged, was not debtor in the loan. She was not bound to interpose at all, and it was not said that she had done more than direct the defender to prepare a disposition of the subjects, i.e., as she held them. The defender was not entitled—far less bound—to go beyond his instructions, and take steps to complete her title.

At advising,—

LORD M'LAREN.—In this case the pursuers, who sue in the character of creditors in a debt due by their father, claim damages from their father's solicitor on the ground of professional negligence, in that the defender being employed by the father to prepare a deed of security in their favour, failed to perfect the title by sasine.

The Lord Ordinary has held, following the case of *Robertson v. Fleming*, 4 Macqueen, 167, that the action fails for want of relevancy, because it is not averred that the defender was employed by the pursuers (that is, the minor children of the debtor) or by their authority.

In such a case, if a father is under an obligation to grant a good security to his children, and is in circumstances which enable him to fulfil that obligation, I cannot doubt that his authority as administrator-in-law for his children would

security over this property, and that he employed Robertson, the agent, for their behoof. The issue sent to the jury was whether Robertson was employed by Hamilton 'for behoof of' the cautioners. The House of Lords held that the issue was improperly worded, on the ground that the words 'for behoof of' meant 'for the benefit of,' and were not equivalent to the words 'by the authority of.'

"Now, in the present case, as I read the pursuers' averments, it cannot be inferred from them that the defender was employed by them, or by their authority; and on that short ground I think the case must be dismissed.

"It appears from the pursuers' own statement that the value of the three *pro indiviso* shares belonging to them and their sister was only £65, and I think the probability is that much more than that small sum was expended by the pursuers' father on their upkeep and education."

¹ Lang v. Struthers, Feb. 2, 1826, 4 S. 418, May 28, 1827, 2 W. and S. 563; Fearn v. Gordon & Craig, Feb. 2, 1893, 20 R. 352; Cann v. Wilson, 1888, L. R., 39 Ch. Div. 39.

² Fleming v. Robertson, 1861, 4 Macq. 167; Tully v. Ingram, Nov. 10, 1891, 19 R. 65.

extend to the giving the necessary authority to a solicitor to see to his children's interests in the matter, and to take care that they got a good security. In the case supposed the solicitor has the authority of the children, as well as of the parent, to act for them; and he would, of course, be responsible to the children in case of negligence resulting in loss to them. If the action is not relevantly laid it is only because it is not distinctly averred that the father's instructions to his solicitor were given in the exercise of his powers as their administrator-in-law.

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As the record stands, and in the absence of any offer of amendment, I do not dissent from the Lord Ordinary's view. But there is another defence, a defence of a more substantial character, on which I should prefer to rest my opinion. The averments in cond. 3 are (1) that the defender was employed "to draw up a bond in favour of the pursuers and their sister," and (2) that he was employed "to prepare for behoof of the pursuers and their sister a disposition of certain subjects" (described) belonging to Mrs Auchincloss, the pursuer's mother. It is further explained that at the time when these instructions were given the title to the subjects to be conveyed in security was incomplete, and it is not averred either that the defender was instructed to pass infeftment on the disposition in security, or to complete the title of Mrs Auchincloss, without which completion an infeftment of the disponent in security would of course be unavailing.

This point, however, has not escaped the attention of the pursuers' advisers.

Being unable (as I assume) consistently with the facts of the case to aver that the defender was instructed to perfect the security, it is set forth in cond. 4 that it was the defender's professional duty (that is, independent of instructions) to perfect the security. Now, I am unable to follow the pursuers in this statement or deduction from the facts of the case as set forth by themselves. The property to be disposed in security was the property of Mrs Auchincloss, who is not said to have been a debtor in the obligation, and she was under no obligation to complete her title and to pass infeftment in favour of her disponents. A person who interposes as a cautioner may mean to give a perfect or an imperfect security, but if he or she instructs a solicitor to prepare a deed of security which still leaves the granter a certain control over an estate, I know of no rule of law which would require the solicitor to perfect the security without instructions from his client or even justify him in so doing. In the present case we have no reason to know that Mrs Auchincloss would have agreed to infeft her children in her property in security of her husband's obligations, and her solicitor clearly had no right to pass infeftment without instructions from his client. It may be said that the disposition was a very poor security unless infeftment passed upon it. That may be, but a debtor who takes security from a cautioner must be content with such security as the cautioner is willing to give. I think we should adhere to the interlocutor.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT adhered.

R. AINSLIE BROWN, S.S.C.—W. A. HARTLEY, W.S.—Agents.

No. 217. HONOURABLE JAMES M. O. BYNG AND ANOTHER (Lucas's Trustees),
Pursuers (Respondents).—*W. C. Smith—Sym.*

July 20, 1894.* DONALD CAMPBELL AND EBENEZER ERSKINE SCOTT (Beresford's Trustee),
Lucas's Trustees v. Campbell and Scott. Defenders (Reclaimers).—*Johnston—Macfarlane.*

Arrestment and furthcoming—Arrestment of joint property—Summons of furthcoming—Conclusions—Competency—Process.—Under the lease of a quarry the plant was declared to be the joint property of the landlord and of the tenant, the landlord being bound to pay one-half of the value thereof to the tenant at the ish of the lease. Certain creditors of the landlord, before the lease ended, used arrestments in the hands of the tenant. Thereafter they raised an action of furthcoming against the arrestee and the landlord's trustee, in which they alleged that the plant in the quarries had been attached, the conclusion being that the arrestee should be ordained to pay the whole debt due by the landlord or such part thereof as was represented by money arrested in his hands due by him to the landlord, and that such other orders should be pronounced as "may seem necessary for satisfying the said claim of the pursuers."

The Court being of opinion that the summons contained no conclusions under which the arrestments, even if competently laid on, could be made available, allowed the pursuers an opportunity of amending the same.

The pursuers thereupon substituted for the original conclusions the following—that the Court should ordain the moveable plant to be sold, and the price thereof, so far as was necessary for the satisfaction of their debt, paid to them, or otherwise to pronounce a like order, upon the pursuers paying to the arrestee half the value of the moveable plant as the same might be ascertained in terms of the lease.

Held that the conclusions were not tenable, and that the interest of the landlord in the plant had not been validly attached by the arrestment.

Per Lord Kinnear—"An arrestment and forthcoming is an adjudication preceded by an attachment, and the essential part of the diligence is the adjudication. It follows that an arrestment is futile unless it can be followed up and the diligence worked out by a decree effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former by the arrestee."

1st Division.
Lord Kinnearney.

THE trustees of the late Sir George de la Poer Beresford of Ballachulish granted a lease in favour of Dr Donald Campbell, from 1878, for fifteen years, running until Whitsunday 1893, of the Ballachulish slate quarries. The lease contained the following clause:—"Further, the said Donald Campbell having paid to the said first party [the trustees] the sum of £3792, 8s. sterling, being one-half the amount of valuation of the engines, waggons, drums, rails, tools, horses, carts, and other moveable plant for the said quarries . . . the same shall be held to be the joint property of the proprietors and tenant" (then followed a provision for renewing plant from time to time at the cost of both parties equally); "and the said first party or their foresaids shall be bound, at the termination of this lease, to pay to the said Donald Campbell or his foresaids one-half of the value of the engines, waggons, drums, rails, tools, horses, carts, and other moveable plant and stock of slates which may then be on said quarries."

In December 1891 the Hon. James M. O. Byng and another, Admiral Lucas's marriage-contract trustees, as assignees of a £10,000 bond in security over the lands of Ballachulish granted in 1879 by Sir George Beresford, raised an action for payment of the amount of the bond against Ebenezer Erskine Scott, C.A., trustee under a trust-deed granted by Sir George Beresford. Decree was obtained in the action in June 1892, and extracted on 16th August 1892.

* Decided June 22, 1894.

On 3d December 1891 the pursuers in that action used arrestments on the dependence to the extent of £15,200 in the hands of Dr Donald Campbell, lessee of the slate quarries.

On 18th May 1893 the trustees further arrested £15,000 in the hands of Dr Campbell, proceeding on the decree they had obtained.

On 31st May 1893 they raised an action of furthcoming against Dr Campbell as arrestee, and against Mr Scott, as trustee foresaid, as principal debtor under the bond. The conclusions of the summons were:—"Therefore the defender, Donald Campbell, in whose hands arrestments have been used, ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to make payment and delivery to the pursuers of the sum of £15,000, or such other sum or sums as may be owing by him to the defender Ebenezer Erskine Scott, as trustee foresaid, and arrested in his hands upon 3d day of December 1891, and upon the 18th day of May 1893, at the instance of the pursuers, or at least of such part thereof as shall satisfy and pay the pursuers the principal sum of £10,000," with interest, . . . "all as decerned for in an interim decree obtained," &c., dated at Edinburgh, the 29th day of June 1892, and extracted the 16th day of August 1892; and such further orders for production, delivery, inspection, sale, consignment, and payment with reference to the goods or property of said Ebenezer Erskine Scott in the possession of the defender Donald Campbell, should be pronounced by our Lordships as may seem necessary for satisfying the said claim of the pursuers."

The pursuers averred;—(Cond. 4) "The said lease terminated at Whitsunday 1893, and there is now in the possession of the said arrestee, the defender Donald Campbell, a large quantity of valuable plant, consisting of engines, waggons, drums, rails, tools, horses, and carts connected with the working of the quarry, which plant is the property of the principal debtor, and which the arrestee is under obligation to deliver to the principal debtor. In terms of said lease the tenant was bound to deliver the plant to the proprietor at the term of Whitsunday 1893, and the defender Scott was bound to make certain payments in respect thereof." (Cond. 6) " . . . Under the said arrestment the foresaid plant in the quarries of Ballachulish was attached. The plant is now and has since the commencement of the lease been wholly in the possession of, and subject to the control of, the defender Campbell." (Cond. 7) "The said arrestee Dr Campbell refuses to make payment to the pursuers of the sums in his hands arrested as condescended on, and the present action has been rendered necessary in order to make the said sums forthcoming to the pursuers."

The pursuers pleaded, *inter alia*;—" (1) The pursuers having arrested in the hands of the arrestee the sums owing, or goods and gear deliverable by him to the principal debtor, they are entitled to have the same made furthcoming in satisfaction of their debt, to the extent due by the arrestee to the principal debtor. (5) On a sound construction of the said lease, the plant connected with the quarries at the termination of the lease was the property of the lessor."

Answers were lodged for both defenders, in which it was explained that the plant in the quarries was not attached by the arrestments. They averred that the plant was the joint property of Dr Campbell, the tenant of the quarries, and of Mr Scott, the trustee, and did not form part of the subjects let to Dr Campbell. Also, that although the original lease expired at Whitsunday 1893, by agreement between the parties in November 1891, it had been extended until Whitsunday 1894.

The defenders pleaded;—" (1) The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The arrestee not having had in his hands

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No. 217. at the date of said arrestments any arrestable funds or goods belonging to the principal debtor, the action should be dismissed.”
 July 20, 1894. Lucas's Trustees v. Campbell and Scott. Upon 5th December 1893 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—“Having considered the cause, finds that the pursuers have competently arrested the right to the sole property of the plant referred to on record, arising to the common debtor at the close of the lease between his predecessors in the lands therein mentioned and the arrestee, in terms of the provisions of the lease libelled: Before further answer, allows to the defenders a proof of the averments in answer 4, to the effect that the lease in question was extended from Whitsunday 1893 to Whitsunday 1894, and appoints the same to proceed on a day to be afterwards fixed.”*

* “OPINION.—This is an action of furthcoming, signeted on 31st May 1893, based on two arrestments, the one dated 3d December 1891, used on the dependence of an action raised by the present pursuers, trustees of Admiral and Mrs Lucas against Ebenezer Erskine Scott, C.A., trustee for Sir George de la Poer Beresford, and another dated 18th May 1893, proceeding on an extract-decret obtained in that action. The arrestments were used in the hands of Dr Donald Campbell, and this action is brought against Mr Scott as common debtor and Dr Campbell as arrestee, and is defended by both.

“By lease dated in 1878 the then trustees of Sir George de la Poer Beresford, with consent of the beneficiaries under his trust-deed, let to Dr Campbell the slate quarries of Ballachulish for fifteen years from Whitsunday 1878, the ish of the lease being Whitsunday 1893.

“The lease contains the following provision in regard to the plant of the quarry—(Quoted *supra*, p. 1096.)

“The pursuers maintained that the plant in the quarry has been arrested by both arrestments, and that since the commencement of the lease it has been wholly in the possession of Dr Campbell, and subject to his control. They have pleaded,—‘(1) The pursuers having arrested in the hands of the arrestee the sums owing or goods and gear deliverable by him to the principal debtor, they are entitled to have the same made furthcoming in satisfaction of their debt to the extent due by the arrestee to the principal debtor.’

“The defenders plead that there were not in the hands of the arrestee at the date of the arrestments any arrestable funds or goods belonging to the common debtor, and that the action should therefore be dismissed.

“The first question then is, were the arrestments competent and effectual? In considering this question it does not seem to me to be necessary to distinguish between the two arrestments. Either, if competent and effectual, might be a good warrant for this action of furthcoming, and the defenders' objections are common to both. The pursuers say that the later arrestment was used *ob majorem cautelam*.

“The pursuers maintained that it resulted from a sound construction of the lease that the plant was truly the property of the landlord, and not at all the property of the tenant; and that therefore being moveable property, belonging to the common debtor in the possession of the tenant, it was duly arrested in his possession.

“I cannot assent to that argument. The deed declares expressly that the plant shall be during the lease the joint property of the landlord and the tenant. There is not the slightest reason to suggest that the parties designed to conceal their true relations or to make them appear other than they really were. It was competent for them to contract that the plant should be joint property. They have contracted to that effect expressly, and there seems no reason why the words of the contract should not receive the effect according to their unambiguous meaning.

“The pursuers further maintained, that supposing the plant to be at the date of the arrestment the joint property of the landlord and tenant, it was competent to arrest it. I do not think that it can be asserted as an abstract and general proposition that it is competent for the creditor of one of two joint owners of

The defenders reclaimed, and argued that the action was irrelevant and incompetent, on the ground, *inter alia*, that the summons contained no effective conclusion for working out the diligence of arrestment. No. 217.

The pursuers maintained that the arrestments were valid for the reasons stated by the Lord Ordinary, and that in the circumstances the second conclusion [printed in italics, p. 1097] was competent and effectual to work out the diligence. July 20, 1894. *Lucas's Trustees v. Campbell and Scott.*

moveable property to arrest the subjects of that joint property, or even the interests of his debtor in that property, and to bring it to sale by means of a forthcoming. It is true that it has been held competent to arrest shares in a joint stock company—*Sinclair v. Staples*, Jan. 27, 1860, 22 D. 600. But in that case the shares of the common debtor could be brought to a sale without affecting the interests of the other shareholders. In the present case I am unable to see how any one article of the plant in this quarry could be brought to a sale if the whole stipulation of the parties had been that it should be joint property. It would not be possible to sell any part of the property of Dr Campbell in order to pay the debts of Beresford's trustee. In *Fleming v. Twaddle*, Dec. 2, 1828, 7 S. 92, it was held incompetent to poind joint property for the individual debt of one of the joint owners; and it must, I think, be equally incompetent to arrest it and follow out the arrestment by a forthcoming and sale.

"But then it is provided by the contract that at the termination of the lease the landlords (that is now Mr Scott as Beresford's trustee) should pay to Dr Campbell one half of the value of the plant 'which may then be on said quarries.' The contract contains no express provision that the plant should on such payment become the property of the landlord; but I think that such a declaration may, and indeed must of necessity be inferred. The contract therefore is so conceived as to eventuate, if its stipulations are duly carried out, in this, that the plant which before the termination of the lease was the joint property of the landlord and tenant shall then, on the stipulated payment by the landlord, become the sole property of the landlord, and that the tenant shall then be bound to deliver the plant to the landlord, or rather shall leave it on the landlord's property, and shall himself quit the occupation of the property and the possession of the plant; and the difficult and somewhat novel question of law arises—Is this right of the landlord so resulting from the stipulations of the contract an arrestable right? If it is, then I apprehend it has been arrested. I think the first plea in law for the pursuers sufficiently, although not very aptly, expresses the pursuers' contention that this ultimate right of the landlord has been arrested.

"The right thus sought to be arrested was not at the date of either arrestment a right prestable to the landlord. But it is established that a personal interest may be arrested although no sum be payable on account of it at the date of the arrestment. The contents of a policy of insurance were held validly attached by an arrestment used between the date of the last premium paid and the death of the person insured—*Strachan v. McDougle*, June 9, 1835, 13 S. 954. Again, Lord Gifford as Lord Ordinary in *Bankhardt's Trustees v. Scottish Amicable Society and Duncan*, Jan. 21, 1871, 9 Macph. 443, held that an arrestment of a policy of insurance used in the hands of the insurance company during the life of the person insured was effectual although a period for payment of the premium had intervened between the date of the arrestment and the date of the forthcoming, and he found that the arresters were entitled to have the principal debtor's interest in the policy sold and the price made forthcoming. So, bills on a third party, for which the holder is accountable to the common debtor, are arrestable before the bills have been paid—*Gordon v. Innes*, Feb. 3, 1740, M. 715; *Lothian v. McCree*, Feb. 27, 1828, 7 S. 72. On the same principle rents and annuities are arrestable *currente termino*.

"A case still more in point is *Marshall v. Nimmo*, Dec. 18, 1847, 10 D. 328. There the creditor of a slater, who had contracted to slate a roof for the arrestee, was held entitled to arrest the sum which would fall due under the contract, although it was not then due, and might not become due at all, as for example, if the slater had not performed his contract. Here the right of the

No. 217. At advising (upon 16th February 1894),—

July 20, 1894. LORD KINNEAR.—This is an action of furthcoming based upon arrestments, by Lucas's Trustees v. Campbell and Scott.

common debtor was held arrestable although not then prestable, and although contingent and indeed dependent on the actings of the common debtor. That case is closely applicable. But in it the eventual right of the common debtor under the contract was for a sum of money, and here it is for certain moveable property. That, I think, makes no difference.

"The defenders maintained that furniture or plant belonging to a landlord was not arrestable in the hands of a tenant, but was capable of being attached by poinding, and they quoted the case of *Davidson v. Murray*, Dec. 18, 1784, M. 761, which at first sight appears to decide that furniture in possession of a tenant could not be arrested by the creditors of the owners of the furniture. The pursuer maintained that the case was not good law, and had not been followed. But it is quoted both by Erskine and Bell without disapproval. I do not, however, think that it decided that point. The common debtor was tenant of a house, and the arrestee was his subtenant, and the furniture of the common debtor was let to the arrestee along with the house. The arrestments were used after the principal lease had expired, and therefore after the sublease had fallen with it, and the arrestee was therefore possessing the house and furniture precariously, without any title, and under no contract, and in these circumstances it was held that the furniture must be regarded as really in the possession of the common debtor, but the case does not, in my opinion, decide that furniture possessed under a lease would not be arrestable.

"The present case presents the further peculiarity that according to the conception of the contract, the same event which converts the joint right to the plant into a sole right in the landlord also determines the possession of the tenant, and it may be that arrestments of the plant on the ground used on the expiry of the lease would be bad, and that then poinding would at that time be the appropriate diligence on the authority of *Murray v. Davidson*, because then the plant would be no longer in the possession of Dr Campbell under a contract, so that it was argued that as the plant could not be arrested before the expiry of the lease because it was joint property, nor after the expiry of the lease because it then ceased to be in the possession of the tenant, it could not be arrested at all. I think this difficulty is met by the consideration that the diligence of arrestment attaches a right in the person of the arrestee at its date, not a right, or money, or a moveable coming into his hands afterwards. It is effectual at the very first, or not at all. In this case the arrestments cannot correctly be said to have attached the plant either at the date of the arrestments or at the close of the lease. What they did attach was the obligation by Dr Campbell to leave the whole plant for the landlord at the end of the lease, an obligation existing at the date of the arrestments, and, as I think, attached by them.

"I am therefore prepared to find that the arrestments used were habile to attach the claim to the sole property of the plant arising to the common debtor at the close of the lease.

"But the defenders have averred that in November 1891—that is, before either arrestment—the lease was extended by agreement for the year from Whitsunday 1893 to Whitsunday 1894. It was maintained on the one hand that this was an averment of a lease for a year, capable of being proved by parole, and, on the other hand, that being a contract regarding heritage, and differing from the ordinary case of a yearly lease, it could not be constituted or proved without writing.

"I can see no good ground for holding that the ordinary rule that a lease for one year may be proved by parole should not apply in this case. I think that the peculiarity of the case, or what is unusual in it, namely, that the lease agreed on was not to commence for more than a year after the agreement, does not affect the mode of proving it. And although it was maintained that the averments were too vague and indefinite to be admitted to proof, I am of opinion that a proof cannot be refused on that ground.

"It appears to me therefore to be necessary, first of all, to ascertain what is

which the pursuers allege that they have effectually attached certain machinery and plant belonging to the common debtor in the possession of Donald Campbell, the arrestee. It is not alleged that the arrestee is indebted to the common debtor in any sum of money, or that anything has been attached by the arrestments excepting the machinery and plant in question. The arrestee was tenant of the slate quarries of Ballachulish belonging to the trust-estate of the late Sir George Beresford, which is now held by the defender Mr Ebenezer Erskine Scott as trustee. The lease was granted for a term of fifteen years, which expired at Whitsunday 1893. It is provided by this lease that inasmuch as the tenant Donald Campbell had paid to the landlord one-half of the amount of the valuation of the engines and other moveable plant for the quarries, the same should be "held to be the joint property of the proprietors and the tenant," and that at the termination of the lease the proprietor should be bound to pay to the tenant one-half of the value of the moveable plant and stock of slates which may then be in the quarries. On the construction of this clause the Lord Ordinary has held that on the termination of the lease, and on the stipulated payment being made by the landlord, the plant and stock will become the sole property of the landlord, and must be delivered to him or left on the ground by the outgoing tenant, and that the landlord's right to acquire this property on the stipulated condition is arrestable, and has been effectually arrested. I do not express any opinion on these questions at present, because assuming the arrestment to be valid, the summons contains no conclusion which it is possible for the Court to sustain. The purpose of an action for furthcoming is to make the debts or goods which have been arrested available for payment of the debt, and the summons contains no effective conclusion for that purpose. The only operative conclusion is for payment of £15,000, or such other sum as may be due by the arrestee to the common debtor. But a decree for payment of money is out of the question unless the property which is said to have been arrested shall first be converted into money. The law is very clearly stated in *Sinclair v. Staples*, 22 D. 600. Every species of moveable property may be validly arrested provided the diligence can be effectually worked out. But in order that that may be done the summons of furthcoming must be so framed as to be applicable to the specific subjects attached by the diligence. It may be that in the ordinary case when corporeal moveables have been arrested, a warrant of sale may be granted, although there is no specific conclusion for sale in the summons. But that proceeds, as Lord Stair explains (iii. l. 38), on the assumption of the arrestee's offer of the goods *ipsa corpora* in order that he may not be "decerned for making furthcoming a liquid sum for the price." And therefore assuming that a warrant for sale might be granted as a matter of course, where the arrestee has no interest in the goods arrested, but is under an absolute obligation to make them over *ipsa corpora* to the common debtor, it is obvious that the same procedure can-

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the true ish of this lease. If it shall turn out to be Whitsunday 1893, then the furthcoming will proceed in the ordinary way. But if it shall be found that the ish has been postponed till Whitsunday 1894, I think that it will not on that account be necessary to dismiss this action as premature, but that it will be sufficient to sist it until the lease shall come to an end.

"It was suggested in argument that the lease might be continued from year to year for an indefinite period. No further extension, however, has been made, and it will be time enough to consider the effect of such an extension of the lease when it is made, when it will fall to be considered whether such an extension of the lease could be allowed to defeat the pursuers' arrestments. . . ."

No. 217. not be followed in a case like the present, where the method of working out the diligence is not fixed by practice. The machinery which is said to have been arrested is at present the joint property of the arrestee and the common debtor, and therefore the pursuer must work out his diligence in such a manner as to make his debtor's interest available without prejudice to the rights of his co-owner. It may be that, as the Lord Ordinary has held, the arrestee's interest may be determined so that the machinery will become the sole property of the common debtor. But then the arrestee is under no obligation to make over the property except upon condition of receiving payment of half the value. It appears to me, therefore, that in order that the arrested moveables may be made available for paying the debts of the common debtor, it is necessary that the common property should be severed, and also that the arrestee's right to half the value of the property should be satisfied; there can be no furthcoming unless these conditions have been satisfied, or otherwise unless the decree contains provision for their satisfaction. It may or may not be that the interests of parties might be adjusted upon a sale, and consequent division of the price. I express no opinion upon that point, but it is obvious that the arrestee has a material interest. But if the pursuer had desired a sale, his summons should have contained a conclusion to that effect, either in absolute terms, if that be his right, or subject to such conditions as he may be able to formulate for securing the rights of the arrestee from prejudice. The only conclusion he adds to that for payment of money is—"And such further orders for production, delivery, inspection, sale, consignment, and payment with reference to the goods or property of said Ebenezer Erskine Scott in the possession of the defender Donald Campbell should be pronounced by your Lordships as may seem necessary for satisfying the said claim of the pursuers." Now, if that means that the Court is to find out the proper order, and give any form of decree that may be effectual, I think it is an incompetent conclusion. The pursuer must formulate his demand, and express in terms the specific decree he asks. I think the summons as it stands must be dismissed, but if the pursuer thinks he can frame a conclusion which would be at once effectual and admissible as an amendment, I think he should be allowed an opportunity of doing so.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

The pursuers thereafter amended the record by substituting for the first part printed above in italics the following:—"Therefore the Lords of our Council and Session should decern and ordain the whole moveable plant, goods, and gear arrested in the hands of the defender Donald Campbell by virtue of arrestments dated 3d December 1893 and 18th May 1893, at the instance of the pursuers, being the plant referred to in the lease mentioned in the condescendence, to be exposed to public roup at the sight of the Sheriff-substitute at Fort-William, or such other person as the said Lords may appoint, and the price thereof paid and delivered over to the pursuers, or at least such part of said price, etc." And for the second part printed in italics the following:—"Or otherwise, and as alternative to the conclusion last above written, upon payment by the pursuers to the said defender Donald Campbell of one-half of the value of the said moveable plant, goods, and gear, as the same may be ascertained in terms of the lease mentioned in the condescendence, our said Lords ought and should decern and ordain the said moveable plant, goods, and gear to be exposed to public roup at sight as afore-

said, and the price thereof, after repayment to the pursuers of the said one-half of the value of the said plant, to be paid and delivered over to the pursuers, or at least such part thereof as shall pay to them the foresaid sum of £10,000 with the said interest."

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They also added to cond. 6 the following:—"The pursuers are willing, in the event of its being held that they are not entitled to have the said plant sold and the price paid over to them in terms of the first conclusion of the summons as amended, to make payment to the arrestee of one-half of the value of said plant (as determined in terms of the lease), the said one-half of the value of said plant to be repaid to the pursuers out of the first proceeds of the sale, and the remainder of the said proceeds to be applied, so far as necessary, to their said debt of £10,000 with interest. It is explained that the whole plant referred to in the lease is in fact moveable, and is so described in the lease"; and added the following pleas in law,—“(6) In any event, the pursuers are entitled to decree of forthcoming on making payment to the arrestee of one-half the value of the plant. (7) On making payment to the arrestee as aforesaid the pursuers are entitled to repayment of the said half the value of the plant out of the first proceeds of the plant when sold.”

The defenders maintained that the conclusions of the summons as amended were incompetent.

At advising,—

LORD KINNEAR.—When this case was last before us the pursuers were allowed to amend their summons, because while we thought that the summons as it stood could not be sustained, we were not prepared to say there was no possible method of making the arrestee's obligation to his creditor prestable to the arresting creditor, while the pursuers undertook to formulate a decree which might be effectual for that purpose. In support of the amended summons the pursuers' counsel repeated an argument which we had already rejected, that they were entitled to a judgment as to the validity of the attachment effected by the arrestment irrespective of the validity of the conclusions of the summons. This appears to me to be a misconception of the legal character of arrestments in execution. An arrestment and forthcoming is an adjudication preceded by an attachment, and the essential part of the diligence is the adjudication. It follows that an arrestment is futile unless it can be followed up and the diligence worked out by a decree effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former by the arrestee. The proceedings for this purpose may vary according to the nature of the debt which is said to have been arrested, but if there be any question whether a future and conditional obligation can be arrested or not, it is essential for the arresting creditor to shew that the diligence can be effectually worked out by means of a decree. Therefore, because the argument had not been directed to this point, which appears to me to be the crucial point of the case, we gave the parties an opportunity of being further heard, and allowed the pursuers, for the purpose of argument, to formulate the decree to which they claim to be entitled.

The pursuers now proposed to amend their summons by substituting two conclusions for those of the original action. But after the amendment had been allowed, certain proceedings have taken place which were not anticipated and the effect of which may possibly be to embarrass the pursuers in argument, although I think they may also serve the purpose of clearing the question by directing the argument to the proper point. In ordinary course we

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should have expected the pursuers to table their amendment at once, so that the question might be finally argued before the determination of the lease, and no doubt that would have been the course which the pursuers would have desired to follow. But then it appears that it was for the interest of all parties, who are equally interested in getting the highest attainable value for the machinery and plant to which their arrestment applies, that arrangements should be made for handing over the plant to a new tenant. We were therefore asked, instead of disposing of the action as it stood, to allow the arrestments to be recalled in the meantime upon certain conditions which would reserve all questions as to the validity of the diligence, and also secure the rights of parties according to their ultimate determination. Now, that was allowed on these conditions, but the defenders, who asked the diligence to be recalled, appear to have been advised that it was unnecessary to follow that course. Accordingly, they did not comply with the conditions, and the arrestments stand now in exactly the same position as if no provisional order for their recall had been given. But then, in the meantime the defenders had themselves proceeded in a manner which is said to alter the position of parties. The lease has come to an end; the tenant in whose hands the arrestment was used has gone away, his claim against his landlord being satisfied, and the new tenant, as I understand, is now in possession, and therefore the position of the subjects with reference to which the action relates is materially altered. But then I think the pursuers are quite entitled to say that the validity of their action must be determined irrespective of this change of circumstances, and that we are to consider the conclusions which they now propose as amended upon exactly the same conditions as if the action had been heard before the termination of the lease, and while the machinery and plant in question were still in the undisturbed possession of the tenant.

Considering the question, therefore, from that point of view, we are to say whether the conclusions which the pursuers now propose to substitute for their original conclusions are tenable or not. It appears to me to be clear that the first of this set of alternative conclusions could never have been sustained, because by that conclusion the pursuer asks that there shall be an immediate decree for exposing to public roup the whole moveable plant, goods, and gear which are said to have been arrested in the hands of the defender Donald Campbell. Now, that is to be an immediate decree irrespective of the conditions of the lease, and irrespective of any conditions whatever for protecting the rights and interests of the arrestee. At the time the arrestments were used the moveable plant and machinery in question were not the property of the common debtor, but were the joint property of the common debtor and the arrestee; and therefore what is proposed is to carry off and sell as for the debt of the common debtor property which is not his exclusive property at all, but is the joint property of himself and of his tenant. That appears to me to be plainly, and on the face of it, quite untenable. An arrestment can never in any way prejudice the rights and interests of the arrestee. It can do nothing but enable the arresting creditor to enforce against the arrestee the obligations which are prestable from him to the common debtor, and to found upon that as giving the arresting creditor a right which would override the separate and independent right of the arrestee in goods belonging either jointly or solely to himself is quite out of the question.

But then, having no doubt that difficulty in view, the pursuers propose an

alternative conclusion, by which they undertake to protect the rights and interests of the arrestee, their alternative conclusion being, that upon payment by them to the arrestee of one-half of the value of the moveable plant, goods, and gear in question, as the same may be ascertained in terms of the lease, then there shall be an order for exposing the whole of these goods and plant to public auction. Now, it appears to me that both branches of this conclusion raise very serious difficulty. In the first place, the conclusion assumes that the pursuers' right depends upon the performance of a certain condition, and I cannot see how that condition could possibly be purified by the operation of any decree of this Court, or otherwise than by the will and good pleasure of the arrestee. Now, the validity of an arrestment cannot possibly depend upon the will of the arrestee. But the right of the arrestee under his lease is to obtain payment, not of one-half of any price that may be fetched by a sale of the moveable portion of the plant, but of one-half of the value of the entire plant, whether fixed or moveable *in situ* as the plant of a going concern. The defenders say that part of the plant now in question is heritable, and that part of it is moveable. If that be so, the pursuers do not claim to have attached the heritable portion of the machinery and plant by their diligence, and they very properly confine the conclusion of their summons to the moveable plant. But then that means that before the tenant's right to obtain payment of one-half of the value of the entire plant can be set aside there is to be a severance of the moveable from the fixed portion, and that he is to have one-half of the value of the moveable portion, the pursuers leaving him to recover, as best he can, the value of the other portion from his debtor. If, therefore, it were conceded that part of the plant is heritable, I should see very great difficulty in working out this conclusion without the consent of the arrestee. If it is not conceded, then it would be necessary that we should have an inquiry, and the arrestee would have to be kept out of his money until the termination of a litigation in which he has no interest.

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Apart from both of these difficulties, which appear to me to be considerable, I am unable to see how we could compel the arrestee to accept payment from the pursuers, or to reject payment from his own proper debtor. He is entitled at the termination of his lease to receive from his landlord one-half of the value of the plant upon the ground let upon his removing himself from the premises. Now, the landlord's obligation is not attached by the arrestment, and could not be attached by any diligence, for payment of the landlord's own debt. There is nothing to prevent the tenant from enforcing his obligation at the termination of the lease, and the diligence which has been used in his hands cannot compel him to accept the arresting creditor as his debtor in place of his landlord, and to refuse payment if it were offered to him by the landlord or by the incoming tenant. An arrester cannot in any way affect the right of the arrestee to recover his own debt. The sole operation of the attachment, if it be effectual at all, is to prevent the arrestee paying debts due to somebody else, or parting with goods belonging to somebody else; it cannot prejudice his right to enforce obligations prestable to himself. But even if it be assumed that the tenant is willing to take payment from the arrester and to discharge his own debtor, I think the conclusion which is supposed to follow upon implement of that condition is untenable. The pursuers' assumption is that as soon as the arrestee has been paid off, there will arise to them an immediate right to obtain an order for the sale of the moveable plant. But that is not the right of an arresting

No. 217. creditor, and I think Mr Macfarlane's criticism upon that conclusion was perfectly just, that there is no operative decree against anybody. And that is not merely a technical objection. It rests upon a perfectly sound view of the nature of an arrestment, which is not a diligence directly affecting the goods themselves, in whose hands soever they may be, but a diligence *in personam*, which can only be carried into effect by the operation of a decree for payment or delivery against the person in whose hands the arrestment is used. It is only as a consequence of the creditor's right as against the arrestee to have the goods made forthcoming that he can have a decree for sale. That is clearly laid down in the passages in Lord Stair's Institutes, to which I called attention on a previous occasion. What Lord Stair says about forthcoming is this. In the first place, he says that "When pursuits are for making arrested goods forthcoming which are not liquid, the party in whose hands arrestment was made will not be decerned for making forthcoming a liquid sum for the price, but if he offer the goods themselves the decree will contain a warrant to roup the goods, that the price thereof may be delivered to the arrester." Then in a subsequent passage he says this, speaking of the executive action arising from arrestment—"It is an action for making arrested goods forthcoming which reacheth no further than the satisfaction of the sum for which the arrestment was laid on, and the title of it were much more suitable to be adjudication upon arrestment, for it is as properly an adjudication of a moveable interest as the adjudications of land rights. Neither is it the making of the goods or sums forthcoming that is the proper effect of this action, but the adjudging of them to the arrester; for if goods be arrested the haver is liberated by producing the goods, whereby they are made forthcoming, but they become not the arrester's until they be roup'd and sold and the price delivered to the arrester." Therefore you must fix upon the arrestee an obligation to deliver the goods before you can have any decree of sale. Now, there is nothing in the conclusions of this summons, either by way of declarator or by way of operative decree, to define the claim for delivery of goods, which the pursuer supposes to have been transferred from the common debtor to himself. And when one comes to consider what the nature of the arrestee's obligation really is, I confess I do not wonder that the pursuers have not been able to formulate a decree which would satisfy these conditions. The tenant under the lease is joint owner of the machinery and plant, half the value of which he paid for at the beginning, but on the determination of the lease he is to obtain one-half of the value from the landlord, and the plant is to become the exclusive property of the latter. Now, the assumption of the action is, that upon that payment being made, some obligation will arise against him to make over or deliver the plant to the landlord; but it appears to me that the only obligation in the lease is that upon the determination of his right the tenant shall leave the premises and depart, leaving the plant for the landlord. Therefore it appears to me that the fact which determines the tenant's joint right and interest in the plant at the same moment determines his possession, and I am unable to see what the obligation is that the arresting creditor thinks that he has attached so as to compel the tenant to perform to him instead of performing to his landlord. It turns out that in point of fact the tenant upon determination of his lease received payment of the money to which he was entitled. Now, I have already said that there is nothing in the attachment effected by the arrestments which can prevent his doing that. That was his absolute right.

Well then, upon receiving that payment he goes away. But that is exactly what he was bound to do under his lease, and I do not understand how it could be supposed that any right should arise to the arresting creditor in consequence of which he could compel the tenant either to retain possession of the subjects let to him under his lease after the period determined, or if he did not do that, to take possession of the plant and machinery in order to make them forthcoming to the arrester. I think there was no obligation of the kind, and therefore I am still unable to see that any obligation by the tenant to the landlord existed which has been effectually attached by arrestment, and which the arresting creditor can now compel the tenant to perform to him. In that view I think we are now in a position to say that the arrestment has been futile, that the interest of the landlord in the machinery and plant in question has not been validly attached, and that the defenders are therefore to be assoilzied.

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The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT assoilzied the defenders.

MILLAR, ROBSON, & M'LEAN, W.S.—A. P. PURVES & AITKEN, W.S.—Agents.

ROSE'S PATENTS COMPANY, LIMITED, Pursuers (Respondents).—*Ure—Greenlees.*

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FREDERICK BRABY & COMPANY, LIMITED, Defenders (Appellants).—*Murray—Salvesen.*

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Patent—Anticipation—Lamp.—The specification for a patent for an improved oil-spray lighting and heating apparatus working with self-generated steam, described as part of the apparatus an air-tight water-tank from which water was led to a pipe coiled round the lower part of the flame of the lamp, where the water was converted into steam. To neutralise the back pressure of the steam in the coil upon the water supply pipe, another pipe was led from the top of the coil to the top of the water-tank, which admitted the steam pressure to the surface of the water.

The patentee claimed as his invention "the method of creating a pressure in the water-tank by admitting steam from the self-generating coil or chamber to the said tank."

In an action by the patentee for interdict against the infringement of the patent, the Court *assoiilzied* the defenders on the ground that the patent had been anticipated by a self-generating oil-vapour lamp in which the back pressure in the oil supply pipe caused by the oil vapour in a generating chamber similar to that of the pursuer was neutralised by admitting oil vapour from the chamber to the oil-tank substantially in the same way as the steam was admitted to the water-tank of the pursuer's apparatus.

In November 1891 Rose's Patents Company, Limited, as in right of letters-patent (No. 18,101, of 1889) for "Improvements in apparatus for burning hydrocarbon, or other oils for lighting and heating purposes," granted to George Rose and assigned to the company, brought an action in the Sheriff Court at Glasgow against Frederick Braby & Company, Limited, praying to have the defenders interdicted from infringing the said letters-patent, and, in particular, to have them interdicted from "making, offering for sale, selling, or using without the consent, licence, or agreement of the pursuers, any oil-spray lamps, or oil-spray lighting apparatus, working with self-generated steam in which a pressure is created in the water-tank by admitting steam from the self-generating coil or chamber to said tank by means of a pipe connection for conduct-

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No. 218. ing steam from said coil or chamber to said tank, according to the method or in the manner described in the said letters-patent and relative specification, or according to any method or in any manner substantially the same, and from making, selling, or using any oil-spray lamp, or oil-spray lighting apparatus, constructed with or embracing in its construction such method or arrangement as aforesaid.”

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In defence Braby & Company pleaded, *inter alia*;—(2) The pursuers' letters-patent, being invalid for the reasons set forth in the defences, interdict should be refused; and in support of this plea averred, *inter alia*, “(1) The alleged invention was not at the date of the alleged letters-patent the subject-matter of a grant within the meaning of the Patent Acts. There is no ingenuity or invention displayed in said invention.

. . . (2) There is no sufficient distinction between what was old, or was in use and known at and prior to the date of the letters-patent, and what was new. These are claimed as new inventions which were old. In particular, Claims 1 and 2 include the inventions of a method and appliances for creating pressure which was anticipated by Doty's Patent, No. 8697, A.D. 1887, and by Robinson's Patent, No. 3696, A.D. 1889.

. . . (3) The alleged invention was not new, and was publicly known before the date of the letters-patent. In particular, the invention was published in the following letters-patent,—Doty's Patent, No. 8697, A.D. 1887; Robinson's Patent, No. 3696, A.D. 1889.”

In the spray lamps described in Rose's patent the source of light was a jet of steam charged with oil spray which it sucked up from a small oil well at the point of discharge.

The arrangement by which this result was obtained was as follows:—

1. Oil supply.—The oil trickled into the well from an open tank by gravitation.

2. Steam supply.—Alongside the oil-tank was an air-tight water-tank strong enough to resist steam pressure. From this tank, when the lamp was burning, water flowed by gravitation through a pipe coiled round the lower part of the flame where it was converted into steam. The steam was led from the upper part of the coil down to a nozzle below the coil where it was discharged close to the oil well.

To prevent the flow of water into the coil being checked by the back pressure of the steam in the coil, a pipe was led from the top of the coil to the top of the water-tank, so as to admit the steam pressure to the surface of the water. This neutralised the back pressure in the feed-pipe, and allowed the water to flow by force of gravitation.

Before setting the lamp into operation it was necessary to heat the coil to a red heat from an extraneous source, so as to enable it to convert the water into steam.

After the steam was produced the oil was admitted to the well, from which it was caught up in the form of spray by the jet of steam. The flame thus produced kept up the heat of the coil and the lamp worked automatically. The flame extended a long way above the coil.

The following were the heads of the pursuers' claim in their specification, in so far as material to this report:—“1. In oil-spray lighting or heating apparatus working with self-generated steam, the method of creating a pressure in the water-tank by admitting steam from the self-generating coil or chamber to said tank, substantially as hereinbefore described. 2. The combination with the steam-generating coil or chamber of the lamp or burner, of a pipe connection for conducting steam from said coil or chamber to the water-tank, substantially as and for the purpose hereinbefore set forth. 6. In oil-spray lighting or heating apparatus working with self-generated steam, the combination with the

water-tank and a self-generating steam coil or chamber of a pipe having a syphon bend therein for supplying water from said tank to the coil or chamber, substantially as hereinbefore set forth. 9. The general arrangement and combination of parts of the self-generating steam lamps, substantially as hereinbefore described with reference to the drawings annexed." * No. 218.
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Doty's letters-patent, 1887, for "An improved method of and apparatus for generating light and heat from mineral or other oil," set forth that one object of his invention was "to provide for converting the oil into gas or vapour and for utilising the heat generated by the combustion of the said gas or vapour for heating the pipe in which such conversion is effected, so that the operation will be continuous without the aid of any separate or extraneous heating apparatus." For this purpose his apparatus consisted of a tank containing oil from which a pipe led to a vertical coiled pipe. The upper end of the coiled pipe was connected with another pipe which was brought down to the foot of the coil and then turned round, so that its opening or burner was within the hollow formed by the lower part of the chamber formed by the coil and pointed upwards. Some oil was then placed in a saucer underneath the coil and ignited. The coil thus becoming heated the oil inside the coil pipe was converted into vapour, which, passing down the side pipe to the burner within the coil, was there ignited. In this way the vapourising of the oil and its combustion were continued so long as the oil continued to flow from the tank. To ensure the necessary flow of oil notwithstanding the back pressure caused by the vapourising of the oil in the coil, Doty specified three methods, viz., (1) placing the oil-tank at such a height above the pipe coil that the oil would continue to flow by the mere force of gravity; (2) the use of an air-pump; and (3) by a method thus described,—“In some instances I place the tank or reservoir for the oil only a few inches above the coil, and connect the upper part of this tank or reservoir above the level of the oil with the upper part of the said coil by means of an elbow or bend, and pipes, or in any suitable manner, so that, when a pressure occurs in the coil from the expanding gases it will be communicated to the said tank or reservoir and extended over the surface of the oil, thus rendering the supply more even and the flame more regular.” Doty supplied no figure specially adapted to shew the working of this last method, and the pursuers maintained that the description was unintelligible; the defenders, on the other hand, maintained that any trained workman of ordinary skill could easily, from the description, make the necessary piping arrangement for carrying a portion of the oil vapour into the tank above the oil so as to counteract the back pressure.

Another part of Doty's invention was to provide for the utilisation of a mixture of oil-gas or vapour with steam or water-gas “for heating purposes,” and he specified a modification of his invention intended for the production of heat “for use in blast-furnaces or for other purposes.” In this modification there were two tanks, the one containing water and the other oil, and a coil consisting of two pipes wound alternately, and placed preferably in a horizontal position, one pipe leading from the water-tank

* In certain of the modifications of the pursuers' apparatus, the pipe leading from the water-tank to the coil, instead of being straight, was for a part of its course bent upwards and then down to the former line. This was in the specification termed a “siphon bend,” and it was described as being for “the purpose of keeping a supply of water in the generating coil.” The defenders maintained (at the hearing in the Inner-House) that there was neither novelty nor merit in this “siphon bend,” and consequently that the sixth head of the pursuers' claim was bad and vitiated the whole letters-patent.—*Murchland v. Nicholson*, July 19, 1893, 20 R. 1006.

No. 218. and the other from the oil-tank. From the end of each of these pipes another pipe was carried back along the outside of the coil, and then turned so that the outlet of each pipe with a burner attached was within the hollow formed by the coil, as in the case of Doty's form of apparatus first described. The coil having been heated by igniting oil in a tray, the oil and the water were respectively converted into steam and oil vapour, which being discharged in contiguous jets, and ignited within the coil hollow, a fierce combustion resulted. Neither the specification, nor the figure annexed as relative to this modification, shewed how the back pressures resulting from the generation of the steam and the oil vapour were to be neutralised; and the pursuers consequently maintained that this apparatus was unworkable, while the defenders contended that this part of the specification was to be read with reference to the earlier portion, and therefore that any of the methods there specified for neutralising the back pressure were intended to be employed, so that the apparatus was one by which the back pressure might be neutralised by leading a portion of the oil vapour and the steam to the tops of the oil-tank and of the water-tank respectively.

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Robinson's patent, 1889, described an apparatus for producing a jet of heated oil vapour from mineral oil similar to that used by Rose for producing steam from water—the back pressure in the feed-pipe supplying oil to the coil being overcome in the same way. Instead, however, of the vapour generator being in the form of a coil like the steam generator in Rose's patent, it was constructed of a series of straight tubes connected with each other arranged in a square round the flame. These tubes were fitted with screw stoppers, which might be removed for the purpose of clearing out the deposit arising from the vapourising of the oil.

A proof was allowed. The evidence shewed that lamps of the general class now in question were of two kinds, oil-vapour lamps and oil-spray lamps. In oil-vapour lamps the oil was vapourised and then burned, as in Robinson's apparatus. The objection to this species of lamp was that owing to the deposit of carbon formed by the vapourising of the oil, the pipes of the generator were apt to become choked, thereby necessitating frequent cleaning and the use of an expensive oil. In oil-spray lamps the oil was not vapourised, but was sprayed into the generator in a cold form by means of steam, as in the pursuers' apparatus. Prior to the date of that apparatus the necessary steam had been supplied in such lamps from an independent boiler, which made the lamps not readily portable, and there was evidence that lamp manufacturers were anxious to produce a spray lamp which, the steam being self-generated and the lamp working automatically, should be easily portable.

On 29th June 1892 the Sheriff-substitute (Guthrie) granted interdict as craved.

On appeal the Sheriff (Berry) on 6th March 1893 adhered.

The defenders appealed, and argued;—At the time when Rose took out his patent both oil-vapour lamps and oil-spray lamps were known. It was also a well-known scientific principle that the back pressure caused by the generation of steam or vapour could be neutralised by using a portion of the steam or vapour, and one apparatus for doing this in the case of lamps was to be found in Doty's and in Robinson's patents. If therefore Rose's patent was for the principle of neutralising the back pressure of steam, it was obviously bad; there could not be a patent for a well-known scientific principle; if it was a patent for a particular apparatus for applying this principle it was bad, on the ground that the apparatus was identical with those of Doty and of Robinson, and there could not be a patent for applying a known article to purposes which

were analogous to those to which it had already been applied. Rose simply took Robinson and Doty's apparatus for neutralising back pressure, and applied it to water instead of to oil. The mere substitution of water for oil did not entitle him to a patent, although his apparatus might have advantages not produced before.¹ Further, Doty's specification in figure 5 shewed an apparatus in which the back pressure of steam was neutralised for a purpose identical with Rose's, it being a matter of no importance that Doty said his figure 5 shewed an apparatus for the production of heat, and not of light; it produced both. It was said that Doty's specification was not full enough to enable a lamp like Rose's to be made merely from Doty's directions. That might be; Doty's patent might be bad. But the question was whether it contained enough to enable, not a mechanic, but a man of science in the particular department to construct a lamp like Rose's. If it did then Rose's patent was bad.² Once the idea was suggested—it might be in an unworkable form—there was no room for inventive ingenuity, and therefore for a patent. Tried by that test Rose had been anticipated by Doty. The pursuers sought to bring themselves within the *Braided Wire* case,³ arguing that that case decided that although bustles were well known and braided wire was well known, there could nevertheless be a good patent for a combination of the two. The *ratio* of the judgment there was, however, that the method of fastening was novel and patentable. If necessary, the defenders would maintain that *Stewart and Briggs*⁴ was badly decided. But the question there was whether the pursuers' patent had been infringed, not whether it had been anticipated. The Court held that it had not been infringed, because by the terms of his specification he had tied himself down to his slot being in the upper side of his die. It did not follow that if the question there had been whether the defenders' patent had been anticipated by the pursuers, the defenders' patent would have been held good.

Argued for the pursuers;—Of the utility of Rose's apparatus there could be no doubt. It was cheaper than any other form of oil-spray lamp in existence prior to the date of Rose's patent, for neither pump nor independent steam generator was necessary, and, going automatically, it did not require attendance. It was easily portable, and, there being no pump, it was less likely to go out of order. Again, the oil-can, having no lid, could be refilled at pleasure without putting out the light, and without causing any danger. As contrasted with oil-vapour lamps which worked automatically, such as Robinson's, the advantage of Rose's lamp was that in it there was no risk of choking owing to the accumulation of deposit in the coil or generator. Automatic oil-vapour lamps thus required an expensive class of oil, while with Rose's lamp a cheap oil could be used. Nor could there be any reasonable doubt of the ingenuity of Rose's apparatus. The mere simplicity of an invention was not a ground for denying its ingenuity; it might be something which everybody would be surprised had not been thought of before.⁵ The question was as to the novelty of Rose's lamp. It was said that it had been anticipated—in particular by Doty and by Robinson. Now, the test on that matter was whether the antecedent statement, which was founded on as an anticipa-

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¹ *Morgan & Co. v. Windover & Co.*, 1890, 7 Pat. Off. Rep. 131; *Longbottom v. Shaw*, 1888, 8 Pat. Off. Rep. 143.

² *Anglo-American Brush Electric Light Corporation v. King, Brown, & Co.*, April 5, 1892, 19 R. (H. L.) 20.

³ *Thomson v. American Braided Wire Co.*, 1889, 6 Pat. Off. Rep. 518.

⁴ *Stewart and Briggs v. Bell's Trustee*, Dec. 5, 1883, 11 R. 236.

⁵ *Vickers, Sons, & Co. v. Siddell*, 1890, L. R., 15 App. Cases, 496, per Lord Herschell, at p. 502.

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tion, was such that a person of ordinary knowledge of the subject could merely by reading the antecedent statement and without further experiment, make the apparatus in question. If something remained to be discovered which was necessary to the useful application of the antecedent statement, then there was room for a new valid patent.¹ Tried by that test, Doty's patent was not an anticipation of Rose's. Apart from his figure 5, Doty's specification, in so far as it bore on the present question, was nothing more than Robinson's in embryo, and therefore, if the defenders failed upon Robinson's specification, the case against them upon Doty's specification was *a fortiori*; if they succeeded upon Robinson they did not require Doty. Doty's figure 5 was no doubt in a somewhat different position. If the earlier part of his specification could be read as containing an intelligible method of automatically neutralising the back pressure of a vapour or gas analogous to that employed by Rose, and if that description could legitimately be read into the description applicable to figure 5, then an apparatus would be described which resembled Rose's in this, that the back pressure of steam would be neutralised in the same way in both. But it was to be noticed that Doty's object in figure 5 was not the production of light but of heat, and that he obtained that result not by producing an oil spray through the application of steam to cold oil but by combining steam with oil vapour; and as, on the defenders' construction of Doty's specification, the back pressure of the oil vapour was neutralised in the same way as that of the steam, the apparatus would be open to all the objections arising from the choking of the generator, &c., to which automatic oil-vapour lamps were open. Apart, however, from this, Doty's specification, as regarded figure 5, was so vague and unintelligible that a person of ordinary skill could not, merely by reading that specification, make a lamp like Rose's. Robinson's specification was not open to the objection of unintelligibility; consequently, if Rose's lamp was the same as Robinson's, the pursuers' case failed. What the defenders said was that Rose had simply taken Robinson's apparatus and used water where he used oil. In one sense this was obviously not true, since steam would not burn. But taking it that the defenders meant that Rose had taken Robinson's apparatus and applied it to a use so closely analogous as to require the exercise of no inventive ingenuity to make the application, then the defenders failed. It was not safe to assume that what could be done with oil could be done with water. It required experiment to discover that. Then Rose's apparatus and Robinson's were essentially different. Rose's was an oil-spray lamp, Robinson's an oil-vapour lamp. No doubt oil-spray lamps were known before Rose's, and the automatic regulation of steam was also known before, but Rose was the first to make the combination. The authorities were with the pursuers. Patents for the combination of old methods had been sustained, although there was much less ingenuity required to make the combination than Rose had shewn here.² *Stewart and Briggs v. Moore*,³ and the *Braided Wire*⁴ case, were probably the strongest examples. The judgment of the Sheriffs ought therefore to be affirmed.

At advising,—

LORD JUSTICE-CLERK.—The pursuers in this case desire to have the defenders

¹ *Hill v. Evans*, 1862, 4 De G., Fish., and Jon. 288, per L. C. Westbury, at p. 300.

² *Cannington v. Nuttall*, 1871, L. R., 5 E. and I. App. 205; *Gosnell v. Bishop*, 1888, 5 Pat. Off. Rep. 151; *Vickers, Sons, & Co. v. Siddell*, *supra*, p. 1111.

³ *Stewart and Briggs v. Bell's Trustee*, Dec. 5, 1883, 11 R. 236.

⁴ *Thomson v. American Braided Wire Co.*, 1889, 6 Pat. Off. Rep. 518.

interdicted from "selling or using without the consent, licence, or agreement of the pursuers, any oil-spray lamps, or oil-spray lighting apparatus working with self-generated steam, in which a pressure is created in the water-tank by admitting steam from the self-generating coil or chamber to said tank by means of a pipe connection for conducting steam from said coil or chamber to said tank," as described in the pursuers' specification, or from making, selling, or using any lamp or apparatus embracing such method or arrangement.

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The pursuers' apparatus as described in the specification consists of two tanks, one containing water and the other containing oil. From the water-tank a pipe is led which is coiled into a vertical coil set above the orifice from the oil-tank. The pipe of the coil is at the top divided into two branches, one of which is brought down to the burner nipple of the branch, and the other is carried into the water-tank above, so that when steam is generated a pressure is produced on the water in the tank to counterbalance the back pressure produced by the steam in the coil pressing back and preventing the flow of the water into the coil by gravitation. When the apparatus is set going by heat artificially applied to the coil, the steam which is conveyed to the lamp nozzle, forcing itself out in a jet, carries with it oil spray from the oil orifice, and a large luminous flame is thus produced.

The defenders' lamp is, as regards the obtaining of the back pressure, substantially the same as the pursuers', but the defenders plead that the pursuers', in so far as there may be any invention in their lamp, was anticipated, and that their alleged invention does not shew any novelty which can be held to have any merit or ingenuity such as would entitle the pursuers to the privileges of a patent. It is maintained that the specifications of Doty and of Robinson both disclose the equivalent of what is claimed by the pursuers. Doty in his specification describes an arrangement by which the pressure of the vapour of oil on the top of the oil-tank is produced in a similar manner to that used by the pursuers in the case of the water-tank, for the purpose of neutralising the back pressure. He also describes as a modification of his invention an arrangement whereby he uses two coils, wound side by side, one for oil and another for water, in the same manner as the single coil for oil. It is true that the purpose he has in view in this arrangement is the production of heat rather than light, but this does not, as it appears to me, make any difference, the end to be attained in both cases being the production of continuous flame by steam carrying oil vapour, and its utilisation whether for heating or lighting purposes in no way affecting the process by which the flame is obtained and kept up. It is true also that in his figure of the double coil he does not shew the arrangement for pressure on the upper surface of the liquid in the tank. But that has been already described, and he indicates that the oil and steam are discharged from their respective vessels in the same manner. If this be so, then Doty had in his specification already described the use of a coil with water, in which by a pressure on the surface produced by part of the steam generated, the back pressure on the feed-pipe of the coil might be neutralised. Having given the matter as careful attention as I can, I hold that Doty does disclose in his specification the use for flame producing purposes of a water-tank, provided with a coil, and the use of a branch steam-pipe for the purpose of producing a neutralising pressure on the water in a water-tank, so as to secure the flow of water into the coil.

If I were wrong in this opinion, it would still remain to be considered

No. 218. whether, if the pursuers' process were not anticipated by any apparatus in which water and steam were used in the apparatus itself, it was not anticipated otherwise. It is certain that both Doty's and Robinson's specifications disclose a closed chamber for oil, a feed into a coil, and a branch pipe for producing a pressure on the surface of the oil. Doty, while describing his tank as placed high above the burner, or a pump arrangement employed to give pressure, distinctly describes as another mode the maintenance of pressure by connecting the upper part of the tank with the pipe carrying the vapour from the heated coil, and gives this as one modification of his invention. Robinson claims as part of his invention the maintaining of an automatic pressure in the oil reservoir by vapour from the coil, as a means of dispensing with the use of a pump, or other auxiliary means for obtaining a pressure on the surface of the liquid. It is thus certain that apparatus whereby, in an exactly similar manner to that used by the pursuers, vapour was generated and used to put pressure on the surface of liquid in an enclosed tank to counteract back pressure was in existence, and publicly known, before the pursuers obtained their patent. It is therefore essential to the validity of the pursuers' patent that there should be in it some merit or ingenuity in particulars different from those above described. Are there any such in this case? I can find none suggested, except this,—that the pursuers apply the arrangement to water and not to oil. That does not, as it appears to me, constitute any patentable invention. That pressure could be applied to water by steam in a closed vessel, just as it could be applied by oil vapour to oil, was a fact well known, and the purpose for which it was applied in both cases was the same,—to neutralise a back pressure which would stop the feed into the apparatus. Therefore even if the pursuers' apparatus using water was not anticipated by Doty, I hold that the pursuers' specification does not display any such ingenuity in producing an invention not already known as to give validity to the patent.

I have only to add that had my opinion been different upon the patent generally, I should still have been unable to sustain it, as there is a claim made in it which could not possibly, as it appears to me, be held good. In the 6th head of the claim, the pursuers set forth as one of the claims "the combination with the water-tank and a self-generating coil or chamber of a pipe having a syphon bend therein for supplying water from said tank to the coil or chamber," substantially as therein described. Now, on referring to the description I find that the water-supply pipe has a "syphon bend which is for the purpose of keeping a supply of water in the generating coil." I am unable to understand what there is in this that can be claimed. It is certainly not a syphon, and it is also certain that the same purpose could be fulfilled equally well by a horizontal bend, or by a bulb, or by having the piece of pipe between the tank and the coil of a larger size. I can see nothing of the nature of invention or ingenuity in this head of claim, which could make it the subject of a patent. But if this claim is not tenable, then it renders the whole patent bad, even if it were otherwise good.

On the whole matter, I have come to the conclusion that the interlocutors pronounced in the Court below are not well founded, and that the defenders are entitled to have them recalled, and to be assoilized from the conclusions of the action.

LORD RUTHERFURD CLARK.—The pursuers are the assignees of a patent taken out by George Rose and others. It is for a combination which may in general

terms be called an automatic spray lamp. Before it was taken out lamps which consumed the spray or vapour of oil were well known and in frequent use. But they were not automatic. They required a separate means—such as a pump, or steam raised in a separate boiler—to maintain the necessary current. The pursuers claim that their invention has satisfied a felt want, and produced a spray lamp which, dispensing with the use of pumps and other equivalents, furnishes a continuous supply of oil spray at the burner.

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The defenders contend that the patent has been anticipated. They rely chiefly on the patents of Doty and Robinson. They also contend that, in so far as the pursuers' patent differs from these patents, it has no merit or ingenuity. There are some other subsidiary objections to which I shall hereafter refer.

The apparatus of Rose consists of a vessel containing a tank of oil and a tank of water. From the former a pipe is conducted to the burner. A pipe is led from the bottom of the water-tank which is carried in several coils round the burner, and thence passes to the tank above the level of the water. From this pipe, and at a point near the top of the coil, another is taken off which joins the oil pipe near the burner.

The water flows by gravitation and stands in the coil. Some waste steeped in grease or oil is placed in the coil and set on fire. Steam is thus generated, which passes partly to the top of the water-tank and partly to the burner. The former portion serves to produce a pressure on the water so as to balance the back pressure in the lower part of the pipe, and thus enables the water to be supplied by gravitation to the coil. The other pressure produces a current of steam through the pipe near the burner, and when the oil is allowed to flow from the tank the steam carries the oil with it in the form of spray. The spray is lighted, and from its heat continues the process which the burning waste began. In this way the lamp needs no extraneous aid, and contains in itself the means of producing a continuous light.

The merit of the invention seems to consist in the apparatus by which this continuity is maintained. Accordingly the patentee claims,—“In oil-spray lighting or heating apparatus working with self-generated steam the method of creating a pressure in the water-tank by admitting steam from the self-generating coil or chamber to said tank substantially as hereinbefore described.” The problem was to construct, as a part of a lamp, an apparatus capable of producing a continuous current at the burner. The difficulty was in overcoming the back pressure in the pipe leading from the tank, and it was successfully overcome in the manner I have described.

I see considerable merit in the apparatus. But unfortunately for the pursuers Rose was not the first and true inventor of it. An apparatus of the same kind was indicated in Doty's specification, and probably it was sufficiently indicated to a person possessing ordinary skill. But it is not necessary to dwell on this, for Robinson's patent precedes that of Rose, and it describes an apparatus identical with that set out in Rose's specification. There are some slight differences in detail, but to my mind it is not doubtful that the two are the same. In particular they both contain that bifurcation of pipe which overcomes the back pressure and enables a continuous current to be maintained at the burner.

The pursuers hardly deny that their apparatus is the same as Robinson's. Their case is that it is applied to a different use. For the lamp constructed by Robinson is an oil-vapour lamp, and consequently his apparatus is intended to vapourise the oil and to produce a continuous supply of oil vapour. The pressure

No. 218. which it creates is in the oil-tank and not in the water-tank, and it is created by the admission of oil vapour and not of steam. The pursuers contend that there is no identity, inasmuch as the apparatus of Rose is used for generating a continuous current of steam in order to produce a continuous oil spray.

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The merit of Rose, in these circumstances, comes to be the application of an old apparatus to a new use. But there cannot be a good patent unless there is ingenuity or merit in the application. Accordingly the pursuers bring evidence to shew that their apparatus has been alone successful, and makes it possible to use any kind of oil; whereas the apparatus of Robinson is liable to choke from the deposit of oil distillates, and from that cause the finest oils can alone be used.

I have come to be of opinion that the pursuers' patent cannot be supported, because there is, I think, no merit or ingenuity in the new use of the apparatus. When the system of producing a continuous current is known, there is no merit in producing it from steam and not from oil, nor is there any merit in applying a current of steam to produce oil spray. It was done in the spray lamps which had heretofore been in use. That the spray lamp has in the automatic form advantages over the vapour lamp is not material, for the claim of the patentee is not for those advantages but for the new use.

The 6th claiming clause of the pursuers' specification is in these terms:—"In oil-spray lighting or heating apparatus working with self-generated steam, the combination with the water-tank and a self-generating steam coil or chamber of a pipe having a syphon bend therein for supplying water from said tank to the coil or chamber, substantially as hereinbefore set forth." It is maintained that what is thus claimed has neither novelty nor utility.

The syphon bend is "for the purpose of keeping a supply of water in the generating coil." It does not act as a syphon, nor is it maintained that it does, although the bend "is for the purpose of keeping a supply of water in the generating coil." If the water is allowed to flow from the tank there is no use of the bend. But if it be shut off it is true that the water in the bend of the syphon nearest the coil will flow to the coil, and thus a larger quantity of water will reach it. But that is nothing more than saying that a bent pipe, being longer than a straight pipe, will contain more water, and if the bend be upright gravitation will act. It was contended that by this contrivance the steam had to pass for a shorter distance from the coil to the water-tank. But there is no novelty or merit in that. It is not a new thing to increase the length of a pipe between two fixed points by bending it, nor is it new that the water will flow down if the curve be upright. I see nothing more than this in the 6th claim of the patent. I think that it is a bad claim, and if it be it avoids the entire patent.

LORD TRAYNER.—I have nothing to add. I entirely concur in the opinions which your Lordships have expressed.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors of the Sheriff-substitute and Sheriff dated 29th June 1892 and 6th March and 18th October 1893: Find that the petitioners are assignees of letters-patent granted to George Rose and others: Find that in the specifications lodged in connection with said letters-patent the patentees claim to have invented an apparatus for producing a continuous current of oil spray at the burner of a spray lamp by a continuous current of steam generated in

the lamp itself : Find that in the specification lodged in connection with prior letters-patent granted to Doty and Robinson, Nos. 8697, A.D. 1887, and 3696, A.D. 1889, the same apparatus was specified, and that it was specified to be used in the same way as the apparatus claimed by George Rose and others, except that it was intended to be used with oil alone, and in order to produce a continuous current of oil vapour at the burner of the lamp : Find that in the specification lodged in reference to the prior letters-patent granted to Doty an apparatus is specified substantially the same as the apparatus claimed by George Rose and others, and specified for the same uses : Find that there was neither ingenuity nor merit in applying the said apparatus to the production of a continuous current of oil spray in the manner described in the said specification of Rose and others : Find that the said George Rose and others are not the first and true inventors of the said apparatus : Find that there is no novelty or merit in the syphon bend claimed in the sixth claim of the specification of George Rose and others for the purposes therein set forth : Find in law that the said patent is invalid ; therefore assoilzie the defenders from the conclusions of the petition," &c.

YOUNG & ROXBURGH, W.S.—J. & J. ROSS, W.S.—Agents.

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MRS JANE STEWART, Petitioner (Appellant).—*W. Campbell—Aitken.*
WILLIAM MARSHALL, Respondent.—*Dickson—A. S. D. Thomson.*

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Stewart v.
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Burgh—Dean of Guild—Process—Petition for lining—Necessity for objections being in writing.—In a petition in a Dean of Guild Court for a lining the burgh surveyor, who was called as a respondent, appeared in Court before the Dean of Guild and stated verbal objections to the granting of the petition, but without having lodged written answers. The Dean of Guild having refused the petition, and the petitioner having appealed, the Court *intimated* that the surveyor could not be heard unless he lodged written answers, and having, of consent of the petitioner, allowed the surveyor to put in objections, *remitted* the cause to the Dean of Guild to make up a record on the petition and answers.

Police—Road—Street—"New Street"—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 152 and 153.—The Burgh Police (Scotland) Act, 1892, sec. 152, enacts that from and after the date when the Act comes into operation, "it shall not be lawful to form or lay out any new street or part thereof," except under certain specified conditions ; and by section 153 it is provided "that the provisions of this Act relating to the width and construction of streets shall not extend or apply to any existing streets . . . which shall be proved to the satisfaction of the Commissioners to have been agreed to or to have been formed previous to the application of the Act."

A street in a burgh which had been formed many years prior to the Act had buildings on the south side only, the street being bounded on the north by the back-gardens of another street, and by a piece of ground belonging to A at the west end of the street.

In a petition by A for authority to erect a house on the boundary of his property adjoining the street, the burgh surveyor opposed the petition on the ground that the intended building would fix the line of building on the north side of the street, and would amount to forming a new street, or part thereof, in the sense of the Act, and that the proposed building did not comply with the conditions of the Act applicable to new streets. The Dean of Guild refused the petition.

In an appeal, the Court held that the proposed building could not be regarded as part of a new street, and that the petition should be granted.

* Decided July 19, 1894.

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2D DIVISION.
Dean of Guild
Court, Kirkin-
tilloch.

IN August 1893 Mrs Jane Stewart presented a petition in the Dean of Guild Court, Kirkintilloch, for a lining and warrant to erect shops and dwelling-houses on property belonging to her at the corner of Cowgate Street and Victoria Street, Kirkintilloch.

The burgh surveyor, who was called as a respondent, appeared before the Dean of Guild and stated objections verbally to the granting of the petition, but lodged no written answers. After hearing parties and inspecting the ground, the Dean of Guild, on 28th October, refused the prayer of the petition.

The petitioner appealed.

On 20th January 1894, when the case was called on the appeal, the Court intimated that the surveyor could not be heard unless he lodged written answers to the petition.

Thereafter, the surveyor having been, of consent of the petitioner, allowed to put in answers, including a separate statement of facts, to which the petitioner lodged answers, the Court on 27th January pronounced this interlocutor:—"Having heard counsel for the parties on the appeal for the pursuer against the interlocutor of the Dean of Guild, recall the said interlocutor, and remit the cause back to the Dean of Guild to receive the answers for the respondent, and answers for the appellant, and to make up a record and proceed in the cause." A record was made up in the Dean of Guild Court accordingly.

The respondent, the surveyor, in his statement of facts averred,—
"Victoria Street has not yet been 'formed or laid out,' within the meaning of the Burgh Police (Scotland) Act, 1892, and sections 146 to 153 thereof. It will, by the erection of the proposed buildings, be formed or laid out 'as a new street, or part thereof,' within the meaning of the said sections." . . . "It has not been proved to the satisfaction of the Commissioners that Victoria Street was agreed to, or was formed previous to the application of the said Act." *

The petitioner in her answers to the respondent's statement of facts, did not dispute that, if Victoria Street would by the erection of her buildings be laid out "as a new street or part thereof," her buildings, if erected as proposed by her, would not be in compliance with the sections of the Burgh Police (Scotland) Act, 1892, relating to the breadth of streets, &c., founded on by the respondent; but she averred,—
"Victoria Street, formed and used as a street, has been in existence since 1836. . . . The Commissioners by their actings in the past have recognised Victoria Street as a street which was formed long prior to the date of the said Act."

A proof disclosed the following facts:—Victoria Street was a *cul-de-sac* running westward at right angles to Cowgate Street, Cowgate Street being one of the chief streets in Kirkintilloch. The petitioner's ground was situated at the north-east corner formed by the junction of the two street. Immediately opposite her property, i.e., on the south-east corner, was a property with buildings on it belonging to Robert Hendrie, and beyond Hendrie's property, on the same side, were several other feus, also built on, belonging to different proprietors, the south side of Victoria Street being entirely built upon, but Hendrie's ground and building projected

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 153, contains, *inter alia*, this proviso,—
"Provided always, that the provisions of this Act relating to the width and construction of streets or courts shall not extend or apply to any existing streets or courts which shall be proved to the satisfaction of the Commissioners to have been agreed to, or to have been formed, previous to the application of this Act."

10 feet further to the north than the other properties and buildings on the south side. On the north side of Victoria Street, and to the west of the petitioner's ground, were the back-gardens of a street called Kerr Street, which was parallel with Victoria Street. The south walls of these back-gardens were in a line with the south boundary of the petitioner's property. The distance between the back-gardens and the houses opposite was 20 feet, but the distance between the petitioner's south boundary and Hendrie's property was, owing to the projection of that property, only 10 feet. The petitioner proposed to build to the extreme boundary of her property, leaving consequently a street of 10 feet in breadth between her house and Hendrie's, which was very much less than the breadth permitted by the Burgh Police Act in the case of "new streets."

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The buildings on the south side of Victoria Street were erected long prior to the Act of 1892, most of them having been erected about 1837. The petitioner's ground was at that date, and remained for many years afterwards, unenclosed, nothing being erected on it except occasionally pedlars' booths and the like, and the public being in the habit of walking over it. In 1883 the petitioner's author let it upon a lease terminable at six months' notice, and the tenant, after obtaining a decree of lining, put up a workshop on the ground with a railing round it. The ground remained in this condition until the petitioner acquired it in 1892. The distance between the railing and Hendrie's house was about 10 feet, and while the ground was thus occupied this 10 feet was the only public access to the rest of Victoria Street.

Victoria Street was on the register of streets of the burgh. The houses on the south side had been, since 1878, numbered with odd numbers. Gas, water, and sewage pipes were laid in the street; these, so far as between Hendrie's and petitioner's property, being laid entirely in the passage 10 feet broad, already mentioned. The petitioner's ground was about 2 feet above the level of that passage. In 1881 a pavement of Caithness flagstone was, by order of the Police Commissioners, laid along Cowgate Street, and at the point where Victoria Street joins Cowgate Street only a 10 feet crossing was left in this pavement. This crossing was causewayed, but Victoria Street was not. It was made up of broken bricks, masons' and joiners' shivers, with ashes laid on the top. In 1887 public gas lamps were introduced into Victoria Street.

On 20th April 1894 the Dean of Guild refused the petition.

The petitioner appealed, and argued;—Victoria Street was not a "new street" in the sense of the Burgh Police Act, 1892. The evidence shewed that it had for many years been, and been recognised by the Police Commissioners as, a street. That was enough under the Act to take it out of the category of "new streets." The English decisions referred to by the respondent had no application to cases like the present. They related to country roads, which, on being included within burghs, became "streets" in the sense that they were put on the Burgh Register of Streets, but they did not become streets in a proper sense until houses were erected, or were proposed to be erected along them.

Argued for the respondent;—The clauses of the Burgh Police (Scotland) Act, 1892, regulating the width of streets and the height of houses, applied to the present case. A street, in the ordinary popular sense of the term, was a road with houses or buildings on both sides of it.¹ Victoria Street had not hitherto possessed that character, although it was doubtless a street within the meaning of the interpretation clause of the

¹ Galloway v. Mayor, &c., of London, 1866, L. R., 1 Eng. and Ir. App. 34, per Lord Chelmsford at p. 55.

No. 219. Act, which was wide enough to include any roadway, whether built on or not. If, however, the present application were to be granted, a permanent line of street would be formed for the first time on the north side of Victoria Street. That would amount to forming or laying out a new street, or part thereof, in the sense of the Act. This view was strongly confirmed by several decisions in England on similar clauses in English statutes.¹ The Police Commissioners had never recognised Victoria Street as a street; *de facto*, the inhabitants of this *cul-de-sac* had used it as the access to their houses—that was all.

At advising,—

LORD RUTHERFURD CLARK.—The lining for which the pursuer applies is opposed by the Police Commissioners of the burgh, on the ground that the proposed building is in contravention of the 152d section of the Police Act of 1892.

That turns on the question whether the pursuer is proposing to lay out a new street, or part of a new street.

We have here nothing to do with public roads which have been included in burgh under special statutory powers, and what, on being included, came to be streets of the burgh. Victoria Street was never a public road. It led to no public place. It was never anything else than a street. It has been regarded for many years as a street, and it has been partly built on, though on one side only. It has been all along dealt with by the Police Commissioners as a street. I do not think that the pursuer proposes to form any new street, or any part of a new street. She is merely proposing to build up to the building line of an existing street in the burgh.

LORD YOUNG, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

THE COURT recalled the interlocutor of 24th April 1894, found that the petitioner in erecting the proposed buildings “is not proposing to form or lay out any new street or part thereof”; therefore repelled the pleas stated by the respondent, and remitted to the Dean of Guild to grant the lining as craved.

WEBSTER, WILL, & RITCHIE, S.S.C.—PATRICK & JAMES, S.S.C.—Agents.

¹ Robinson v. Local Board of Barton Eccles, 1883, L. R., 8 App. Ca. 798; Pound v. Plumstead Board of Works, 1871, L. R., 7 Q. B. 183; Vestry of St Giles, Camberwell, L. R. [1892], 2 Q. B. 33; Taylor v. Metropolitan Board of Works, 1867, L. R., 2 Q. B. 213.

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AGENT AND CLIENT. *Funds in agent's hands for special purpose—Bankruptcy of client.*

1. A, a person charged with crime, having sent a sum of money to a law-agent to be used for the purposes of his defence, and having been sequestrated before the trial, and while the agent still had part of the money in his hands, held, in an action of accounting at the instance of the trustee in the sequestration against the agent, that the mandate to the agent was a revocable contract, which fell by the sequestration, and consequently that the defender was bound to account to the trustee for all sums in his hands belonging to A at the date of the sequestration. *M'Kenzie v. Campbell*, June 13, 1894, p. 904.

Agent and Principal—Liability for disclosed principal—Foreign—Custom—English custom applicable to solicitors.

2. In an action by an English solicitor against a law-agent in Scotland for payment of an account for professional services, the pursuer averred that he had been employed by the defenders to conduct a litigation in England for a client, and that by the custom of England a solicitor employing another for a client was personally liable to the solicitor employed for costs. After a proof, held that the pursuer had failed to prove that the custom extended to the case of an English solicitor employed by a Scots law-agent. *Livesey v. Purdom & Sons*, June 15, 1894, p. 911.

AGENT AND CLIENT—*Continued.*

Negligence—Employment—Relevancy.

In an action of damages against a law-agent the pursuers averred that in 1852, when they were in minority, their father held a sum of money belonging to them; that without consulting them he borrowed this sum; that the pursuers' mother voluntarily offered to give security over certain heritable subjects belonging to her in which she was not infeft, that their father, as their curator, and their mother, instructed the defender to draw up a bond and disposition in security; that the defender prepared a bond and disposition in security, but did not complete the mother's title by infeftment; that the pursuers did not know of the granting of the bond till 1889; that it was the defender's duty to complete the mother's title, and that his failure to do so had resulted in the loss of the sum borrowed. *Held* that as the pursuers did not aver that the defender had been instructed to complete the mother's title, the action was not relevant. *Auchincloss v. Duncan*, July 20, 1894, p. 1091.

AGENT AND PRINCIPAL *Right in Security—Ship—Bill of lading.*

A bank advanced money to P. on the security of merchandise then afloat, P. delivering the bill of lading to the bank. Subsequently the bank sent the bill of lading to P. as trustee for the bank to obtain delivery of the merchandise on arrival and sell it for behoof of the bank. *Held* that the bank by sending the bill of lading to P. had lost their real security over the merchandise, which thus became the unburdened property of P., and liable to the diligence of his creditors. *North-Western Bank, Limited, v. Poynter, Sons, & Macdonald*, Feb. 2, 1894, p. 513.

Agent—Title to sue.

On 31st March Stewart, Brown, & Company sent the following sale-note to Biggart & Fulton:—"We have this day sold to you, on account of Stevenson & Company, Manila, 100 tons of sugar at £10, 17s. 3d. c. i. f. Liverpool . . . we to accept shippers' drafts at 3 m/s." Biggart & Fulton authorised Stewart, Brown, & Company to take delivery of and sell the sugar on arrival in Liverpool and to credit themselves with the proceeds against the price, and their outlay in taking delivery of the sugar and selling it. The proceeds of the sale in Liverpool were insufficient to meet the price, &c., and Stewart, Brown, & Company (together with Stevenson & Company) sued Biggart & Fulton for the difference. In defence Biggart & Fulton pleaded no title to sue, in respect that Stewart, Brown, & Company, as agents for a disclosed principal, had no title, and that Stevenson & Company had no title, as they had made no contract with Biggart & Fulton. On a proof it appeared that Stevenson & Company were in the custom of sending cargoes of sugar to this country for sale, but instead of breaking the cargoes into quantities to suit purchasers they disposed of them entire to brokers upon contracts which bore that the broker was "buyer" of the cargo at a certain sum per ton. The broker then disposed of the sugar in lots to the buyers whom he had secured at a somewhat increased rate per ton, he receiving the difference. Stewart, Brown, & Company held the cargo, of which the 100 tons in question was a part, on a contract in these terms, and disposed of it in this way to different purchasers. *Held* that Stewart, Brown, & Company, as agents for Biggart & Fulton in paying the price, taking delivery of the sugar, and reselling it at Liverpool, were entitled to recover the sum sued for.

Question whether the pursuers had a title to sue upon the sale-note of 31st March. *Stewart, Brown, & Co. v. Biggart & Fulton*, Dec. 13, 1893, p. 293.

Shipbroker—Commission.

Circumstances in which it was *held* that a shipbroker who had first introduced to a firm of shipbuilders the name of a person who afterwards bought a ship from them was not entitled to any commission, the intro-

AGENT AND PRINCIPAL—*Continued.*

duction having in no way contributed to bring about the sale. *Jacobs & Co. v. McMillan & Son, Limited*, March 8, 1894, p. 623.

Contract by an agent for intended company.

4. *Held* that a limited company had no title to sue upon a contract entered into by a person, as agent for the company, before the company had been incorporated. *Tinnevely Sugar Refining Co., Limited, v. Mirrless, Watson, & Yaryan Co., Limited*, July 17, 1894, p. 1009.

Sale—Factors Act, 1889, sec. 9—Factors Act, 1890.

5. A sold certain casks of whisky to D, and gave him a delivery-order for the whisky on C, the keeper of A's bonded warehouse. *Question* whether D was a "mercantile agent in possession" of a document of title in the sense of the Factors Act, 1889, sec. 9. *Browne & Co. v. Ainslie & Co.*, Nov. 28, 1893, p. 173.

Debt collector—Reparation.

6. Taking decree in absence for debt paid after action raised—Malice—Want of probable cause—Issue. *Rhind v. Kemp & Co.*, Dec. 13, 1893, p. 275.
See *Agent and Client*, 2.

ALIMENT. See *Husband and Wife*, 4, 5.APPEAL. *Execution pending appeal—Prayer for further order.*

It is incompetent in a petition for interim execution of a judgment pending an appeal to the House of Lords to add a prayer for any further or other order in the proceedings. *Stevenson v. Stevenson*, March 7, 1894, p. 617.

Appeal to Court of Session. See *Process*, 32 to 38.

Appeal to Court of Justiciary. See *Justiciary Cases*, 15.

APPORTIONMENT. See *Lease*, 10.APPREHENSION. See *Reparation*, 27.ARBITRATION. *Jurisdiction—Provident Society—Dispute between society and member.*

1. The rules of a provident society provided that in the event of any dispute between a member of the society, or any person claiming through a member, and the society, it must be referred to a committee of the society. In an action against the society at the instance of the executor-dative of a member to recover a sum alleged to be due by the society to the deceased, *held* that, as the defender denied the pursuer's right to represent the deceased member, the question raised was not a dispute within the meaning of the rule, and that the jurisdiction of the Court was not ousted. *Symington's Executor v. Galashiels Co-operative Store Co., Limited*, Jan. 13, 1894, p. 371.

Nomination of arbiter—Sheriff—Appeal.

2. Under a private Act of Parliament differences were to be referred to an arbiter appointed "by the Sheriff of the county of Lanark." *Held* that in appointing an arbiter the Sheriff was not acting in his judicial capacity, and that, therefore, an appeal to the Court of Session against his finding was incompetent. *Magistrates of Glasgow v. Glasgow District Subway Co.*, Nov. 8, 1893, p. 52.

Contract—Foreign—Locus solutionis.

3. A contract between an English and a Scots firm to be implemented in Scotland was signed in London and contained this clause:—"Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange." In an action by the Scots firm against the English firm, the First Division held (1) that the validity and effect of the contract fell to be determined by the law of Scotland, the locus solutionis; (2) that the arbitration clause could not be regarded as a separate contract, the locus solutionis of which was in England; and (3) that the reference to unnamed arbiters was by the law of Scotland invalid. *Held* (in rev. the judgment) (1) that the arbitration clause fell to be construed and governed by the law of England, as its terms shewed that that was the intention of the parties; (2) that by the law of England it was valid;

ARBITRATION—Continued.

(3) that there was no principle of public policy to prevent the Courts of Scotland from giving effect to it. *Hamlyn & Co. v. Taliaker Distillery*, May 10, 1894, H. L., p. 21.

Corruption—Act of Regulation—Arbiter's fee—Personal objection.

4. An arbiter who had accepted a reference without stipulating for any fee intimated to the parties that an award had been signed, and requested payment of a fee of £300 before they uplifted the award. Each of the parties paid one-half of the fee without protest. In an action by one of the parties for reduction of the award on the ground that the arbiter had acted corruptly in the sense of the Act of Regulation in demanding payment of a fee as a condition of allowing the award to be uplifted, *held*, that as the pursuer had paid his half of the fee without objection he was barred from challenging the award on the ground stated. *Duff v. Pirie*, Nov. 14, 1893, p. 80.

Ultra fines compromissi.

5. The employer, under a contract for the execution of harbour works, brought an action for reduction of an award of the arbiter named in the contract on the ground that the arbiter had acted *ultra vires* in ordaining him to execute works. *Held* that the award was not *ultra vires* in respect that the order on the pursuer to execute the works was not obligatory, but was merely a condition which he must fulfil before enforcing an order on the contractor. *Duff v. Pirie*, Nov. 14, 1893, p. 80.

Award—Reduction—Personal objection.

6. In the pleadings before an arbiter, under a reference in an contract for the construction of harbour works, the employer objected to a claim by the contractor on the ground that the claim was excluded by a special agreement between the parties. The contractor denied the existence of such an agreement. The arbiter sustained the contractor's claim. In an action at the instance of the employer for reduction of the award on the ground that the claim was excluded by the express words of the contract, *held* that the employer having based his case before the arbiter on the alleged special agreement, was barred from pleading the contract as a ground for reducing the award. *Duff v. Pirie*, Nov. 14, 1893, p. 80.

ARRESTMENT. *Salé—Subsalé—Intimation—Mercantile Law Amendment Act, 1856, sec. 3.*

1. In an action by B. & Company, the subvendees of certain whisky, against A. & Company, the original sellers, for delivery of the whisky, which had been arrested by A. & Company in their own bonded stores, A. & Company pleaded that, under the Mercantile Law Amendment Act, 1856, sec. 3, the subsale not having been intimated to them by or with the authority of B. & Company, it was ineffectual in competition with the arrestments. It was proved that A. & Company knew of the subsale, but that it had not been intimated to them by or with the authority of B. & Company. *Held* that the arrestments were ineffectual in competition with B. & Company. *Browne & Co. v. Ainslie & Co.*, Nov. 28, 1893, p. 173.

Bankruptcy—Arrestments within sixty days of sequestration—Bankruptcy (Scotland) Act, 1856, sec. 108.

2. *Held* that while arrestments used within sixty days of sequestration are ineffectual to create a preference in the arresting creditor, they are effectual to lay a *nexus* on the funds to the effect of preventing the arrestee from paying them away to the prejudice of the trustee on the estate, to whom they were transferred by the sequestration. *Mackenzie v. Campbell*, June 13, 1894, p. 904.

Arrestment of joint property of tenant and landlord for landlord's debt.

3. Under the lease of a quarry the plant was declared to be the joint property of the landlord and of the tenant, the landlord being bound to pay one-half of the value thereof to the tenant at the ish of the lease. Certain creditors of the landlord before the lease ended used arrestments in the hands of the tenant, and then raised an action of furthcoming against the arrestee and

ARRESTMENT—Continued.

the landlord's trustee, in which, without alleging that anything except the plant in the quarries had been attached, they concluded for a decree ordaining the arrestee to pay the whole debt due by the landlord or such part thereof as was represented by money arrested in his hands due by him to the landlord, and to pronounce such other orders as to the Court might "seem necessary for satisfying the said claim of the pursuers." The Court were of opinion that the summons contained no conclusions under which the arrestments, even if competently laid on, could be made available, but allowed the pursuers an opportunity of amending. The pursuers, thereupon, amended their summons, concluding that the Court should ordain that the arrested plant should be sold, and the price thereof, so far as was necessary for the satisfaction of their debt, paid to them, or otherwise should pronounce a like order, upon the pursuers paying to the arrestee half the value of the plant as the same might be ascertained in terms of the lease. The Court *assolized* the defenders, on the ground that the conclusions were untenable, and that the interest of the landlord in the plant had not been validly arrested. *Lucas's Trustees v. Campbell and Scott*, July 20, 1894, p. 1096.

ASSESSMENT. See *County Council*, 3—*Police*, 1, 2, 3—*Reparation*, 8.

ASSIGNATION. See *Lease*, 3—*Right in Security*, 2, 3—*Tille to Sue*, 3.

BANK. See *Insurance*, 6—*Payment—Reparation*, 30.

BANKRUPTCY. *Sequestration—Jurisdiction—Sheriff—Ultra vires—Bankruptcy (Scotland) Act*, 1856, *secs.* 26 and 30.

1. *Held* that it is *ultra vires* of a Sheriff to consider the question of jurisdiction in a petition for sequestration until the diet to which the debtor is cited, under sec. 26 of the Bankruptcy Act, 1856, to shew cause why sequestration should not be awarded. *Hope v. Macdougall*, Nov. 7, 1893, p. 49.

Sequestration—Reduction—Foreign—Jurisdiction.

2. A, the trustee in a sequestration granted in 1885, under the Bankruptcy Act, 1856, having realised the bankrupt's estate and distributed it among the creditors, was discharged in 1889. In 1893 B, alleging that he was trustee in a liquidation by arrangement of the debtor's estates instituted in 1881 in the English Courts, brought an action against A for reduction of the sequestration and of the act and warrant appointing the trustee thereunder, on the ground that the Court in Scotland had no jurisdiction to award sequestration in respect of the dependence of the bankruptcy proceedings in England. The Court *dismissed* the action on the ground that all parties interested had not been called.

Opinions that an action for reduction of a sequestration on the ground that the Court had no jurisdiction to award sequestration by reason of the existence of a liquidation in England of the debtor's estates was incompetent. *Gibson v. Munro*, June 5, 1894, p. 840.

Sequestration—Arrestments within sixty days of sequestration—Bankruptcy (Scotland) Act, 1856, *sec.* 108.

3. *Held* that while arrestments used within sixty days of sequestration are ineffectual to create a preference in the arresting creditor, they are effectual to lay a *nexus* on the funds to the effect of preventing the arrestee from paying them away to the prejudice of the trustee on the estate, to whom they were transferred by the sequestration. *Mackenzie v. Campbell*, June 13, 1894, p. 904.

Sequestration—Effect of.

4. Funds having been handed to a law-agent for the purposes of the client's defence in a criminal charge, and the client having been thereafter sequestered before the trial took place, *held* that the mandate to the agent fell by the sequestration and consequently that the agent was bound to account to the trustee in the sequestration for all sums in his hands belonging to

BANKRUPTCY—*Continued.*

the client at the date of the sequestration. *Mackenzie v. Campbell*, June 13, 1894, p. 904.

Trust—Whether trust one for creditors—Jus quesitum tertio—Personal liability of trustee.

5. Circumstances in which it was held that a trustee having represented that the trust in his person was a trust for creditors, and a creditor having intimated her claim to the trustee, he was not entitled to pay over the balance of the trust funds to the truster without satisfying the creditor's claim, and having done so that he was personally liable to her. *Cruickshank v. Thomas*, Dec. 9, 1893, p. 257.

Trust for creditors—Accession.

6. Provision by father to daughter subject to declaration that all advances by him to son-in-law should be taken in satisfaction—Accession by father to son-in-law's trust for creditors, and part repayment thereunder of advance to son-in-law—Discharge of son-in-law—Held on death of father that the advance, in so far as not repaid under son-in-law's trust, was to be imputed in satisfaction of daughter's provision. *Smith's Trustees v. Sellar*, March 9, 1894, p. 633.

Trust for creditors—Cautioner.

7. Where the creditors, under a trust for behoof of creditors, entered into a composition arrangement whereby 7s. 6d. per £ was to be paid in four instalments, with cautioners for payment of the last instalment, and after receiving payment of the first instalment only, took a second trust-deed from the debtor, held that they had liberated the cautioners. *Allan, Buckley Allan, & Milne, v. Pattison*, Nov. 29, 1893, p. 195.

Lease—Balancing of accounts in bankruptcy—Value of buildings erected by tenant.

8. A tenant, several years before the termination of his lease, granted a trust-deed for behoof of his creditors. The lease having been abandoned by the tenant, it was arranged between the trustee and the landlord that buildings which the tenant would have been entitled to remove at the natural expiration of the lease should be taken over by the landlord at their value. Held that the landlord's agreement to pay the value of the buildings was to be construed as subject to his antecedent right to retain them till the tenant had implemented his obligations under the lease, and that the landlord was entitled to set off against the trustee's claim for the value of the buildings his loss by the tenant's abandonment of the lease. *Smith v. Harrison & Co.'s Trustee*, Dec. 22, 1893, p. 330.

Cessio—Diligence of prior creditors against property acquired by debtor after decree of cessio—Debtors (Scotland) Act, 1880, sec. 9, subsec. 5.

9. Held (by a Court of seven Judges) that although, in a process of cessio, a debtor has been decerned to execute a disposition *omnium bonorum* in favour of a trustee for behoof of his creditors, individual creditors are entitled to do diligence for the recovery of their debts against property acquired by the debtor after the date of the decree. *Reid v. Graham*, July 3, 1894, p. 935.

See *Company*, 9—*Husband and Wife*, 6, 7, 8, 9—*Marriage-contract*, 1, 4—*Payment*.

BILL OF EXCHANGE. *Denial of signature—Suspension—Caution.*

A person who had been charged upon a bill bearing his name as acceptor presented a note of suspension on the ground that he had not adhibited or authorised the signature. *Circumstances* in which the Court passed the note without caution. *Kechans v. Barr*, Nov. 14, 1893, p. 75.

BILL-CHAMBER. See *Process*, 28.

BOARD OF TRADE. See *Statute*, 3.

BONA ET MALA FIDES. See *Contract*, 1—*Public-house*, 4—*Railway*, 8—*Succession*, 28—*Teinds*.

BOUNDARY COMMISSIONERS. See *Poor*, 1.

BRIDGE. See *Road*, 1.

BURGH. *Dean of Guild—Process—Record*.

1. In a petition in a Dean of Guild Court for a lining the burgh surveyor, who was called as a respondent, appeared in Court before the Dean of Guild and stated verbal objections to the granting of the petition, but without having lodged written answers. The Dean of Guild having refused the petition, and the petitioner having appealed, the Court *intimated* that the surveyor could not be heard unless he lodged written answers, and having of consent of the petitioner allowed the surveyor to put in objections, *remitted* the cause to the Dean of Guild to make up a record on the petition and answers. *Stewart v. Marshall*, July 20, 1894, p. 1117.

Ultra vires—Secretary for Scotland—Special Water District—Local Government (Scotland) Act, 1889, sec. 81, subsec. 2.

2. *Held* that a determination of the Secretary for Scotland under the above section, that a police burgh should be represented on the committee in the proportion of eight members to six members appointed by the County Council was *ultra vires*, and determination *reduced*. *Eastern District Committee of Dumbartonshire County Council v. Police Commissioners of Clydebank*, Oct. 19, 1893, p. 12.

Public-House—Licensing authority—Burgh Police (Scotland) Act, 1892, sec. 38.

3. *Held* that the right of granting, refusing, renewing, and transferring certificates under the Public-Houses Acts for premises within police burghs has not been transferred under the Burgh Police (Scotland) Act, 1892, sec. 38, from the county Justices to the magistrates of such burghs. *Tennent v. Magistrates of Partick*, March 20, 1894, p. 735.

County Council—Assessment—Burgh—Local Government (Scotland) Act, 1889.

4. *Held* that under the Local Government (Scotland) Act, 1889, a county council is entitled to levy the county general assessment on the annual value of lands and heritages in parliamentary burghs within the county which have less than 7000 inhabitants and have no police establishment. *Police Commissioners of Oban v. County Council of Argyllshire*, March 9, 1894, p. 644.

See *Church*, 3—*Police—Property*, 4—*Reparation*, 5, 6, 8, 10.

CANAL. See *Railway*, 1.

CAUTIONER. *Liberation of cautioner—Cautioner for composition—Substitution of trust for creditors in place of composition arrangement—Personal objection*.

1. A debtor, who had granted a trust-deed for behoof of his creditors, entered into a composition arrangement with them for payment of a composition of 7s. 6d. in the £, and he found caution for the payment of the last instalment, A being one of the cautioners. The debtor failed to pay the first instalment of the composition, and the creditors took from him a second trust-deed for their behoof. No intimation of this was sent to A, but a meeting of the creditors having been subsequently called by circular, one of the circulars was sent to A, who took no notice of it. The debtor's estate realised enough to pay about 2s. 6d. per £. The cautioners having subsequently been called on to pay, A disputed liability, and an action was raised against him. *Held* that by taking the second trust-deed the creditors had liberated the cautioners, and that A was not barred from pleading this by his silence after receiving the circular. *Allan, Buckley Allan, & Milne v. Pattison*, Nov. 29, 1893, p. 195.

Act 1695, cap. 5—Septennial Limitation—Contract.

2. Action in which *held* that a cautionary obligation had been extinguished by the operation of the Act 1695, cap. 5, and that the pursuer had not relevantly averred a new and independent contract with the cautioner under which he would still be liable for the debt. *McGregor's Executors v. Anderson's Trustees*, Oct. 18, 1893, p. 7.

CAUTIONER—*Continued.*

Cautioner for cash-credit.

3. Payment—Appropriation of indefinite payments—Extinction of cautionary obligations. *Cuthill v. Strachan*, Feb. 16, 1894, p. 549.

See *Bill of Exchange—Insurance*, 6—*Judicial Factor*, 7.

CESSIO. See *Bankruptcy*, 9.

CHARITABLE INSTITUTION. See *Minor and Pupil*, 1.

CHARITABLE TRUST. See *Trust*, 13, 14, 15, 16.

CHURCH. *Lands held in trust for use and benefit of minister—Mines and minerals.*

1. In 1676 certain lands were conveyed in trust “for the use and benefit of the minister of the gospel serving the cure at the Kirk of Bo’ness.” In 1888 minerals in the lands were opened and leased for twenty years at a yearly rent of £25 or royalties. In a special case between the trustees and the minister of the parish, *held* that the mineral rents or royalties were not to be paid to the minister as part of the income of the benefice, but were to be accumulated as capital, the income of the accumulated fund only being paid to the minister for the time. *Galbraith v. Minister of Bo’ness*, Oct. 27, 1893, p. 30.

Churchyard—Heritors—Compromise—Ultra vires.

2. *Held* that it is within the powers of the heritors of a parish to compromise questions regarding the extent of the churchyard, arising with a contentious proprietor, subject to the control of the Court at the instance of anyone having a legitimate interest. *Fraser v. Turner*, Dec. 13, 1893, p. 278.

Minister—Stipend—“Competent and legal stipend”—Arrears of stipend—Interest—Mora.

3. Where the magistrates of a burgh, who admitted liability to provide a parish minister with a certain limited stipend, were found to be under a contractual obligation to provide him with a “competent and legal stipend suited to the circumstances of the time, and the position and duties of the benefice,” *held* that the minister was entitled to stipend at the rate of £320 from 1880, when he first made his claim to an increase, down to 1891, when he raised action, and £400 a-year thereafter so long as the circumstances remained the same; and (2) that he was entitled to interest on arrears accruing down to 1891 at the rate of 2 per cent, and to interest on arrears accruing thereafter at the rate of 4 per cent. *Peters v. Magistrates of Greenock*, June 9, 1894, p. 886.

See *Process*, 34—*Revenue*, 3.

CLUB. See *Public-house*, 4.

COMMISSIONERS, STATUTORY. See *Company*, 1—*Poor*, 1.

COMPANY. *Railways and Canals—Whether “company” includes commissioners—Valuation of Lands (Scotland) Act, 1854, sec. 21.*

1. *Held* that the words “canal company” in the above section applied to a body of statutory commissioners, who were charged with the administration of a canal when the Act was passed. *Commissioners of the Caledonian Canal v. County Councils of Inverness and Argyll*, July 18, 1893, p. 1045.

Contract by agent for intended company—Title to sue.

2. In an action of damages against a firm of manufacturing engineers at the instance of a limited company, registered on 29th July 1890, the pursuers averred that, on 14th July 1890, prior to the incorporation of the company, D, as agent for the company, entered into a contract with the defenders for the supply by the latter of certain pieces of machinery, and that the machinery supplied was defective, and had caused great loss to the company. *Held* (1) that the company had not set forth a title to sue, as D could not have acted as its agent before it was in existence.

COMPANY—*Continued.*

Tinnevelley Sugar Refining Co., Limited, v. Mirrlees, Watson, & Yaryan Co., Limited, July 17, 1894, p. 1009.

General meeting—Quorum—Companies Act, 1862, Schedule I., Table A, Articles 37, 38.

3. *Held* (1) that in the above provision "members" means members entitled to vote; and (2) that a quorum must not only be present at the commencement of the meeting but also at the time when the business is transacted. *Henderson v. Louttit & Co., Limited*, March 15, 1894, p. 674.

Articles of Association—Invalid addition to articles—Mutual insurance.

4. *The articles of association of a mutual insurance company were altered, and, as altered, were registered in terms of the Companies Acts, but certain of the provisions of these Acts with respect to the alteration of articles of association were not complied with. A policy, issued by the company after the alteration, bore in gremio that the "articles of association shall be deemed, and considered part of this policy," and on the back of the policy the articles (as altered) were printed. In a question between the policy-holder and the company, held (aff. judgment of the First Division) that the altered articles were valid conditions of the insurance. Muirhead v. Forth and North Sea Mutual Insurance Association*, Nov. 17, 1893, H. L., p. 1.

Memorandum of Association—Alteration of—Companies (Memorandum of Association) Act, 1890, sec. 1.

5. A company incorporated in 1866 under the Companies Act, 1862, presented a petition under the Companies (Memorandum of Association) Act, 1890, for confirmation of a special resolution of the company altering its memorandum of association by giving it power to acquire and pay for the business of any other company carrying on any business which the company might legally carry on; to sell the business or property of the company; and to amalgamate with any other company in the United Kingdom established for objects similar to its own. The Court *refused* the petition on the ground that the Act did not contemplate that such general powers should be conferred, although particular transactions of the kinds specified might be sanctioned. *Young's Paraffin Light and Mineral Oil Co., Limited*, Jan. 16, 1894, p. 384.

Rectification of Register—Prospectus—Material misrepresentation—Companies Act, 1862, sec. 35.

6. B, who had received an allotment of shares in a limited company in March 1893, in June presented a petition to have his name removed from the register of shareholders and for repetition of payments, on the ground that he had been induced to apply for shares by the statement in the prospectus that S, whom he knew to have a high reputation for business ability and integrity, was one of the directors; that he had subsequently learned that prior to the allotment S had intimated to the company that he withdrew his consent to become a director, and that the company had made the allotment to the petitioner without intimating to him that S was not to be a director. The facts above stated having been proved, *held* that B was entitled to have his petition granted. *Blakiston v. London and Scottish Banking and Discount Corporation, Limited*, Jan. 24, 1894, p. 417.

Rectification of register—Shares allotted as promotion money—Petition—Competency—Companies Act, 1862, sec. 35.

7. Shareholders of a company presented a petition under the 35th section of the Companies Act, 1862, for rectification of the register of the company by deletion therefrom of the names of certain shareholders, in respect that their shares had been illegally allotted to them as promotion money. The respondents lodged answers in which they denied the petitioners' allegations, stated facts and circumstances tending to shew that they had given good consideration for their shares, and pleaded that the petition was incompetent. The Court *held* that petition under the 35th section was an inappropriate and inconvenient way of dealing with the statements contained in the petition and answers, and *sisted* process in order to enable

COMPANY—*Continued.*

the petitioners to raise an action of reduction in ordinary form. *Blakie v. Coats*, Nov. 21, 1893, p. 150.

Shares—Fully paid up—Payment in cash—Companies Act, 1867, sec. 25.

8. In the voluntary liquidation of a company, *held* that as no agreement had been registered under section 25 of the above Act, and as the company had received no payment in cash on account of the shares, and as the allottees were aware of that fact, they fell to be regarded as allottees of unpaid-up shares. *Furness & Co. v. Liquidators of "Cynthiana" Steamship Co., Limited*, Dec. 8, 1893, p. 239.

Transfer of shares to an insolvent person.

9. The articles of association of a limited company provided that the company might decline, in respect of any shares not fully paid up, to register any transfer made to a bankrupt. *Held* that the company was not entitled to refuse to register a transfer made to a person who was insolvent but not bankrupt, although the transfer was made for the purpose of freeing the transferor from liability. *Furness & Co. v. Liquidators of "Cynthiana" Steamship Co., Limited*, Dec. 8, 1893, p. 239.

Reduction of capital—Companies Act, 1867—Companies Act, 1877.

10. A company whose shares consisted of A preference shares, fully paid-up so far as issued, but not all issued, and B postponed shares, all issued and fully paid-up, passed a special resolution to reduce its capital, with the consent of the sole holder of the B shares "(1) by the cancellation as being unrepresented by available assets" of two-fifths of the nominal value of the B shares, and "(2) by paying off, as being in excess of the wants of the company," the remaining three-fifths of the nominal value of the B shares. The company proposed to pay off the three-fifths by borrowing on the security of its heritable property. The only creditors of the company were heritable creditors, and trade creditors whose debts were paid monthly. In a petition the Court *confirmed* the reduction and authorised the company to discontinue the use of the addition "and reduced" to the company's name after the lapse of six months from the date of the resolution. *West End Café Co., Limited (and Reduced)*, Jan. 16, 1894, p. 381.
11. A limited company, incorporated under the Companies Acts, 1862 to 1867, passed a special resolution, under sections 9 and 15 of the Companies Act, 1867, by which 10 per cent of its capital was to be returned to its shareholders "upon the footing that the amounts returned, or any part thereof, may be called up again." The Court *held* that the resolution was competent and fell to be confirmed. *Scottish Vulcanite Co., Limited*, March 20, 1894, p. 752.

Winding-up by the Court—"Officer of company"—Managing director—Effects to which company prima facie entitled—Retention—Companies Act, 1862, sec. 100.

12. A, the holder of certain patents, who had sold them to a company, and was under an obligation to assign them to it, became its managing director. In a liquidation at the instance of a creditor of the company the liquidator presented a note under the above section craving the Court to ordain A to assign the patents to him. A maintained, first, that the petition was incompetent, in respect (1) that he was not an officer of the company, and (2) that the company was not *prima facie* entitled to the patents, which he held, not as an officer of the company, but as an undivested seller; and second, that he was entitled to retain the letters-patent in security for the payment of the balance of the price. *Held* (1) that A was an officer of the company in the sense of the section; (2) that the substantial right to the patents belonged to the company, and that the liquidator was entitled to a decree ordaining A to assign them; but (3) that A was entitled to a reservation of any claim to a preference in the liquidation for the balance of the price which he would have had if he had retained possession of the patents. *Dunlop v. Donald*, Nov. 15, 1893, p. 125.

COMPANY—*Continued.*

Winding-up by the Court—Failure of object of the company—Just and equitable cause—Companies Act, 1862, sec. 79, subsec. 5, sec. 129, subsec. 1.

13. On 13th December 1893 a shareholder, holding 10 out of 215 shares of a limited company, incorporated to own and work a particular ship, presented a petition to have the company wound up by the Court, on the ground that the ship had become a total loss off the coast of North America on 25th November 1893. Answers were lodged by the company, in which they stated that no good reason had been given or existed for a winding-up, and that it would not be just that the company should be wound up by the Court. It appeared that notice of abandonment had not yet been formally accepted by the underwriters who had insured the vessel, and that no meeting of shareholders had been held to consider the question of a voluntary winding-up. The Court *refused* the petition. *Cox v. "Gosford" Ship Co.*, Jan. 10, 1894, p. 334.

Winding-up by Court—Inability to pay debts—Companies Act, 1862, secs. 79 and 80.

14. A creditor of a company charged the company for payment upon an extract decree, and the *inducie* having expired without payment, presented a petition for judicial winding-up of the company under the 79th and 80th sections of the Companies Act, 1862. Five other creditors opposed the application, on the grounds that a liquidation would be injurious to the just interests of the creditors, and that the petitioner would gain nothing by it, but they did not aver that there were no assets which could be made available in the liquidation for payment of the petitioner's debts. The Court *granted* the prayer of the petition. *Gardner & Co. v. Link*, July 11, 1894, p. 967.

See *Revenue*, 1.

COMPENSATION. See *Lease*, 4, 8.

COMPROMISE. See *Transaction*.

COMPULSORY SALE. See *Railway*, 2 to 9.

CONDITION. See *Contract*, 1, 5, 6,—*Insurance*, 2, 5—*Sale*, 15.

CONTEMPT OF COURT. See *Administration of Justice*, 1.

CONTRACT. *Constitution—Advertisement—Condition precedent—Insurance—Next of kin.*

1. The proprietors of a newspaper advertised that £100 would be paid by an insurance company named to the person whom the proprietors of the newspaper "may decide to be the next of kin of anyone who is killed in a railway accident," provided that a copy of the current issue was in his possession at the time of the accident, or that he was a regular subscriber to the newspaper. In an action against the proprietors of the paper, by the children and sole next of kin of a subscriber to the paper, who had been killed by a railway accident, for payment of the sum mentioned in the advertisement, the defence was that the defenders had decided that the widow of the deceased was his next of kin; that under the terms of the advertisement they were entitled so to decide; and that the money had been paid to her. The Court, after a proof, *assolized* the defenders, being of opinion that it was a condition precedent to requiring payment of the sum mentioned in the advertisement that the person claiming the money should produce the decision of the proprietors of the paper that he was the next of kin of the deceased, and that the pursuers had failed to prove that the defenders in refusing to decide that the pursuers were next of kin of the deceased had acted in bad faith. *Law v. George Newnes, Limited*, July 17, 1894, p. 1027.

Compare *Symington's Executor v. Galashiels Co-operative Store Co., Limited*, Jan. 13, 1894, p. 371.

CONTRACT—*Continued.**Foreign—Locus solutionis.*

2. Where a personal contract is entered into between persons residing in different countries where different systems of law prevail, the intention of the parties as expressed or implied in the contract will determine the system by which the whole or any part of the contract is to be interpreted and governed. *Hamlyn & Co. v. Talisker Distillery*, May 10, 1894, H. L., p. 21.

Proof—Oral—Modification of written contract.

3. Held that it was incompetent to prove by parole evidence an alleged verbal agreement to vary the terms on which an action had been compromised in a joint minute signed by counsel. *Hamilton & Baird v. Lewis*, Nov. 15, 1893, p. 120.

Pactum Illicitum—Weights and Measures Act, 1878, secs. 14, 19.

4. Held that a bargain to deliver 600 stones of hay each stone to weigh 24 imperial pounds was not void under the provisions of the Weights and Measures Act, the transaction being a sale by an imperial weight, namely, the pound. *Lang v. Cameron*, Jan. 10, 1894, p. 337.

Right in security—Assignment to bond and disposition in security—Unconditional offer and acceptance—Implement—Defect in bond.

5. The holders of a bond and disposition in security having advertised the security subjects for sale, the firm of A & B, who had a reversionary interest in the subjects, in consideration of the bondholders having agreed to withdraw the subjects from sale, bound themselves, by letter, personally to take an assignment of the bond and to pay the amount therein with interest. This was agreed to by letter, and the subjects were withdrawn from sale. Thereafter A & B refused to implement the contract, on the ground that they had discovered that the bond was not a valid security over the subjects *quoad* the interest, and that its validity in this respect was an implied condition of their obligation. In an action at the instance of the holders of the bond against A & B for implement of the contract, held that A & B were bound to take over the bond whether it was defective or not. *Forbes v. Welsh & Forbes*, March 8, 1894, p. 630.

Notice—Master and Servant.

6. In defence to an action by a workman against his employers for damages for personal injury, at common law and under the Employers Liability Act, 1880, the defenders proved that they had posted at various places in their works, including the pay-box, notices to the effect that from the weekly wages paid to the workmen certain sums would be deducted, to secure certain insurance benefits in case of accident, and that any workman accepting such benefits would be held to have discharged all claims against his employers. It was further proved that the notice was well known to the defenders' workmen generally, and that the pursuer had taken benefit of the insurance. The Court *assoluzied* the defenders, holding (1) that the conditions founded on were lawful conditions of the contract of employment; and (2) that on the evidence the pursuer must be held to have known of and assented to the conditions. *Wright v. Howard, Baker, & Co.*, Oct. 26, 1893, p. 25.

Construction.

7. "Equal monthly quantities of 300 tons maximum." *Barr v. Waldie*, Dec. 8, 1893, p. 224.
8. 3000 tons to be delivered "over next four months" in "average" or "about equal monthly quantities." *Ireland & Son v. Merryton Coal Co.*, July 13, 1894, p. 989.
9. Offer and acceptance.—"This for reply by" a day named. *Jacobsen, Sons, & Co. v. Underwood & Son, Limited*, March 10, 1894, p. 654.
- See *Company*, 2—*Insurance*, 2—*Interest*, 3—*Lease*, 3, 12—*Sale*, 15.

COPYRIGHT. *Infringement—Monthly Railway Time-Table—Interdict.*

The proprietor of a book of local railway time-tables, published monthly, presented a bill of suspension and interdict against the publishers of another

COPYRIGHT—Continued.

book of time-tables, for the same locality, selling or exposing for sale any time-tables copied or only colourably different from the complainer's time-tables, or containing excerpts therefrom. Held upon a proof (alt. judgment of the First Division) (1) that in so far as the respondents' publication consisted of ordinary time-tables, there had been no infringement of copyright; but (2) that in so far as the respondents' publication consisted of certain pages of selected and condensed information as to tourist arrangements and Saturday excursions, which were proved to have been copied from the complainer's publication, there had been a breach of copyright, and that the complainer was entitled to interdict against the respondents issuing any publication containing the said copyright matter. Leslie v. Young & Sons, June 7, 1894, H. L., p. 57.

COUNTY COUNCIL. *Ultra vires*—Secretary for Scotland—Special Water District—Local Government (Scotland) Act, 1889, sec. 81, subsec. 2.

1. *Held* that a determination of the Secretary for Scotland under the above section, that a police burgh should be represented on the committee in the proportion of eight members to six members appointed by the County Council was *ultra vires*, and determination *reduced*. Eastern District Committee of Dumbartonshire County Council v. Police Commissioners of Clydebank, Oct. 19, 1893, p. 12.

Reparation—Road.

2. *Held* that a claim of damages is competent against a county council for injuries arising from their neglect of duty in failing to keep a road sufficiently fenced. Strachan v. Aberdeen District Committee of the County Council of Aberdeenshire, June 19, 1894, p. 915.

Assessment—Burgh—Local Government (Scotland) Act, 1889.

3. *Held* that under the Local Government (Scotland) Act, 1889, a county council is entitled to levy the county general assessment on the annual value of lands and heritages in parliamentary burghs within the county which have less than 7000 inhabitants and have no police establishment. Police Commissioners of Oban v. County Council of Argyllshire, March 9, 1894, p. 644.

CROFTER. See *Lease*, 17, 18.

CROWN. See *Fishing*, 2.

CURATOR AD LITEM. See *Judicial Factor*, 8, 9.

CUSTOM. See *Agent and Client*, 2—*Agent and Principal*, 3—*Retention*.

DEAN OF GUILD. See *Burgh*, 1.

DEBT COLLECTOR. See *Reparation*, 29.

DEPOSIT-RECEIPT. See *Husband and Wife*, 6—*Insurance*, 6.

DILIGENCE. See *Bankruptcy*, 3, 9—*Reparation*, 30.

DISCHARGE. See *Contract*, 1—*Lease*, 10—*Title to Sue*, 3.

DONATION. See *Husband and Wife*, 6, 7.

ELECTION LAW. *Notice of objection*—Signature of objector impressed by "cyclostyle"—Burgh Voters Act, 1856, sec. 4—Representation of the People Act, 1884, sec. 8, subsec. 6.

1. A voter objecting to a certain person's name being retained on the Register of Voters, instead of signing the notice of objection in the ordinary way, stencilled his name upon it through a perforated signature he had made on a waxed skin. *Held* that the notice was "signed by the person objecting" in the sense of sec. 4 of the Burgh Voters Act, 1856. Whyte v. Watt, Nov. 27, 1893, p. 165.

ELECTION LAW—*Continued.*

County Franchise—Joint occupancy—Value—Representation of the People (Scotland) Act, 1868, secs. 6 and 14—Representation of the People Act, 1884, secs. 5, 11, and 12.

2. *Held*, upon a construction of the Registration Statutes, that in order to entitle joint tenants and occupants to be registered as voters in respect of lands and heritages held by them jointly, it is necessary that the value of the subjects should be sufficient when divided amongst them to give to each a sum of not less than £14. *Wainwright v. Aitken*, Nov. 27, 1893, p. 162.

ENTAIL. *Disentail—Consent of next heir—Security—Curator ad litem—Personal liability—Entail (Scotland) Act, 1882, sec. 12.*

1. An entailed estate was disentailed in 1884, the consent of the next heir, a minor, being given by A, his curator ad litem, who took a bond over the estate as the consideration for the consent. On attaining majority the next heir brought an action against A for payment of £16,000, on the ground that the defender had, in breach of his duty as curator ad litem, failed to obtain proper security for the sum of £16,000. The defender pleaded that the action was irrelevant, in respect that he was protected by section 12 of the Entail Act, 1882, there being no averment that he had acted corruptly. *Held* that the action was irrelevant. *Maxwell Heron v. Dunlop*, Dec. 8, 1893, p. 230.

Provision to widow—Increase of provision after granter's death—Aberdeen Act, secs. 1 and 3.

2. Although a bond of provision by way of liferent annuity granted under the Aberdeen Act by an heir of entail in possession in favour of his wife may not at the date of the granter's death be effectual, or may be effectual only to a limited extent by reason of the subsistence of similar bonds in favour of widows of prior heirs, it will become effectual (within the limits of the statute) as these prior bonds lapse. *Morison v. Morison*, Feb. 13, 1894, p. 538.

Petition to fix widow's annuity—Process.

3. An heir of entail cannot by way of summary petition obtain the judgment of the Court on a question as to the extent to which the estate is burdened by a bond of annuity granted by a former heir to his widow. *Carter-Campbell v. Lamont-Campbell*, Feb. 27, 1894, p. 614.

See Revenue, 8, 9—Superior and Vassal, 1.

EXCISE. *See Public-House, 4.*

EXECUTOR. *See Goodwill, 2—Lease, 10.*

EXPENSES. *Parent and Child—Parent suing as tutor and administrator for pupil child.*

1. *Held* that a father who sues an action as tutor and administrator for his pupil son is liable personally for expenses if he is unsuccessful in the action. *White v. Steel*, March 10, 1894, p. 649.

Multiplepoinding.

2. *Observed* that where an action of multiplepoinding was competently brought, the invariable rule was that the expenses of bringing the action fell to be paid out of the fund *in medio*. *Shaw v. Rex*, July 17, 1894, p. 1024.

Taxation—Process—A. S., July 15, 1876, General Regulation, 5.

3. The defender of an action, who, besides denying the pursuer's averments on the merits, pleaded that the action was incompetent, did not reclaim against an interlocutor of the Lord Ordinary repelling the plea to competency and allowing a proof. The Lord Ordinary, having heard the proof, gave judgment for the pursuer. At the hearing upon a reclaiming note against that judgment the defender insisted in his objection to the competency of the action, but admitted that his defences on the merits could not be entertained in the absence of a third party. The Court recalled

EXPENSES—Continued.

the interlocutor of the Lord Ordinary, dismissed the action as incompetent, and found the defender entitled to expenses. The pursuer objected to the Auditor's report on the defender's account of expenses in respect that under the A. S., July 15, 1876, General Regulation 5, the Auditor ought to have taxed off the whole expenses of the proof. The Court *repelled* the objection, holding that the question raised was one which it was for the Court to decide when disposing of the motion for expenses, and not for the Auditor, and that the objection came too late, the Court having finally disposed of the motion for expenses. *Welsh v. Russell*, May 19, 1894, p. 769.

Fees to counsel—Jury trial.

4. A jury trial for damages for personal injury lasted for part of a day at the sittings. In taxing the successful party's account of expenses, the Auditor reduced the fee of senior counsel from twenty guineas to thirteen, and that of junior counsel from fifteen guineas to eight. The successful party objected to the reduction, maintaining that it had been fixed by decisions of the Court that twenty guineas and fifteen guineas respectively were the proper fees to be allowed against the losing party in all ordinary jury trials which did not extend beyond a single day, and that this rule ought to be applied in the present case, the Auditor not having reported that there was anything exceptional in the case. The Court *refused* to interfere with the discretion of the Auditor. *Blair v. Caledonian Railway Company*, Oct. 26, 1893, p. 23.

Time of lodging objections to the Auditor's report—A. S., Feb. 6, 1806.

5. *Held* that, as a general rule, objections must be lodged within forty-eight hours, and that the forty-eight hours run from the date of the Auditor's issuing his report, and not from the date when the report is lodged in process.

Circumstances in which objections were allowed to be lodged on the eighth day after the report was signed. *A B v. C D*, July 20, 1894, p. 1083.

See *Process*, 9.

FACILITY. See *Fraud—Judicial Factor*, 3.

FACTORY REGULATION. See *Reparation*, 18.

FACULTIES AND POWERS. See *Succession*, 18, 19, 20.

FISHING. *Trout-fishing—River navigable but non-tidal.*

1. In a question between a riparian proprietor and a member of the public *held* (1) that a right in the public of being at or on the non-tidal portion of a river for the purposes of navigation does not entitle them to fish for trout therein, and (2) that such a right of fishing cannot be acquired by prescriptive use. *Grant v. Henry*, Jan. 12, 1894, p. 358.

Salmon-fishing ex adverso of adjacent lands—Title to sue—Possession—Prescription.

2. In an action to which the Crown was not a party, *held* that even assuming the defender to have no right to the salmon-fishings claimed, as the pursuer had failed to produce an express grant to the fishings, or to shew by exclusive possession for the prescriptive period that his general title to salmon-fishings included them, the defender was entitled to absolvitor.

Opinion that a right of salmon-fishing was an estate in land in the sense of the Conveyancing Act of 1874, and that possession of salmon-fishings for twenty years was prescriptive possession thereof. *Ogston v. Stewart's Trustees*, Dec. 13, 1893, p. 282.

FIXTURES. See *Lease*, 6, 7, 8, 9.

FOREIGN. *Bankruptcy—Sequestration—Reduction—Jurisdiction.*

1. *Opinions* that an action for reduction of a sequestration on the ground that the Court had no jurisdiction to award sequestration by reason of the

FOREIGN—*Continued.*

existence of a liquidation in England of the debtor's estates was incompetent. *Gibson v. Munro*, June 5, 1894, p. 840.

Jurisdiction—Reconvention.

2. In an action raised by an English firm in the Sheriff Court the pursuers obtained a final judgment on the merits, with a finding of expenses. While the pursuers' account of expenses was before the Auditor the defender brought an action relating to the same subject-matter against the pursuers as subject to the jurisdiction of the Court *ex reconventionem*. *Held* that notwithstanding the judgment on the merits the action of reconvention was competent. *Allan v. Wormser Harris & Co.*, June 8, 1894, p. 866.
3. An English firm raised an action in Scotland against a Scotsman, but before final judgment the firm was dissolved, one of the partners continuing the business under the original firm name. No notice of the dissolution was given to the defender of the action, and, *ex facie* of the proceedings, the firm continued to litigate to the end. The defender thereafter raised an action in Scotland against the firm by its firm name, pleading that jurisdiction existed *ex reconventionem*. *Held* that jurisdiction *ex reconventionem* existed notwithstanding the dissolution of the firm. *Allan v. Wormser Harris & Co.*, June 8, 1894, p. 866.

Agent and Principal—Liability for disclosed principal—Agent and Client—Custom—English custom applicable to solicitors.

4. In an action by an English solicitor against a law-agent in Scotland for payment of an account for professional services, the pursuer averred that he had been employed by the defender to conduct a litigation in England for a client, and that by the custom of England a solicitor employing another for a client was personally liable to the solicitor employed for costs. After a proof, *held* that the pursuer had failed to prove that the custom extended to the case of an English solicitor employed by a Scots law-agent. *Livesey v. Purdom & Sons*, June 15, 1894, p. 911.

Contract—Locus solutionis.

5. *Where a personal contract is entered into between persons residing in different countries where different systems of law prevail, the intention of the parties as expressed or implied in the contract will determine the system by which the whole or any part of the contract is to be interpreted and governed.* *Hamlyn & Co. v. Talisker Distillery*, May 10, 1894, H. L., p. 21.

FRAUD. *Undue influence—Facility—Nurse and patient—Issue—Reduction.*

In an action for reduction of a will the pursuer averred that the testatrix had, through excessive drinking, become deteriorated in her mental and physical condition, and facile and yielding in her disposition; that the defender, three months before the death of the testatrix, had been engaged to attend her as nurse; that taking advantage of her position of nurse, and of the patient's craving for alcohol, she had plied her with drink, and that by this means, by excluding her relations, and by various false stories, she had induced the patient to make a will in her favour. *Held* (rev. judgment of Lord Wellwood) that the pursuer was not entitled to an issue of undue influence, but only to an issue of facility and fraud or circumvention. *M'Callum v. Graham*, May 30, 1894, p. 824.

See *Company*, 6—*Hiring*, 2—*Judicial Factor*, 3—*Lease*, 3.

GAME. See *Lease*, 12.

GAS SUPPLY. See *Police*, 3.

GOODWILL. *Trust—Trustees—Liability—Goodwill of business carried on by trustee.*

1. An engineer who had been many years in India, on his return to this country, continued to supply native and other traders in India with cotton presses, which he bought from makers in this country. At the time of his death his average income from this source was about £300 per annum.

GOODWILL—Continued.

In an action of accounting brought some years after his death by the beneficiaries under his settlement against his trustees, the pursuers contended that the trustees were bound to account for the value of the goodwill of the testator's business which they had not sold. After a proof, *held* that the goodwill was an asset of the deceased's estate which should have been sold by the trustees, and that they fell to be debited with £300 as the value thereof. *Donald v. Hodgart's Trustees*, Dec. 8, 1893, p. 246.

Public-house—Transfer of certificate—Heir and executor.

2. A wine and spirit-merchant, who carried on business in a public-house, of which he was proprietor, died intestate on 7th December 1891. His widow entered into possession of the business, and on 16th February 1892 she succeeded in obtaining from the licensing magistrates, in competition with her husband's executor, a transfer of his certificate. The widow died on 23d February, and her executor then entered into possession of the business, stock, and fittings, and carried on the business till 16th May, when he sold the goodwill, stock in trade, &c., to a purchaser for £1500. The widow's executor had prior to this sale made and carried out an arrangement with the husband's heir-at-law, whereby the latter agreed to grant to the purchaser of the goodwill a new lease of the premises for seven years, in consideration of a sum of £250 paid by the widow's executor. In an action of accounting raised by the husband's executor against the widow's executor, *held* (1) that the defender was not bound to account for any profits made after the widow obtained a transfer of the certificate; and (2) that the defender was not bound to account for any part of the price received for the goodwill of the business sold by him. *Philp's Executor v. Philp's Executor*, Feb. 1, 1894, p. 482.

GUILD, DEAN OF. See *Burgh*, 1.

HABBOUR. See *Reparation*, 11—*Valuation Acts*, 3, 4.

HEIR. See *Goodwill—Lease*, 10.

HERITABLE AND MOVEABLE. See *Lease*, 6, 7, 9—*Succession*, 26.

HERITOR. See *Church*, 2.

HIRING. *Reparation—Personal injury—Responsibility of hirer for fault of owner.*

1. The hirer of a driver and vehicle is not responsible for an accident occasioned by the fault of the driver. *Anderson v. Glasgow Tramway and Omnibus Co., Limited*, Dec. 19, 1893, p. 318.

Refetation—General lien—Fraud—Lessee holding himself out as true owner—Rollers for calico printing—Custom of trade.

2. W. M. let out on hire to M. J. & Co., calico printers, certain copper rollers, on an agreement that the rollers should be marked with his name, and that in the event of M. J. & Co. parting with the custody of the rollers to any third person they should be delivered under a receipt bearing that they were "received from W. M." M. J. & Co., who had no printing works of their own, in accordance with a custom of the trade, sent their cloth with the rollers to be printed by H. & Sons, to whom they falsely represented that the rollers were their own property. M. J. & Co. having become insolvent, H. & Sons refused to deliver the rollers to W. M., on the ground that by an admitted custom of trade calico printers employed to print for others had a general lien over the cloth and rollers sent to them. *Held* (rev. judgment of Lord Low) that as M. J. & Co. had no power to subject W. M.'s rollers to the lien of H. & Sons, and as W. M. had done nothing to mislead H. & Sons into the belief that the rollers were the property of M. J. & Co., he was entitled to recover them. *Mitchell v. Heys & Sons*, Feb. 27, 1894, 21 R. 600.

HUSBAND AND WIFE. *Divorce—Desertion.*

1. In an action at the instance of a wife for divorce on the ground of deser-

HUSBAND AND WIFE—*Continued.*

tion, it was proved that the husband had treated his wife with cruelty, and when drunk had turned her out of his house, and that for more than four years thereafter the spouses had lived separate. Evidence on which the Court refused to grant decree of divorce on the ground that the spouses had been living separately of mutual consent. *Gibson v. Gibson*, Feb. 1, 1894, p. 470.

2. In an action for divorce on the ground of desertion by a wife against her husband, evidence upon which it was held, distinguishing from the case of *Gibson v. Gibson*, *supra*, No. 1, that the husband, who had expelled his wife from the house, and had acted with great cruelty towards her, had so acted with the view of putting an end to conjugal cohabitation, and, consequently, that she was entitled to decree of divorce. *Murray v. Murray*, March 17, 1894, p. 723.

Custody of Child—Cruelty to Wife—Guardianship of Infants Act, 1886, sec. 5.

4. A married woman commenced a suit in the English Courts for judicial separation on the ground of cruelty. The husband objected to the jurisdiction on the ground that his domicile was in Scotland. The husband subsequently presented a petition to the Court of Session for the custody of the children against his wife, who had removed them from his custody under pretence of taking them on a visit to her father. The wife, in answer, averred that on some occasions the petitioner had treated the children with cruelty, and further made specific statements of cruelty to herself. The Court granted the prayer of the petition. In an appeal the House, holding that the wife's averments of cruelty to herself were relevant in answer to the husband's petition for the custody of his children, and considering it expedient that the inquiry into the husband's conduct should be made in the wife's proceedings for judicial separation, in which the question as to the custody of the children might also be determined, recalled the interlocutor of the First Division, on the wife undertaking to abandon the proceedings in England, and to raise and duly prosecute an action of separation in Scotland, and directed the Court to sist the husband's petition in hoc statu.

Held further that having regard to the interests of the children, the eldest of whom was not more than eight years of age, the interim custody should remain with the mother. *Stevenson v. Stevenson*, June 5, 1894, H. L., p. 96.

Aliment—Maintenance of lunatic widow.

4. A husband died intestate and childless, survived by his widow, who was of unsound mind, and was confined in a lunatic asylum. She had no means of subsistence other than her right to a half of her husband's estate, which amounted to £200. In a special case between her curator bonis and the deceased's next of kin, held that the maintenance of the widow was not a burden on the husband's estate, and that the next of kin were entitled to immediate payment of one-half thereof. *Howard's Executor v. Howard's Curator Bonis*, May 25, 1894, p. 787.

Aliment—Separation—Parent and Child.

5. Under a voluntary deed of separation and aliment, dated in August 1891, a wife was entitled to the income of £1000 vested by the husband in trustees. In October 1891 the wife gave birth to a daughter, and in May 1893 an action was raised in name of the daughter, with her mother's concurrence, against the father for aliment. In this action the pursuer alleged that no provision had been made for her aliment, and that her father was possessed of means between £2000 and £3000. Held (1) that the action was to be regarded as an application by the mother for additional aliment; (2) that the agreement made in August 1891 must be held to have been made in contemplation of the birth of the child; and (3) that no relevant ground had been stated for giving additional aliment. *Scott v. Scott*, June 6, 1894, p. 853.

Separate estate—Donation—Deposit-receipt—Bankruptcy—Married Women's Property Act, 1881, sec. 1.

6. A married woman claimed, as against the trustee in her husband's sequestra-

HUSBAND AND WIFE—Continued.

tion, £70 of the contents of two deposit-receipts for £305 and £145 respectively, which bore that the contents had been received from the spouses, and were payable to either or the survivor. She averred that she was possessed of £70 at her marriage, that she had after her marriage placed it on the deposit-receipts, and that the remaining contents of the deposit-receipts were donations to her by her husband. *Held* that, assuming that she had placed £70 of her own property on the deposit-receipts, her statement shewed that it had not been kept separate from her husband's estates, and consequently that she was not entitled to a proof. *National Bank of Scotland, Limited, v. Cowan*, Oct. 18, 1893, p. 4.

7. In the case of a marriage contracted in 1885 *held* that furniture which had belonged to the wife before her marriage, and had been taken by her to the house in which she and her husband lived after marriage, had not been immixed with her husband's funds nor lent or entrusted to him, in the sense of the Married Women's Property Act, 1881, sec. 1, and did not pass, on his sequestration, to his trustee. *Adam v. Adam's Trustee*, March 16, 1894, p. 676.

Sale—Delivery—Possession—Conveyance to marriage-contract trustees retenta possessione.

8. In December 1883 M's estates were sequestrated, but before a trustee had been appointed a deed of arrangement was executed between M and his creditors and B. By this deed M assigned his furniture to B in consideration of payment of a sum exceeding its value by way of composition to the creditors. B thereafter assigned the furniture to the trustees under M's antenuptial marriage-contract for behoof of M's wife in liferent, and of the children of the marriage in fee, M's *jus mariti* being excluded. The furniture was allowed to remain in the house then occupied by M and his wife, which belonged to the trustees, and on the spouses removing to another house in 1884 the furniture was taken with them. In 1890 M sold the furniture to G, and G let the furniture on hire to M. The furniture remained with M and his wife. In an action by the marriage-contract trustees to have G interdicted from removing the furniture, *held* that the right to the furniture was in the trustees, in respect that since the date of the assignation in their favour M's wife had been in actual possession of it as liferentrix, and that the trustees had accordingly been in civil possession through her, and that G therefore had no title to it, and interdict *granted*. *Mitchell's Trustees v. Gladstone*, Feb. 27, 1894, p. 586.

Jus mariti—Marriage-contract.

9. By antenuptial marriage-contract a wife conveyed the whole funds payable to her under her father's settlement to trustees for the purpose, *inter alia*, that the revenue of £5000 (being the portion of the funds available at the date of the contract) should be paid to herself exclusive of the *jus mariti* and right of administration of her husband, the clear revenue of the remainder to be held for the joint behoof of the spouses and paid to them on their joint receipt. The husband expressly renounced his *jus mariti* and right of administration, in so far as the capital of the whole funds and the revenue of the £5000 were concerned, but the deed was silent as to the husband's rights with respect to the revenue of the remainder of the funds. *Held* that the husband's *jus mariti* and right of administration did not affect funds conveyed to the trustees by the antenuptial contract of marriage or the revenue thereof, and that he had no interest in them except under the trust. *Bruce's Trustees v. Bruce's Trustee*, Feb. 27, 1894, p. 593.

See *Marriage-contract—Succession*, 7, 11, 16, 28, 33.

INCOME-TAX. See *Revenue*, 1, 2, 3.

INCORPORATION. See *Trust*, 15, 16.

INDUSTRIAL SOCIETY. See *Provident Society*.

INHABITED HOUSE DUTY. See *Revenue*, 4.

INSANITY. See *Husband and Wife*, 4—*Poor*, 4.

INSURANCE. *Constitution of contract—Advertisement—Condition precedent—Next of kin.*

1. The proprietors of a newspaper advertised that £100 would be paid by an insurance company named to the person whom the proprietors of the newspaper "may decide to be the next of kin of anyone who is killed in a railway accident," provided that a copy of the current issue was in his possession at the time of the accident, or that he was a regular subscriber to the newspaper. In an action against the proprietors of the paper, by the children and sole next of kin of a subscriber to the paper, who had been killed by a railway accident, for payment of the sum mentioned in the advertisement, the defence was that the defenders had decided that the widow of the deceased was his next of kin; that under the terms of the advertisement they were entitled so to decide; and that the money had been paid to her. The Court, after a proof, *assolized* the defenders, being of opinion that it was a condition precedent to requiring payment of the sum mentioned in the advertisement that the person claiming the money should produce the decision of the proprietors of the paper that he was the next of kin of the deceased, and that the pursuers had failed to prove that the defenders in refusing to decide that the pursuers were next of kin of the deceased had acted in bad faith. *Law v. George Newnes, Limited*, July 17, 1894, p. 1027.

Mutual insurance—Conditions in policy—Company—Articles of association imported into policy—Invalid addition to articles.

2. The articles of association of a mutual insurance company were altered, and, as altered, were registered in terms of the Companies Acts, but certain of the provisions of these Acts with respect to the alteration of articles of association were not complied with. A policy, issued by the company after the alteration, bore in gremio that the "articles of association shall be deemed and considered part of this policy," and on the back of the policy the articles (as altered) were printed. In a question between the policy-holder and the company, held (aff. judgment of the First Division) that the altered articles were valid conditions of the insurance. *Muirhead v. Forth and North Sea Mutual Insurance Association*, Nov. 17, 1893, H. L., p. 1.

Notice—Reparation—Master and Servant—Employers Liability Act, 1880.

3. In defence to an action by a workman against his employers for damages for personal injury, at common law and under the Employers Liability Act, 1880, the defenders proved that they had posted at various places in their works, including the pay-box, notices to the effect that from the weekly wages paid to the workmen certain sums would be deducted, to secure certain insurance benefits in case of accident, and that any workman accepting such benefits would be held to have discharged all claims against his employers. It was further proved that the notice was well known to the defenders' workmen generally, and that the pursuer had taken benefit of the insurance. The Court *assolized* the defenders, holding (1) that the conditions founded on were lawful conditions of the contract of employment; and (2) that on the evidence the pursuer must be held to have known of and assented to the conditions. *Wright v. Howard, Baker, & Co.*, Oct. 26, 1893, p. 25.

Marine insurance—Policy—Declared value.

4. A shipowner insured a steamer with a mutual insurance company. The policy provided that the vessel, "for so much as concerns the assured by agreement between the assured and the company in this policy," should be valued at £3750. In a question between the assured and the company as to whether the assured had violated a condition of the policy, which required him to keep one-fifth of the value of the steamer uninsured, held (aff. judgment of First Division) that the value of the vessel must be taken to be the value declared in the policy. *Muirhead v. Forth and*

INSURANCE—*Continued.*

North Sea Steamboat Mutual Insurance Association, Nov. 17, 1893, H. L., p. 1.

Accident insurance—Post-mortem examination—Contract—Condition precedent.

5. A person insured against death by accident fell into a river, while fishing, and his dead body was subsequently recovered. In an action upon the policy, the insurance company, in defence, averred that his death resulted from disease and not from drowning. Evidence on which *held* that death from drowning was instructed without a *post-mortem* examination.

An accident assurance policy contained the following condition:—"In the case of death the legal representatives of the assured . . . shall furnish all such other information and evidence as the directors may require from time to time, or may consider necessary or proper to elucidate the case." *Opinion* (per Lord Young) that upon a sound reading of the condition the refusal by the representatives of a person insured to comply with a demand by the company for a *post-mortem* examination, in circumstances which made the demand not unreasonable, did not of itself liberate the company from the obligations in the policy. *Ballantine v. Employers' Insurance Co. of Great Britain, Limited*, Dec. 15, 1893, p. 305.

Insurance of deposit-receipt—Default by bank—Reconstruction of bank.

6. An insurance company guaranteed payment to a depositor of the deposit-receipt of a bank "after default" in payment by the bank. The bank stopped payment and failed to pay the deposit-receipt at due date. It was afterwards reconstructed. In an action against the insurance company at the instance of the depositor, *held* that the bank was in default, and that the pursuer was entitled to a decree for the amount of his deposit-receipt. *Young v. Trustee, Assets, and Investment Insurance Co., Limited*, Dec. 8, 1893, p. 222.

INTERDICT. *Summary Procedure—Competency of civil action for interdict where statute provides a penalty on summary conviction—Patent.*

The Patents, Designs, and Trade-Marks Act, 1888, sec. 1, by subsec. 1, enacts that a person should not be entitled to describe himself as a patent-agent unless he is registered, and by subsec. 4, enacts that if any person knowingly describes himself as a patent-agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding £20. An action for declarator that the defender was not entitled to describe himself as a patent-agent so long as he was not registered, and for interdict against him so describing himself, dismissed as incompetent, on the ground that the statute in making the use of the designation patent-agent by a person not registered a criminal offence, and subjecting the person so using it to a penalty, did not confer any civil right upon other persons to prevent him from using it. Institute of Patent-Agents v. Lockwood, June 11, 1894, H. L., 61.

See *Road, 2—Parent and Child, 3.*

INTEREST. *Church.*

1. Interest on arrears of stipend due by burgh to parish minister. *Peters v. Magistrates of Greenock*, June 9, 1894, p. 886.
- Railway—Interest on purchase-money from date of entering on land—Land's Clauses Consolidation Act, 1845, sec. 84.*
2. *Held* (1) that when the owner of lands entered upon dispenses with the granting of the bond mentioned in the above section, he is nevertheless entitled to 5 per cent interest upon the compensation from the date of the entering upon his land till the compensation is paid; and (2) that he is entitled to payment of such interest out of the sum deposited by the promoters. *West Highland Railway Co. v. Place*, Feb. 21, 1894, p. 576.

Reparation.

3. Damages for breach of contract *calculated* on the footing of allowing interest on the loss caused by the breach from the date when the loss

INTEREST—Continued.

accrued—the rate of such interest held to be 5 per cent. *Dunn & Co. v. Anderston Foundry Co., Limited*, June 8, 1894, p. 880.

Right in security—Bond and disposition in security—Bond for indefinite sum—Rate of interest not specified.

4. *Held* by Lord Low (Ordinary) that a heritable bond for a principal sum “with interest,” the rate not being specified, did not constitute a valid security *quoad* the interest, as bearing to impose a burden of indefinite amount. *Opinions* in the Inner-House *reserved*. *Forbes v. Welsh & Forbes*, March 8, 1894, p. 630.

Succession—Advances in satisfaction.

5. Interest held not to be due on advances to son-in-law declared to be imputed in satisfaction of daughter's provision. *Smith's Trustees v. Sellar*, March 9, 1894, p. 633.

Succession—Legitim.

6. *Held* that interest at the rate of 5 per cent per annum was due upon a child's legitim from the date of the father's death, although the funds in the hands of the father's testamentary trustees had been earning only about 2 per cent. *Bishop's Trustees v. Bishop*, March 17, 1894, p. 728.

ISSUES. See *Fraud—Reparation*, 9, 19, 20, 21, 22, 25, 27, 29.

JOINT ADVENTURE. See *Partnership*, 1.

JUDICIAL FACTOR. Appointment—Factor on trust-estate.

1. Petition for removal of a trustee and the appointment of a judicial factor *refused* on the ground that no malversation of office on the part of the trustee had been averred. *Harris v. Howie's Trustee*, Oct. 20, 1893, p. 21.

Appointment—Factor on estate of person sui juris—Contempt of Court—Custody of child—Recall.

2. A father presented a petition for the custody of his pupil child and obtained decree against an aunt of the child ordaining her to deliver the child to him. The aunt not having done so, the Court ordered her to attend personally at the bar, and on her failure to obey this order sequestered her estates, and appointed a judicial factor thereon. Thereafter the aunt presented a petition for the recall of the sequestration and the factory. She explained that she had not received service of the order to attend, and that her health made it dangerous for her to attend, and by her counsel she submitted herself unreservedly to the judgment of the Court. The father lodged answers, in which he submitted that the petition ought not to be granted until the aunt had handed over the child to him. It appeared that the child, who had now attained twelve years of age, had resided with the aunt for eight years, and had a decided wish to remain with her. The Court, without requiring the aunt's personal presence, and without requiring her to deliver up the child, *granted* her petition. *Edgar v. Fisher's Trustees*, Nov. 10, 1893, p. 59, and *Fisher v. Edgar*, July 20, 1894, p. 1076.

Appointment—Factor on estate of one said to be facile and subject to undue influence—Marriage-contract.

3. A petition for the appointment of a judicial factor on the estate of a widow eighty-six years of age was presented by all her children, except her youngest son, averring that owing to her facility and the undue influence of her youngest son, she was gratuitously alienating her estate to the prejudice of the marriage-contract rights of her other children. The widow denied the averments as to her health and facility and as to the conduct of her youngest son, and stated that her estate belonged to her absolutely. The Court *dismissed* the petition in respect (1) that it was not clear upon the deeds what the rights of the petitioners were, and that the petition was not an appropriate process for their ascertainment; and (2) that the other averments as to the widow's liability to undue influence were not relevant

JUDICIAL FACTOR—*Continued.*

to support an application for the appointment of a judicial factor. *Dowie v. Hagart*, July 19, 1894, p. 1052.

Factor loco tutoris—Removal of tutor.

4. Under a trust-deed an aunt was sole tutor and curator to a pupil niece, *quoad* the trust-estate. The aunt having removed the child out of the jurisdiction of the Court, and having failed to comply with an order of Court to restore the child, her estates were sequestrated and a judicial factor appointed thereon. In a petition at the instance of the father of the child, the Court, without removing the aunt from her office, *appointed* the judicial factor on her estate to be factor *loco tutoris* to the child. Thereafter the aunt having purged the contempt of Court, the appointment of the factor *loco tutoris* was recalled. *Edgar v. Fisher's Trustees*, Dec. 20, 1893, p. 325, and *Fisher v. Edgar*, July 20, 1894, p. 1076.

Special powers—Sale of heritages not in accordance with power conferred by Court—Approval of sale.

5. A judicial factor having obtained power from the Court to expose certain heritable subjects for sale by public roup at the upset price of £9750, and if not sold, to re-expose the subjects at a reduced upset price, or to sell the same by private bargain at a price not less than the sum at which they had been publicly exposed for sale, sold the subjects before exposing them by public roup to a private purchaser for £9800. The property was bonded much above its value, and the postponed bondholders approved of the sale. Petition for approval of the sale *refused*.

Opinions that it was competent for the Court to approve of such a sale.

Drummond's Judicial Factor, June 30, 1894, p. 932.

Action against judicial factor.

6. *Question*, whether it is competent to sue in the Sheriff Court a judicial factor appointed by the Court of Session. *Hallpenny v. Howden*, July 4, 1894, p. 945.

Petition for delivery of bond of caution—Remit to Accountant of Court—Judicial Factors (Scotland) Act, 1889.

7. In 1893 the judicial factor on a trust-estate, who was appointed in 1877, and whose factory did not fall under the Pupils Protection Act, 1849, presented a petition for delivery of his bond of caution, stating that his duties had come to an end, and that he had obtained a discharge from the beneficiary, which he produced. He did not ask for a judicial discharge. The Court *refused* to grant a warrant without first making a remit to the Accountant of Court to examine the factor's accounts.

Observed that the effect of the Judicial Factors (Scotland) Act, 1889, is to subject all factories alike to the supervision of the Accountant of Court, and that it is in his discretion to say whether a full audit may be dispensed with. *Aitken*, Nov. 10, 1893, p. 62.

Curator ad litem.

8. The brother of twin orphan children—a minor and a pupil—who had placed them in a charitable institution, petitioned to have them restored to his custody. Petition *refused*, upon consideration of the circumstances as ascertained by a curator ad litem appointed to the children. *Morrison v. Quarrier*, June 9, 1894, p. 889, and July 19, 1894, p. 1071.

See also *Fisher v. Edgar*, July 20, 1894, p. 1076.

Curator ad litem—Personal liability—Disentail—Entail (Scotland) Act, 1882, sec. 12.

9. The next heir in certain disentail proceedings, on reaching majority, raised an action against his curator ad litem in these proceedings for payment of £16,000, averring that he had sustained loss to that amount through the defender's breach of duty in failing to take adequate security for the sum paid for the consent to the disentail. The defender pleaded that under the above section the action was irrelevant, there being no averment that he had acted corruptly. Action *dismissed* as irrelevant. *Maxwell Heron v. Dunlop*, Dec. 8, 1893, p. 230.

JURISDICTION. *Exclusion of jurisdiction of a Court of law—Rules made in virtue of statute—Board of Trade.*

1. *In pursuance of the Patents, Designs, and Trade-Marks Acts, 1883 and 1888, the Board of Trade made certain rules which were, in terms of the statutes, laid before both Houses of Parliament and were not annulled. Opinions as to whether it was within the jurisdiction of a Court of law to entertain any question as to the validity of these rules. Institute of Patent Agents v. Lockwood, June 11, 1894, H. L., p. 61.*

Exclusion of jurisdiction of a Court of law—Reference clause—Industrial and Provident Societies Act, 1876, sec. 14.

2. The rules of a provident society provided that in the event of any dispute between a member of the society, or any person claiming through a member, and the society, it must be referred to a committee of the society. In an action against the society at the instance of the executor-dative of a member to recover a sum alleged to be due by the society to the deceased, *held* that, as the defenders denied the pursuer's right to represent the deceased member, the question raised was not a dispute within the meaning of the rule, and that the jurisdiction of the Court was not ousted. *Symington's Executor v. Galashiels Co-operative Store Co., Limited*, Jan. 13, 1894, p. 371.

Exclusion of the jurisdiction of the Court of Session.

3. Exclusion of jurisdiction under sec. 75 of the General Police and Improvement (Scotland) Act, 1862. *Hamilton Police Commissioners v. Finlay*, Nov. 8, 1893, p. 54.

Exclusive jurisdiction of the Court of Session.

4. *Question*, whether it is competent to sue in the Sheriff Court a judicial factor appointed by the Court of Session. *Hallpenny v. Howden*, July 4, 1894, p. 945.

Nobile officium—Notary-public.

5. *Held* that the Court of Session has jurisdiction to deprive a notary-public of office. *Incorporated Society of Law-Agents in Scotland v. Laing*, Dec. 12, 1893, p. 267.

Reconvention—Foreign.

6. An English firm raised an action in Scotland against a Scotchman, but before final judgment the firm was dissolved, one of the partners continuing the business under the original firm name. No notice of the dissolution was given to the defender of the action, and, *ex facie* of the proceedings, the firm continued to litigate to the end. The defender thereafter raised an action in Scotland against the firm by its firm name, pleading that jurisdiction existed *ex reconventione*. *Held* that jurisdiction *ex reconventione* existed notwithstanding the dissolution of the firm. *Allan v. Wormser Harris & Co.*, June 8, 1894, p. 866.
7. In an action raised by an English firm in the Sheriff Court the pursuers obtained a final judgment on the merits, with a finding of expenses. While the pursuers' account of expenses was before the Auditor the defender brought an action relating to the same subject-matter against the pursuers as subject to the jurisdiction of the Court *ex reconventione*. *Held* that notwithstanding the judgment on the merits the action of reconvention was competent. *Allan v. Wormser Harris & Co.*, June 8, 1894, p. 866.

Bankruptcy—Sequestration—Reduction—Foreign.

8. *Opinions* that an action for reduction of a sequestration on the ground that the Court had no jurisdiction to award sequestration by reason of the existence of a liquidation in England of the debtor's estates was incompetent. *Gibson v. Munro*, June 5, 1894, p. 840.

Bill-Chamber.

9. *Held* by Lord Kinnear that a petition by a father for the custody of his child was competently presented in vacation to the Lord Ordinary on the Bills. *Edgar v. Fisher's Trustees*, Nov. 10, 1893, p. 59.

See *Bankruptcy*, 1—*Justiciary Cases*, 1, 15.

JUS QUÆSITUM TERTIO. See *Trust*, 2.

JUSTICE OF PEACE. See *Public-House*, 9.

JUSTICIARY CASES. *Jurisdiction—Sheriff—Burgh Police (Scotland) Act*, 1892, secs. 447, 454, 508, and 509.

1. The Burgh Police (Scotland) Act, 1892, does not deprive the Sheriff of a county of jurisdiction to try persons for offences committed within a burgh in the county. *Cameron v. Macniven*, Jan. 23, 1894, Just. Cases, p. 31.

Crimes and offences—Reset of theft—Proof—Previous conviction—Prevention of Crimes Act, 1871, sec. 19.

2. Held that under the above section previous convictions may be proved if evidence has been given that the accused had the stolen goods in his possession, actually or constructively, at any time after they had been stolen. *Watson v. Her Majesty's Advocate*, Jan. 23, 1894, Just. Cases, p. 26.

Crimes and offences—Coal Mines Regulations Act, 1887.

3. In 1871 a mine owner entered into an agreement with his miners by which the parties agreed that an average uniform deduction of 56 lbs. should be made from the gross contents of each hutch sent up from the pit in respect of stones and substances in the hutch other than coal. In an appeal by the manager against a conviction of a contravention of section 12 of the above Act, the Court *quashed* the conviction, holding that the agreement was lawful, and that deductions made in terms thereof did not infer a contravention of the Act in cases where the miner was paid on a smaller amount of coal than he had actually sent up. *Ronaldson v. Mowat*, July 13, 1894, Just. Cases, p. 55.
4. A coalowner entered into an agreement with his miners, by which no payment should be made for the excess weight of any hutch beyond 10 cwt., and the practice was when a hutch was found to contain more than 10 cwt. to carry the weighing of it no further. In an appeal by the manager against a conviction of offences against section 12 and section 13, subsection 1, of the above Act, held (1) that the conviction of the first offence was bad, in respect that the agreement for deductions was valid, overfilling being "improper filling" in the sense of the Act, and the failure to weigh or pay for the contents of the hutches beyond the maximum of 10 cwts. was not a contravention of section 12; and (2) that the conviction of the second offence was bad, the Lord Justice-Clerk and Lord Wellwood holding that the checkweigher's duty to see that the agreement as to deductions was properly carried out did not require him to ascertain the exact weight of hutches weighing over 10 cwt., Lord Adam holding that the second charge was not relevant, as the accused was not bound to weigh the coal in the hutches separately from the other contents thereof. *Atkinson v. Hastie*, July 13, 1894, Just. Cases, p. 62.

Apprehension.

5. Apprehension without a warrant. *Leask v. Burt*, Oct. 28, 1893, p. 32.

Conviction.

6. The record of a conviction may competently be altered after the accused has left the bar, if the alteration is verbal only and not in substance. *M'Giveran v. Auld*, July 20, 1894, Just. Cases, p. 69.

Petition for recall of sentence of outlawry.

7. A panel against whom sentence of outlawry had been pronounced in consequence of his failure to appear and answer to an indictment charging him with attempt to murder and murder along with another panel against whom the trial had subsequently proceeded, petitioned the Court to recall the sentence on the ground that at the time of the trial he was furth of Scotland, but was now willing to surrender himself for trial. No appearance was made for the Crown, to whom the petition was duly intimated. The Court *recalled* the sentence, and reponed the panel thereagainst. *Sweeney v. Her Majesty's Advocate*, May 21, 1894, Just. Cases, p. 44.

Precognition of witnesses.

8. *Opinion per* Lord Justice-Clerk that where the interests of the public in the punishment of crime or the interest of a prisoner charged with crime call for the ascertainment of facts, it is the duty of witnesses on either side

JUDICIARY CASES—*Continued.*

to give information to the other side. *Her Majesty's Advocate v. Monson*, Dec. 23, 1893, Just. Cases, p. 5.

Proof—List of productions—Photograph.

9. *Held* that it was incompetent to examine a witness as to the likeness in a photograph which could not be produced, not being in the list of productions. *Her Majesty's Advocate v. Monson*, Dec. 23, 1893, Just. Cases, p. 5.

Proof—Question tending to prove crime not charged—Competency.

10. In a trial for murder, the prosecutor proposed to ask a witness whether a certain document which was pertinent to the case and which bore the name of the witness as a signature was in fact signed by him, the suggestion being that the signature was forged by the prisoner. *Held* that as the crime of forgery had not been charged against the prisoner the question was *incompetent*. *Her Majesty's Advocate v. Monson*, Dec. 23, 1893, Just. Cases, p. 5.

Proof—Hearsay—Fugitive.

11. Of two persons charged with the crime of murder, one disappeared and was declared an outlaw. During the trial which proceeded against the other, the prosecutor stated that he had without success exhausted all possible resources for finding the fugitive, and he proposed to elicit from a witness who knew him a statement made by the fugitive to the witness shortly after the alleged murder. *Held* that the evidence was *incompetent*, in respect (1) that statements made in the panel's absence could not be evidence against him; and (2) that the failure to find a person did not make hearsay evidence as to statements made by him competent. *Her Majesty's Advocate v. Monson*, Dec. 23, 1893, Just. Cases, p. 5.

Proof—Questions in cross-examination affecting character of witness.

12. At a trial for assault alleged to have been committed upon a doctor sent by a parochial board to vaccinate a child, by the child's father, the doctor was asked in cross-examination whether he was at the time of the alleged assault under the influence of drink. He answered in the negative. The following questions were then put to the doctor,—"Were you under the influence of drink during any part of the day? What quantity of intoxicating drink had you that day?" The Sheriff-substitute disallowed the questions, and thereafter convicted the accused. The accused appealed upon a case stated. The case did not set forth the grounds upon which the Sheriff-substitute had disallowed the questions. *Held* that as there was nothing in the case to shew that the questions were not legitimate, and as the answer to them might have affected the judgment of the Sheriff-substitute, the conviction fell to be set aside. *Falconer v. Brown*, Oct. 30, 1893, Just. Cases, p. 1.

Proof—Evidence at former trial.

13. Parole proof of evidence given at a former trial is competent. *M'Giveran v. Auld*, July 20, 1894, Just. Cases, p. 69.

Proof—Telephone.

14. *Held* that the evidence of a person who deposed that he had heard words through a telephone, and thought that he recognised the voice, was competent evidence as to the identity of the person speaking through the telephone. *M'Giveran v. Auld*, July 20, 1894, Just. Cases, p. 69.

Appeal—Case stated—Criminal cause—Public Health Act, 1867, secs. 16, 18, 106, 107, and 108—Housing of the Working-Classes Act, 1890, sec. 32 and schedule 3—Summary Prosecutions Appeals (Scotland) Act, 1875, secs. 2 and 3.

15. Cause under the above Acts which was *held* not to be criminal, and therefore not to be appealable to the High Court on a case stated. *Suburban District Committee of County Council of Midlothian v. Maitland*, Jan. 19, 1894, Just. Cases, p. 11.

Summary Procedure—Amendment—Instance—Merchant Shipping Act, 1854, secs. 531 and 542—Summary Procedure Act, 1864, sec. 5.

16. The Merchant Shipping Act, 1854, sec. 531, enacts that in Scotland

JUSTICIARY CASES—*Continued.*

summary complaints under the Act, when of a criminal nature or for penalties, may be brought at the instance of the procurator-fiscal, or at the instance of any party aggrieved, with the concurrence of the procurator-fiscal. *Held* that where the complaint is at the instance of a party aggrieved, the concurrence of the procurator-fiscal must be given before service of the complaint on the accused, and that it is incompetent to amend the complaint by the procurator-fiscal appending his concurrence when the complaint is called for trial. *Lundie v. M'Brayne*, Jan. 23, 1894, Just. Cases, p. 33.

Summary Procedure—Limitation of time—Summary Procedure (Scotland) Act, 1864, sec. 24—Prevention of Cruelty to and Protection of Children Act, 1889, sec. 1.

17. A person was on 29th March 1894 served with a complaint which charged him with a contravention of the Prevention of Cruelty to and Protection of Children Act, 1889, in that he "did between the 1st August 1893 and the 28th February 1894 . . . wilfully ill-treat, neglect, and expose A B, a boy under fourteen years of age, so as to cause unnecessary suffering and injury to his health by beating him, failing to supply him with necessary food and clothing, and otherwise ill-using him." The Sheriff found the accused "guilty of the contravention charged to the extent of wilfully ill-treating the said" A B "so as to cause unnecessary suffering by beating him." In a suspension the Court *quashed* the conviction, in respect that looking to the terms of the complaint and the terms of the conviction it was impossible to say that the Sheriff might not have convicted the accused on the strength of ill-treatment between 1st August 1893 and 29th September 1893, which latter date was six months before the date of the complaint. *Farquharson v. Gordon*, June 4, 1894, Just. Cases, p. 52.

Summary Procedure—Complaint—Relevancy—"On Sunday or about that time"—Public-Houses Act Amendment Act, 1862.

18. A person was convicted of a breach of his certificate upon a complaint which set forth that he did sell liquor "upon Sunday 31st day of December 1893, or about that time." *Held* in an appeal by him upon a case stated under the Summary Prosecutions Appeals Act, 1875, that the complaint was irrelevant in respect that the words "or about that time" must be taken as including the days immediately before and after the Sunday specified, and therefore as including hours on Saturday and Monday when the sale would not have been an offence. *Macdonald v. Patterson*, March 5, 1894, Just. Cases, p. 38.

Summary Procedure—Penalty—Summary Procedure Act, 1864, section 4, schedule A—Summary Jurisdiction (Scotland) Act, 1881, section 6—Day Trespass Act, section 1.

19. Suspension, on the ground that the complaint contained no statement that the term of imprisonment, which the accused might be adjudged to suffer in default of paying a fine of £2, fell in terms of section 6 of the Summary Jurisdiction Act of 1881 to be restricted to one month *refused*, on the ground that the Sheriff-substitute's attention had been sufficiently called to the restriction of the penalty by the Act of 1881 in the reference to that Act in the heading of the complaint. *M'Ewen v. Lord Abinger*, Jan. 19, 1894, Just. Cases, p. 14.

Summary Procedure—Summary Procedure Act, 1864, sec. 16.

20. In trials under the Summary Jurisdiction Acts articles produced in evidence are properly noted in the record of the proceedings, although the evidence may have failed to connect them with the accused. *M'Giveran v. Auld*, July 20, 1894, Just. Cases, p. 69.

Summary Procedure—Competency of civil action for interdict where statute provides a penalty on summary conviction—Patent.

21. *The Patents, Designs, and Trade-Marks Act, 1888, sec. 1, by subsec. 1, enacts that a person should not be entitled to describe himself as a patent-agent*

JUSTICIARY CASES—*Continued.*

unless he is registered, and by subsec. 4 enacts that if any person knowingly describes himself as a patent-agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding £20. An action for declarator that the defender was not entitled to describe himself as a patent-agent so long as he was not registered, and for interdict against him so describing himself dismissed as incompetent on the ground that the statute in making the use of the designation patent-agent by a person not registered a criminal offence, and subjecting the person so using it to a penalty, did not confer any civil right upon other persons to prevent him from using it. Institute of Patent-Agents v. Lockwood, June 11, 1894, H. L., p. 61.

Summary Procedure—Conviction.

22. Objection to a conviction that it was a general conviction of an alternative charge repelled. *McGiverau v. Auld*, July 20, 1894, Just. Cases, p. 69.

LEASE. *Constitution—Whether one partner can bind firm.*

1. Where one only of two joint adventurers signed a lease for a period of years of premises in which to carry on the business of the joint adventure, and, upon the termination of the joint adventure at the end of the first year of the lease, the other joint adventurer was sued for the amount of the rent for that year, *held* after a proof that the defender was liable in the sum sued for, but *question* whether he was liable as tenant under the lease. *Cooke's Circus Buildings Co., Limited, v. Welding*, Jan. 11, 1894, p. 339.

Invalid lease—Liability of tenant to implement obligations.

2. The lease of a mansion-house and shootings granted by trustees, after being acted on for fourteen years, was reduced on the ground that it had been *ultra vires* of the trustees to grant it. In an action of damages at their instance against the tenant, *held* that the tenant, who had had no other title of possession to the subjects, was bound by its terms during the period of his occupancy. *Elliott's Trustees v. Elliott*, June 7, 1894, p. 858.

Exclusion of assignees except with consent of landlord—Landlord's right to withhold consent.

3. The proprietor of a granite quarry let it to a company, the lease containing a clause "expressly excluding (except with the consent of the proprietor in writing) assignees, legal or conventional. . . ." The company having gone into liquidation, the landlord's agents wrote a letter to the liquidators intimating that he was willing to consent to the sale of the lease, but on the condition "that the assignee must be a person approved by him." The liquidators thereafter sold the lease, and granted an assignation to the purchasers without the landlord's approval. In an action by the landlord for reduction of the assignation, the defenders averred that the landlord in refusing to recognise the defenders as assignees "is acting in fraud of his arrangement with the liquidators," and that "the true reason of the pursuer's refusal is this—that he has come under some obligation to give a lease of the quarry to" another person. "It is solely for the purpose of implementing this obligation that the pursuer is unfairly and unreasonably withholding his approval of the assignees tendered by the liquidators." *Held* that as the assignation had been granted to assignees not approved by the landlord it fell to be reduced. *Marquis of Breadalbane v. Whitehead & Sons*, Nov. 16, 1893, p. 138.

Subject—Lease of farm—Right to take peats from another part of estate—Sale of farm and of peat moss to different persons—Rent—Abatement—Act 1449, cap. 18.

4. In 1880 the tenant of a farm renewed his lease of the farm "all as possessed by him." For many years he and his predecessors in the farm had been in use to take peats from a moss on another part of the landlord's estate, a particular lair being appropriated to the farm. Certain estate regulations were incorporated in the lease, under which, *inter alia*, the landlord reserved to himself "all the mosses on the estate, with power to regulate and divide them as circumstances may render necessary, . . . And in the event of the proprietor letting the mosses for cultivation, it is hereby

LEASE—*Continued.*

specially conditioned and declared that he shall be under no obligation to find moss for the tenants in place thereof. The tenant continued under the new lease to take peats from the moss, until 1887, when the proprietor sold the moss. The proprietor having subsequently sold the farm, *held* in a question between the tenant and the purchaser of the farm that the tenant had under his lease a right to take peats from the moss, and that he was entitled to an abatement from his rent corresponding to the value of the right to take peats of which he had been deprived.

Opinion (per Lord Young) that the tenant's right to take peats from the moss was not protected by the Act 1449, cap. 18, so as to be good against singular successors in the ownership of the peat moss. *Duncan v. Brooks*, May 17, 1894, p. 760.

Subject—Lease of mines and minerals—Right to occupy houses.

5. The proprietor of a mineral field, and of the surface of certain detached pieces of ground on which were built workmen's houses, stores, &c., let the minerals for a period of thirty-one years with the usual rights to work the same, and with right also to the tenant "to use and occupy," during the currency of the lease, the houses, &c., the tenant paying and so relieving the landlord of all feu-duties and taxes payable in respect of the houses, and also undertaking to keep in repair and insure the same; "for which causes and on the other part," the tenant bound himself to pay a fixed rent, or, in the option of the landlord, specified lordships. In a competition between the proprietor's representative in the mineral field and his general testamentary trustees, *held* that the whole of the fixed rent or lordships was payable in respect of the right to work the minerals, the occupation of the houses being a separate right, the consideration for which was the payment of the feu-duties, &c. *Dixon's Trustees v. Church's Trustees*, Jan. 30, 1894, p. 441.

Trade fixtures—Right in security.

6. Trade fixtures attached by a tenant to the *solum* become the property of the landlord subject to the tenant's right to remove them.

A tenant assigned to his landlord certain trade fixtures on the subjects let, in security of advances. In a question between the landlord and the tenant's creditors, *held* that the fixtures being *partes soli* were the property of the landlord, and that the tenant's assignation operated as a valid renunciation of his right to remove them so long as the debt was not paid. *Miller v. Muirhead*, March 10, 1894, p. 658.

Tenant's right to remove buildings erected by him.

7. Where a tenant is entitled at the expiration of his lease to remove buildings erected by him, he cannot enforce this right when he has not implemented his obligations under the lease. *Smith v. Harrison & Company's Trustee*, Dec. 22, 1893, p. 330.

Value of buildings erected by tenant—Trust-deed for creditors—Compensation.

8. A tenant, several years before the termination of his lease, granted a trust-deed for behoof of his creditors. The lease having been abandoned by the trustee, it was arranged between the trustee and the landlord that buildings which the tenant would have been entitled to remove at the natural expiration of the lease should be taken over by the landlord at their value. *Held* that the landlord's agreement to pay the value of the buildings was to be construed as subject to his antecedent right to retain them till the tenant had implemented his obligations under the lease, and that the landlord was entitled to set off against the trustee's claim for the value of the buildings his loss by the tenant's abandonment of the lease. *Smith v. Harrison & Company's Trustee*, Dec. 22, 1893, p. 330.

Fixtures—Paper-mill—Steam-engines—Valuation of Lands (Scotland) Act, 1854, sec. 42.

9. The steam-power of a paper mill in the hands of the proprietor was supplied by a number of engines of different sizes, which were fixed by bolts and nuts to solid foundations of masonry, specially designed for their reception.

LEASE—Continued.

Although they could be removed without injury to themselves or to the buildings, the foundations would have required alteration to adapt them to engines of any other shape or size. *Held* that the engines were heritable fixtures in the sense of the Act of 1854, and fell to be valued as part of the lands and heritages.

Observed that the rules which regulate the rights of landlord and tenant in regard to machinery erected by the tenant during the currency of his lease had no application; and that the principles to be applied were practically those which regulate the rights of heir and executor. *Cowan & Sons, Limited, v. Assessor for Midlothian*, May 25, 1894, p. 812.

Rent—Rent legally due prior to heir's succession, but conventionally payable thereafter—Title to sue.

10. Where a tenant is bound to pay rent at a certain term, the landlord then in possession is entitled to enforce the obligation notwithstanding that he may be liable to account for the rent recovered to the representatives of his predecessor. *Lennox v. Reid*, Nov. 14, 1893, p. 77.

Compensation for improvements—Notice—Determination of tenancy—Agricultural Holdings (Scotland) Act, 1883, sec. 7.

11. The lease of a farm was granted for nineteen years from the tenant's "entry, which is hereby declared to be to the houses, grass, and fallow land" at Whitsunday, "to the arable land in corn crop at the separation of the crop from the ground, and to the barns, barn-yard, and two cot-houses at Whitsunday following." After removing from the houses and grass the tenant, four months before Martinmas, gave notice to the landlord of his intention to claim compensation. *Held* (aff. judgment of the First Division) that the notice given by the tenant was sufficient under the above Act. *Black v. Clay*, June 22, 1894, H. L., p. 72.

Claim by landlord for damages—Lease of shootings—Excessive stock of game.

12. A lease of shootings gave the tenant the exclusive right to the game, including hares and rabbits, and bound the tenant to relieve the landlord of all claims which might be made by any of the agricultural tenants on account of damage sustained from the game, including hares and rabbits. In an action by the landlord against the shooting tenant for damage alleged to have been caused to the estate by the tenant permitting an excessive and unreasonable stock of rabbits to remain upon it, the pursuer did not allege that any claims had been made against him by the agricultural tenants. *Held* that the action was not relevant. *Elliott's Trustees v. Elliott*, June 7, 1894, p. 858.

Claim by landlord for damages—Mora.

13. Where, in the course of a lease for a term of years, a landlord considers that he is entitled to damages from his tenant, and where the tenant might be prejudiced in his defence through the loss of evidence, the landlord is bound, without delay, to give notice to his tenant of his claim, and of his intention to enforce it, otherwise he will be barred from doing so. *Elliott's Trustees v. Elliott*, June 7, 1894, p. 858.

Claim by tenant for damages—Mora.

14. The tenant of a farm, three years after the farm had been sold, brought an action against his former landlord, averring that on each occasion during a period of seven years on which he had paid his rent, and at various other times, orally and in writing, he had protested against and complained of the landlord's failure to implement conditions of the lease under which the landlord was bound to burn a certain proportion of the heather annually, and to keep the fences of the farm in repair, and concluding for damages for the alleged breach of these conditions. *Held* that the pursuer's averments were irrelevant, as they shewed that he had paid his rent during the seven years without reservation of a specific claim for damages. *Emalie v. Young's Trustees*, March 16, 1894, p. 710.
15. In an action of damages at the instance of a tenant against his landlord on the ground that from 1887 to 1892 he had not had the use of the granary

LEASE—*Continued.*

and piggery on the farm, the pursuer averred that in the former year those buildings became "unfit to be repaired" "on account of decay occasioned by the lapse of time," that at the rent collection in the summer of that year, and at every succeeding rent collection, he had asked the factor to put them into tenantable order, and that the factor had frequently promised to have this done, but had never fulfilled his promise. He had not, however, made or claimed any deduction from his rent. *Held* (1) that the tenant had a relevant action of damages, in respect that the landlord was liable for extraordinary repairs necessitated by natural decay; and (2) that the tenant was not barred by delay from insisting on his claim. *Johnstone v. Hughan*, May 22, 1894, p. 777.

Trespass by landlord—Reparation—Personal injury—Horse frightened by manure piled on farm near end of lease.

16. In an action of damages for personal injury the pursuer averred that the defender was the proprietor of a farm of which the pursuer was tenant, and from which he was to remove at Whitsunday; that before the term of removal the defender entered on a field on the farm and placed thereon a heap of bags of manure covered with a tarpaulin, which flapped in the wind; that on 12th May the pursuer's horse shied at the manure bags, whereby the pursuer was seriously injured; and that the defender in placing the bags where he did was a trespasser on ground in the pursuer's occupation. *Held* that the pursuer was entitled to an issue whether the defender wrongfully placed the bags of manure upon a field in the occupation of the pursuer, and whether the pursuer was injured by his horse taking fright thereat. *Gibson v. Stewart*, Jan. 30, 1894, p. 437.

Crofter—Nature of right in holding—March fence—Crofters Holdings Act, 1886—Act 1661, c. 41.

17. *Held* that a crofter within the meaning of the Crofters Holdings Act, 1886, is the tenant, not the proprietor, of his holding, and that, therefore, he has no title to insist, under the Act 1661, c. 41, upon the proprietor of lands adjoining his croft paying half the cost of the march fence. *MacDonald v. Dalgleish*, June 12, 1894, p. 900.

Crofter—Succession—Crofters Holdings Act, 1886, sec. 16.

18. *Held* that, under the 16th section of the Crofters Act, 1886, a crofter is not entitled to bequeath his right to his croft to the son of his mother's sister. *Mackenzie v. Cameron*, Jan. 25, 1894, p. 427.

See *Arrestment*, 3.

LEGITIM. See *Succession*, 8, 9.

LIEN. See *Retention*.

LIMITATION OF ACTION. See *Justiciary Cases*, 17—*Reparation*, 28.

MAILS AND DUTIES. See *Right in Security*, 1.

MALICE. See *Reparation*, 29.

MANDATE. See *Agent and Principal*.

MANSE. See *Revenue*, 3.

MARCHES. See *Property*, 6.

MARRIAGE-CONTRACT. *Antenuptial bond of annuity—Whether provision for wife or wife trustee for husband.*

1. By antenuptial bond of annuity A provided to his wife an annuity of £1000 per annum, "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life, . . . moreover, I do hereby renounce and discharge my *jus mariti* and right of administration of and in relation to" his wife's estate, "including the foresaid annuity payable to her during my lifetime, declaring that the

MARRIAGE-CONTRACT—*Continued.*

same shall be and remain a separate estate in her person, free of any right or claim on my part whatsoever." Some years after the marriage A executed a trust-disposition of his whole estate for behoof of creditors. *Held* that the annuity fell to be applied by the wife for her husband's behoof, and that therefore the bond was ineffectual in a question with his creditors. *Elliott v. Elliott's Trustee*, July 7, 1894, p. 955.

Jus mariti—Exclusion of.

2. By antenuptial marriage-contract executed in 1855 a wife conveyed the whole funds payable to her under her father's settlement to trustees for the purpose, *inter alia*, that the revenue of £5000 (being the portion of the funds available at the date of the contract) should be paid to herself exclusive of the *jus mariti* and right of administration of her husband, the clear revenue of the remainder to be held for the joint behoof of the spouses and paid to them on their joint receipt. The husband expressly renounced his *jus mariti* and right of administration, in so far as the capital of the whole funds and the revenue of the £5000 were concerned, but the deed was silent as to the husband's rights with respect to the revenue of the remainder of the funds. *Held* that the husband's *jus mariti* and right of administration did not affect funds conveyed to the trustees by the antenuptial contract of marriage or the revenue thereof. *Bruce's Trustees v. Bruce's Trustee*, Feb. 27, 1894, p. 593.

Jus relictæ—Married Women's Property Act, 1881, secs. 6 and 8.

3. Provisions of an antenuptial contract of marriage, dated in 1874, which were *held* to be inconsistent with a claim by the surviving husband to one-half of his wife's moveable property *jure relictæ*. *Buntine v. Buntine's Trustees*, March 16, 1894, p. 714.

Income to be held for joint behoof and paid on joint receipt of spouses—Spouses living separate—Husband's sequestration.

4. An antenuptial marriage-contract contained a direction that a certain fund was to be held by trustees "for the joint behoof of the spouses, and paid to them on their joint receipt." Under an arrangement between the husband and wife, the trustees for some time paid over one-half of the income to each, but the husband's estate having been sequestered, they refused to make any payments except on the joint receipt of the wife and the husband or his trustee. *Held* that the wife and the husband's trustee were entitled each to receive payment of one-half. *Bruce's Trustees v. Bruce's Trustee*, Feb. 27, 1894, p. 593.

Conveyance to marriage-contract trustees retenta possessione—Sale—Delivery.

5. In December 1883 M's estates were sequestered, but before a trustee had been appointed a deed of arrangement was executed between M and his creditors and B. By this deed M assigned his furniture to B in consideration of payment of a sum exceeding its value by way of composition to the creditors. B thereafter assigned the furniture to the trustees under M's antenuptial marriage-contract for behoof of M's wife in liferent, and of the children of the marriage in fee, M's *jus mariti* being excluded. The furniture was allowed to remain in the house then occupied by M and his wife, which belonged to the trustees, and on the spouses removing to another house in 1884 the furniture was taken with them. In 1890 M sold the furniture to G, and G let the furniture on hire to M. The furniture remained with M and his wife. In an action by the marriage-contract trustees to have G interdicted from removing the furniture, *held* that the right to the furniture was in the trustees, in respect that since the date of the assignation in their favour M's wife had been in actual possession of it as liferentrix, and that the trustees had accordingly been in civil possession through her, and that G therefore had no title to it, and interdict *granted*. *Mitchell's Trustees v. Gladstone*, Feb. 27, 1894, p. 586.

Scope of conveyance.

6. *Observations* on the effect of a conveyance in a marriage-contract of the

MARRIAGE-CONTRACT—Continued.

property which should belong to one of the spouses at the date of his or her death. *Dowie v. Hagart*, July 19, 1894, p. 1052.

Provisions to children.

7. Father twice married—First marriage without a marriage-contract—*Question* whether the provisions under antenuptial contract to the children of the second marriage were debts to the effect of diminishing the legitim of children of first marriage. *Bishop's Trustees v. Bishop*, March 17, 1894, p. 728.

Alimentary liferent—Whether revocable.

8. Terms of a will left by a husband upon the construction of which it was held that it was not his intention to leave his widow his entire estate absolutely, and discharged of an alimentary liferent constituted in her favour by their marriage-contract.

Question whether it is in the power of a husband, with the consent of his wife, to revoke an alimentary liferent in her favour constituted by marriage-contract. *Elliott's Trustees v. Elliott*, July 13, 1894, p. 975.

See *Succession*, 20.

MASTER AND SERVANT. Contract—Notice—Reparation—Insurance—Employers Liability Act, 1880.

1. In defence to an action by a workman against his employers for damages for personal injury, at common law and under the Employers Liability Act, 1880, the defenders proved that they had posted at various places in their works, including the pay-box, notices to the effect that from the weekly wages paid to the workmen certain sums would be deducted, to secure certain insurance benefits in case of accident, and that any workman accepting such benefits would be held to have discharged all claims against his employers. It was further proved that the notice was well known to the defenders' workmen generally, and that the pursuer had taken benefit of the insurance. The Court *assolized* the defenders, holding (1) that the conditions founded on were lawful conditions of the contract of employment; and (2) that on the evidence the pursuer must be held to have known of and assented to the conditions. *Wright v. Howard, Baker, & Co.*, Oct. 26, 1893, p. 25.

Assignment of contract of service by master—Newspaper.

2. In 1888 M'Farlane, the proprietor of a daily newspaper, appointed Ross to be manager of the paper by letter as follows:—"I hereby accept your offer to serve me as general manager of" the paper "for two years." In 1890 the engagement was renewed by letter, addressed to Ross and signed by both parties, in these terms,—“We have to-day arranged your reappointment as general manager of” the paper for five years. In 1892 M'Farlane sold the paper to Martin, the contracts with the newspaper staff being assigned to Martin, who undertook to relieve M'Farlane of his future liabilities thereunder. Martin offered to employ Ross as manager on the same terms as before, but Ross being afraid that by accepting this offer he might liberate M'Farlane from his liability under the former contract, declined to accept it without M'Farlane's written consent. In reply to Ross' application for this, M'Farlane wrote,—“You are at liberty to make any bargain you like with Martin without my consent.” M'Farlane withheld his written consent until after Martin had withdrawn his offer and had declined to take Ross as manager. In an action of damages for breach of contract by Ross against M'Farlane, the defender pleaded that the pursuer having been offered employment on the same terms with Martin, was entitled to nominal damages only. *Held* that the pursuer was entitled to substantial damages, *per* the Lord Justice-Clerk, on the ground that the defender being in breach of his contract with the pursuer, and not having given the written consent required by the pursuer, was not entitled to plead the offer of employment with Martin in mitigation of damages; *per* Lord Rutherford Clark and Lord Trayner, on the ground that whether the defender was in breach of contract or not, he was bound to have given

MASTER AND SERVANT—*Continued.*

the pursuer the consent required; *dis.* Lord Young, on the ground that there had been no breach of contract by the defender. *Opinions* (per Lord Rutherford Clark and Lord Trayner) that the defender by assigning the business to Martin, and so disabling himself from fulfilling the contract with the pursuer, had committed a breach of contract. *Ross v. M'Farlane*, Jan. 19, 1894, p. 396.

See *Police*, 1—*Process*, 32—*Public-House*, 1, 4—*Reparation*, 13, 16, 17, 18, 23, 27—*Revenue*, 4.

MINES AND MINERALS. *Railway—Freestone—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 70.*

1. Held that the exception of "mines of coal, ironstone, slate, and other minerals," in the 70th section of the Railway Clauses Consolidation Act, 1845, from conveyances of land to railway companies covers freestone. *Glasgow and South-Western Railway Co. v. Bain*, Nov. 15, 1893, p. 134.

Railway—Notice—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 71.

2. A quarry-master having given notice to a railway company, under the 71st section of the Railway Clauses Consolidation Act, 1845, that he intended to work certain freestone belonging to him under the company's line, the company brought a note of suspension and interdict, averring, *inter alia*, that in the ordinary course of working the quarry the freestone in question would not be worked for many years, and that the notice had not been *bona fide* given, but was merely intended to raise up a fictitious claim against the company. Held that these averments were relevant, and a proof allowed. *Glasgow and South-Western Railway Co. v. Bain*, Nov. 15, 1893, p. 134.

Lease—Construction—Right to occupy houses.

3. The proprietor of a mineral field, and of the surface of certain detached pieces of ground on which were built workmen's houses, stores, &c., let the minerals for a period of thirty-one years with the usual rights to work the same, and with right also to the tenant "to use and occupy," during the currency of the lease, the houses, &c., the tenant paying and so relieving the landlord of all feu-duties and taxes payable in respect of the houses, and also undertaking to keep in repair and insure the same; "for which causes and on the other part," the tenant bound himself to pay a fixed rent, or, in the option of the landlord, specified lordships. In a competition between the proprietor's representative in the mineral field and his general testamentary trustees, held that the whole of the fixed rent or lordships was payable in respect of the right to work the minerals, the occupation of the houses being a separate right, the consideration for which was the payment of the feu-duties, &c. *Dixon's Trustees v. Church's Trustees*, Jan. 30, 1894, p. 441.

Church—Lands held in trust for use and benefit of minister.

4. In 1676 certain lands were conveyed in trust "for the use and benefit of the minister of the gospel serving the cure at the Kirk of Bo'ness." In 1888 minerals in the lands were opened and leased for twenty years at a yearly rent of £25 or royalties. In a special case between the trustees and the minister of the parish, held that the mineral rents or royalties were not to be paid to the minister as part of the income of the benefice, but were to be accumulated as capital, the income of the accumulated fund only being paid to the minister for the time. *Galbraith v. Minister of Bo'ness*, Oct. 27, 1893, p. 30.

Wages of miners—Coal Mines Regulation Act, 1887.

5. In 1871 a mine owner entered into an agreement with his miners by which the parties agreed that an average uniform deduction of 56 lbs. should be made from the gross contents of each hutch sent up from the pit in respect of stones and substances in the hutch other than coal. In an appeal by the manager against a conviction of a contravention of sec. 12 of the above Act, the Court *quashed* the conviction, holding that the agreement was

MINES AND MINERALS—Continued.

lawful, and that deductions made in terms thereof did not infer a contravention of the Act in cases where the miner was paid on a smaller amount of coal than he had actually sent up. *Ronaldson v. Mowat*, July 13, 1894, Just. Cases, p. 55.

6. A coalowner entered into an agreement with his miners by which no payment should be made for the excess weight of any hutch beyond 10 cwt., and the practice was when a hutch was found to contain more than 10 cwt. to carry the weighing of it no further. In an appeal by the manager against a conviction of offences against sec. 12 and sec. 13, subsec. 1, of the above Act, *held* (1) that the conviction of the first offence was bad, in respect that the agreement for deductions was valid, overfilling being "improper filling" in the sense of the Act, and that the failure to weigh or pay for the contents of the hutches beyond the maximum of 10 cwts. was not a contravention of sec. 12; (2) and that the conviction of the second offence was bad, the Lord Justice-Clerk and Lord Wellwood holding that the checkweigher's duty to see that the agreement as to deductions was properly carried out did not require him to ascertain the exact weight of hutches weighing over 10 cwt., Lord Adam holding that the second charge was not relevant, as the accused was not bound to weigh the coal in the hutches separately from the other contents thereof. *Atkinson v. Hastie*, July 13, 1894, Just. Cases, p. 62.

See *Valuation Acts*, 6.

MINOR AND PUPIL. *Custody—Orphans—Minor's choice of residence and of religion—Brother's right to custody—Father's religion—Curator ad litem—Charity.*

1. Two orphan children, a brother and sister, twelve years of age, were placed by their brother, thirty years of age, in a charitable institution not Roman Catholic. Shortly afterwards he presented a petition to the Court to have them restored to his custody, averring that they were not being brought up in the Roman Catholic faith, which he alleged to be that of their father, and that the children themselves wished to be removed. He also averred that he had arranged for their being suitably brought up in a Roman Catholic institution, and that he was "willing, should the Court require it, to retain them under his own care or under the care of a relative." Answers were lodged for the manager of the institution. The Court, in order to ascertain the actual facts in the interest of the children, before answer, appointed a curator ad litem. Thereafter the Court being satisfied, on a statement made by the curator ad litem in a minute, that the children were well provided for in the institution, that the girl, a minor pube, was desirous of remaining where she was, that both children were averse to being separated, and that the father's conduct shewed that he wished them to be brought up as Protestants, *refused* the petition. *Morrison v. Quarrier*, June 9, 1894, p. 889, and July 19, 1894, p. 1071.

Custody of child—Contempt of Court—Disobedience of order to bring child within jurisdiction—Sequestration.

2. A father presented a petition for the custody of his pupil child and obtained decree against an aunt of the child ordaining her to deliver the child to him. The aunt not having done so, the Court ordered her to attend personally at the bar, and on her failure to obey this order sequestered her estates, and appointed a judicial factor thereon. Thereafter the aunt presented a petition for the recall of the sequestration and the factory. She explained that she had not received service of the order to attend, and that her health made it dangerous for her to attend, and by her counsel she submitted herself unreservedly to the judgment of the Court. The father lodged answers, in which he submitted that the petition ought not to be granted until the aunt had handed over the child to him. It appeared that the child, who had now attained twelve years of age, had resided with the aunt for eight years, and had a decided wish to remain with her. The Court, without requiring the aunt's personal

MINOR AND PUPIL—*Continued.*

presence, and without requiring her to deliver up the child, *granted* her petition. *Edgar v. Fisher's Trustees*, Nov. 10, 1893, p. 59, and *Fisher v. Edgar*, July 20, 1894, p. 1076.

Tutor.

3. Factor loco tutoris appointed without removing tutor from office. *Edgar v. Fisher's Trustees*, Dec. 20, 1893, p. 325, and *Fisher v. Edgar*, July 20, 1894, p. 1076.

Tutor—Expenses—Parent suing as tutor and administrator for pupil child.

4. Held that a father who sues an action as tutor and administrator for his pupil son is liable personally for expenses if he is unsuccessful in the action. *White v. Steel*, March 10, 1894, p. 649.

MISREPRESENTATION. See *Fraud*.

MORA. See *Church*, 3—*Lease*, 13, 14, 15—*Succession*, 27, 28.

NOBILE OFFICIUM. See *Judicial Factor—Minor and Pupil*, 1, 2—*Notary-public—Process*, 14, 23—*Trust*, 7, 15, 16.

NOTARY-PUBLIC. *Jurisdiction—Nobile officium.*

Held that the Court of Session has jurisdiction to deprive a notary-public of office. *Incorporated Society of Law-Agents in Scotland v. Laing*, Dec. 12, 1893, p. 267.

NOTICE. See *Lease*, 11—*Master and Servant*, 1—*Railway*, 2.

ONUS. See *Proof*, 2, 3—*Public Health*, 2.

PACTUM ILLICITUM. See *Contract*, 4.

PARENT AND CHILD. *Aliment—Voluntary separation of parents.*

1. Under a voluntary deed of separation and aliment, dated in August 1891, a wife was entitled to the income of £1000 vested by the husband in trustees. In October 1891 the wife gave birth to a daughter, and in May 1893 an action was raised in name of the daughter, with her mother's concurrence, against the father for aliment. In this action the pursuer alleged that no provision had been made for her aliment, and that her father was possessed of between £2000 and £3000. Held (1) that the action was to be regarded as an application by the mother for additional aliment; (2) that the agreement made in August 1891 must be held to have been made in contemplation of the birth of the child; and (3) that no relevant ground had been stated for giving additional aliment. *Scott v. Scott*, June 6, 1894, p. 853.

Custody—Bill-Chamber—Jurisdiction.

2. Held by Lord Kinnear that a petition by a father for the custody of his child was competently presented in vacation to the Lord Ordinary on the Bills, and order for delivery *granted*. *Edgar v. Fisher's Trustees*, Nov. 10, 1893, p. 59.

Custody—Contempt of Court—Judicial Factor.

3. A father presented a petition for the custody of his pupil child and obtained decree against an aunt of the child ordaining her to deliver the child to him. The aunt not having done so, the Court ordered her to attend personally at the bar, and on her failure to obey this order sequestrated her estates and appointed a judicial factor thereon. Thereafter the aunt presented a petition for the recall of the sequestration and the factory. She explained that she had not received service of the order to attend, and that her health made it dangerous for her to attend, and by her counsel she submitted herself unreservedly to the judgment of the Court. The father lodged answers, in which he submitted that the petition ought not to be granted until the aunt had handed over the child to him. It appeared that the child, who had now attained twelve years of age, had resided with the aunt for eight years, and had a decided wish to remain with her. The Court, without requiring the aunt's personal

PARENT AND CHILD—*Continued.*

presence, and without requiring her to deliver up the child, *granted* her petition. *Edgar v. Fisher's Trustees*, Nov. 10, 1893, p. 59, and *Fisher v. Edgar*, July 20, 1894, p. 1076.

Custody—Cruelty to Wife—Guardianship of Infants Act, 1886, sec. 5.

4. A married woman commenced a suit in the English Courts for judicial separation on the ground of cruelty. The husband objected to the jurisdiction on the ground that his domicile was in Scotland. The husband subsequently presented a petition to the Court of Session for the custody of the children against his wife, who had removed them from his custody under pretence of taking them on a visit to her father. The wife, in answer, averred that on some occasions the petitioner had treated the children with cruelty, and further made specific statements of cruelty to herself. The Court granted the prayer of the petition. In an appeal the House, holding that the wife's averments of cruelty to herself were relevant in answer to the husband's petition for the custody of his children, and considering it expedient that the inquiry into the husband's conduct should be made in the wife's proceedings for judicial separation, in which the question as to the custody of the children might also be determined, recalled the interlocutor of the First Division, on the wife undertaking to abandon the proceedings in England, and to raise and duly prosecute an action of separation in Scotland, and directed the Court to *sist* the husband's petition in *hoc statu*.

Held further that having regard to the interests of the children, the eldest of whom was not more than eight years of age, the interim custody should remain with the mother. *Stevenson v. Stevenson*, June 5, 1894, H. L., p. 96.

Custody—Appeal—Execution pending appeal—Prayer for further order.

5. A wife having presented an appeal to the House of Lords against a judgment of the Court ordaining her to deliver up the children of the marriage to their father, the husband presented a petition craving the Court "to allow execution to proceed upon the said judgment notwithstanding the appeal," and also "to grant warrant to messengers-at-arms and other officers of the law to take into their custody the persons of the said children, wherever they may be found, and deliver them into the custody of the petitioner." The Court *granted* the prayer for execution pending appeal, there being no reason to believe that the interests of the children would be prejudiced thereby, but *quoad ultra* refused the prayer of the petition as incompetent. *Stevenson v. Stevenson*, March 7, 1894, p. 617.

Custody—Repayment of costs of upbringing of child—Custody of Children Act, 1891, sec. 2.

6. In a petition by a father for the custody of his daughter, six years of age, the respondent, the child's maternal grandfather, stated that he had brought up the child from its birth, and that he was willing to deliver up the child on payment of £85, which he had expended on its aliment. In pronouncing an order for delivery of the child the Court, considering that the petitioner was in humble circumstances, and that the respondent had failed to shew that a larger sum was reasonable, ordained the petitioner to pay to the respondent £15, in monthly payments of 5s. *Soutar v. Carrie*, July 19, 1894, p. 1050.

Religious training of child.

7. *Opinions* that the wishes of a deceased father with reference to the religious training of his children, though entitled to weight, are not conclusive on the subject, the paramount consideration being the interests of the children themselves. *Morrison v. Quarrier*, July 19, 1894, p. 1071.

Expenses—Parent suing as tutor and administrator for pupil child.

8. Held that a father who sues an action as tutor and administrator for his pupil son is liable personally for expenses if he is unsuccessful in the action. *White v. Steel*, March 10, 1894, p. 649.

Reparation—Action of damages for death of father.

9. Action at the instance of widow and certain only of the children—Intimation to remaining children in order that they might crave themselves to

PARENT AND CHILD—*Continued.*

be sisted in the action within eight days, if so advised. *Smith v. Wilson and Clyde Coal Company, Limited*, Nov. 25, 1893, p. 162.

PARTNERSHIP. *Power of one partner to bind firm—Lease.*

1. Where one only of two joint adventurers signed a lease for a period of years of premises in which to carry on the business of the joint adventure, and, upon the termination of the joint adventure at the end of the first year of the lease, the other joint adventurer was sued for the amount of the rent for that year, *held*, after a proof, that the defender was liable in the sum sued for, but *question*, whether he was liable as tenant under the lease. *Cooke's Circus Buildings Company, Limited, v. Welding*, Jan. 11, 1894, p. 339.

Jurisdiction—Reconvention—Foreign.

2. An English firm raised an action in Scotland against a Scotsman, but before final judgment the firm was dissolved, one of the partners continuing the business under the original firm name. No notice of the dissolution was given to the defender of the action, and *ex facie* of the proceedings the firm continued to litigate to the end. The defender thereafter raised an action in Scotland against the firm by its firm name, pleading that jurisdiction existed *ex reconventione*. *Held* that jurisdiction *ex reconventione* existed notwithstanding the dissolution of the firm. *Allan v. Wormser Harris & Company*, June 8, 1894, p. 866.

PATENT. *Anticipation—Lamp.*

1. The specification for a patent claimed "in oil-spray lighting and heating apparatus working with self-generating steam the method of creating a pressure in the water-tank by admitting steam from the self-generating coil or chamber to the said tank." In an action by the patentee for interdict against the infringement of the patent, the Court *assolized* the defenders on the ground that the patent had been anticipated by a self-generating oil-vapour lamp in which the back pressure caused by the generation of the oil vapour in a self-generating chamber was neutralised by admitting oil vapour from the chamber to the oil-tank substantially in the same way as the steam was admitted to the water-tank of the pursuer's apparatus. *Rose's Patents Co., Limited, v. Brady & Co., Limited*, July 20, 1894, p. 1107.

Patent-Agent—Patents, Designs, and Trade-Marks Acts, 1883 and 1889.

2. *Patent-Agents' Rules—Statute—Tax—Board of Trade.* Institute of Patent-Agents v. Lockwood, June 14, 1894, H. L., p. 61.

PAYMENT. *Appropriation of indefinite payments—Account-current—Bank—Cash-credit account.*

In an account-current where there is no appropriation of payments to the discharge of any particular debts, the law makes an appropriation according to the order of the debit items in the account.

Circumstances in which the rule was applied to payments into a cash-credit account. *Cuthill v. Strachan*, Feb. 16, 1894, p. 549.

PENALTY. *Summary procedure—Competency of civil action for interdict where statute provides a penalty on summary conviction—Patent.*

The Patents, Designs, and Trade-Marks Act, 1888, sec. 1, by subsec. 1 enacts that a person should not be entitled to describe himself as a patent-agent unless he is registered, and by subsec. 4 enacts that if any person knowingly describes himself as a patent-agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding £20. An action for declarator that the defender was not entitled to describe himself as a patent-agent so long as he was not registered, and for interdict against him so describing himself, dismissed as incompetent on the ground that the statute in making the use of the designation patent-agent by a person not registered a criminal offence, and subjecting the person so using it to a penalty, did not confer any civil right upon other persons to prevent him

PENALTY—*Continued.*

from using it. Institute of Patent-Agents v. Lockwood, June 11, 1894, H. L., p. 61.

PERSONAL OBJECTION. See *Arbitration*, 4, 6—*Cautioner*, 1—*Lease*, 1—*Trust*, 2.

PLEDGE. See *Right in Security*, 2, 8.

POLICE. *Assessment—Abortive assessment—Reparation—Action of damages against collector—General Police and Improvement (Scotland) Act, 1862, sec. 106.*

1. An action by the Police Commissioners of a burgh against a ratepayer of the burgh for recovery of a private improvement assessment imposed by them was dismissed on the ground that the ratepayer had not received notice of the imposition of the assessment at least two weeks before the day fixed for the hearing of appeals, as required by section 106 of the General Police and Improvement Act, 1862. The Commissioners then raised an action against their collector for payment of the amount of the assessment, averring that their failure to recover the assessment had occurred through his neglect to send the notice within the statutory time. The Court *dismissed* the action, holding that the pursuers had not proved loss through the defender's fault, in respect that it had not been determined whether the sum sued for might not still be recovered from the ratepayer by re-imposing the assessment and giving him timeous notice under the statute. Glasgow Police Commissioners v. Donald, June 12, 1894, p. 895.

Assessment—Special sewer-rate—Ultra vires—General Police and Improvement (Scotland) Act, 1862, secs. 75 and 96 to 100.

2. In an action by police commissioners against a ratepayer for payment of the amount of a special sewer-rate for 1891-92, the defender pleaded that the rate was *ultra vires* because unnecessary, in respect that if the commissioners had not in previous years debited the special sewer-fund with certain expenditure which was not a proper charge against the special fund, and had credited that fund with certain income which had been improperly paid into the general burgh funds, the commissioners would have raised enough money during the previous years, in name of special sewer-rate, to satisfy the purposes for which the assessment had been imposed. *Held* that this plea was not relevant as a defence to an action for payment of the rate. Hamilton Police Commissioners v. Finlay, Nov. 8, 1893, p. 54.

Assessment—Gas—Burgh Gas Supply (Scotland) Act, 1876, secs. 38 and 41.

3. *Held* that gas commissioners are entitled (1) in fixing the price of gas to consider whether a higher or lower rate of charge will yield the greater return, and to adopt such rate as in their judgment will yield the greatest return from gas consumers, if that is necessary to prevent a deficit, and (2) at the same time to impose a guarantee rate to meet an anticipated deficit on the gas account. Milne v. Commissioners of Lockerbie, July 4, 1894, p. 940.

Assessment—Local Government (Scotland) Act, 1889.

4. *Held* that under the Local Government (Scotland) Act, 1889, a county council is entitled to levy the county general assessment on the annual value of lands and heritages in parliamentary burghs within the county, which have less than 7000 inhabitants and have no police establishment. Police Commissioners of Oban v. County Council of Argyllshire, March 9, 1894, p. 644.

Street—Regular line of street—Setting back buildings—General Police and Improvement Act, 1862, sec. 162.

5. In 1877 the corporation of a burgh resolved to widen a street in the burgh to an uniform width of 40 feet. In 1893 the width of the street, with the exception of one place in which three houses projected 13 to 15 feet into the street, was at least 40 feet, but the buildings were not in any regular line, some being further back from the 40 feet line than others. One of

POLICE—*Continued.*

the three houses which projected beyond that line having been pulled down with a view to its being rebuilt, the Magistrates sought to have the proprietor ordained to set the new building back to "the regular line of the street," in terms of sec. 162 of the General Police and Improvement Act, 1862. *Held* that the "regular line of the street" contemplated by the Act was the line of the existing buildings in the street, and that there was, in point of fact, no such regular line to which the Magistrates were entitled to have the new building set back. *Magistrates of Galashiels v. Schulze*, March 16, 1894, p. 682.

Street—Restriction on height of building—General Turnpike Act, 1831—Adoption of Act by Local Act.

6. *Held* that sec. 91 of the above Act applied to a street in the burgh, and that the Magistrates were entitled to prevent the proprietor of vacant land bordering on a street from erecting thereon buildings of a greater height than 7 feet within 25 feet of the centre of the street. *Magistrates of Galashiels v. Schulze*, March 16, 1894, p. 682.

Street—Height of houses—Dean of Guild—Edinburgh Municipal and Police (Amendment) Act, 1891, sec. 44.

7. *Held* that the above enactment applied to houses which it was proposed to erect on ground hitherto unbuilt on fronting an existing street. *Hogg v. Magistrates of Edinburgh*, July 7, 1894, p. 958.

Street—"New street"—Burgh Police (Scotland) Act, 1892, secs. 152 and 153.

8. A street in a burgh which had been formed several years prior to the above Act had buildings on the south side only, the street being bounded on the north by the back gardens and by a piece of ground belonging to A at the west end of the street. *Held* that A by building on his ground would not form a new street, or part thereof, in the sense of the Act. *Stewart v. Marshall*, July 20, 1894, p. 1117.

Street—Property—Disposition—Obligation on disponent to maintain road—Conversion of road into a city street.

9. By disposition, dated in 1875, of a piece of ground in the burgh of Maryhill, near Glasgow, A, the disponent, became bound to construct a road and footpath through other lands belonging to him as an access to the ground disposed, and B, the disponent, became bound to pay a certain proportion "of the expense of maintaining the said road." In 1891 the burgh of Maryhill was included in the extended boundaries of the city of Glasgow, and the Glasgow Master of Works called on A to repair the road by putting in new water-channels of square dressed whinstone four feet broad, and covering the road with hand-broken whinstone metal. A having called on B to pay his proportion of the expense of such repair, and B having repudiated liability, A brought an action against B for declarator that the defender was bound to pay a proportion of the expense of the operations required by the Master of Works. B pleaded that as these operations were not of the character contemplated by the disposition he was not liable. A proof shewed that the operations required by the Master of Works would greatly exceed in cost what would be necessary to restore the road to its original condition. *Held* that the pursuer was not entitled to decree of declarator as concluded for. *Campbell's Trustees v. Scottish Union and National Insurance Co.*, Nov. 28, 1893, p. 167.

Street—Reparation—Regulation of traffic.

10. In order to ease the traffic passing up a steep street in Glasgow, there was laid down a stone track which led up on the right hand side of the street for a considerable distance, and then passed diagonally across it. At one point the track was only 18 inches from the pavement, between which and it there was a rough gutter 6 inches below the kerbstone of the pavement, and sloping gently upward to the track, which was about a foot above the gutter. The rule of the road was, according to these arrangements, reversed for traffic going up and down the street. A child of five years old while

POLICE—*Continued.*

playing at the point referred to tripped in the gutter, and falling on to the track was run over by a cart and killed. The track had been for a long time in the same condition without accident. In an action of damages by the child's father against the Police Commissioners founded upon the position of the track and condition of the gutter, *held* that no fault was attributable to the defenders. *Scott v. Glasgow Police Commissioners*, Jan. 31, 1894, p. 466.

Street—Reparation.

11. *Held* that the proprietor of a house in a public street within burgh, whose titles include the *solum* of the pavement in front of the house, is not relieved from the duty of maintaining the pavement in a safe condition for foot-passengers by the mere fact that the street is under the control and management of a public body, and that he will be liable in damages to foot-passengers who are injured through his neglect to fulfil this duty. *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, p. 498.

Street—Reparation—Glasgow Police Act, 1866, secs. 289, 317, 326.

12. *Held* that the owner of the *solum* of a pavement adjoining his house in a public street is liable in damages for an accident caused to a member of the public by the defective state of the pavement, unless the pavement had been taken over by the board of police in terms of sec. 326 of the above Act. *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, p. 498.

Street—Causing obstruction in a public street—Greenock Police Act, 1877, sec. 179, subsec. 25.

13. Terms of a complaint charging four persons with having wilfully occasioned an obstruction and annoyance in a public street by standing, walking, and loitering therein, and procuring two other persons carrying boards with placards thereon to do the same, which was *held* relevant. *M'Giveran v. Auld*, July 20, 1894, Just. Cases, p. 69.

Special Water District—Ultra vires—Secretary for Scotland—Local Government (Scotland) Act, 1889, sec. 81, subsec. 2.

14. *Held* that a determination of the Secretary for Scotland under the above section that a police burgh should be represented on the committee in the proportion of eight members to six members appointed by the County Council was *ultra vires*, and determination *reduced*. *Eastern District Committee of Dumbartonshire County Council v. Police Commissioners of Clydebank*, Oct. 19, 1893, p. 12.

Water-pipe—Public Road—Compulsory Powers—Ultra vires—Railway—Construction—Water-Works Clauses Act, 1847, secs. 28 and 29.

15. Public water commissioners had statutory authority to lay a line of water-pipes along a road which passed over two girder bridges belonging to a railway company. *Held*, upon a construction of secs. 28 and 29 of the Water-Works Clauses Act, 1847 (*rev. judgment of Lord Low*), that it was *ultra vires* of the commissioners to carry the pipes through the stone abutments of the bridges and to sling them from the girders. *Glasgow and South-Western Railway Co. v. Magistrates of Glasgow*, July 17, 1894, p. 1033.

POOR. *Liability where alteration of boundaries by Boundary Commissioners—Local Government Act, 1889, sec. 50.*

1. In an action at the instance of the Inspector of Poor of the parish of Gala-shiels, to which a part of the parish of Melrose had been transferred by the Boundary Commissioners, the Court decided that the original parish was still liable for the maintenance of a pauper who had, prior to the Commissioners' order, acquired a settlement in the transferred area. Thereafter the parties having failed to come to an agreement as to the adjustment of rates and liabilities necessitated by the transference, the Commissioners issued an award under section 50 (2) of the Local Government Act, 1889, by which they ordained the parish of Galashiels "to assume responsibility for and relieve" the parish of Melrose of advances made or to be made in respect of paupers who had prior to the transference acquired a settlement

POOR—Continued.

in the transferred area ; and on the other hand ordained the parish of Melrose to make certain annual payments to the parish of Galashiels. *Held* that the award was within the powers of the Commissioners, and was not inconsistent with the previous decision of the Court. *Inspector of Galashiels v. Inspector of Melrose*, Jan. 19, 1894, p. 391.

Property held for behoof of the poor—Poor-Law Amendment Act, 1845, sec. 52.

2. Funds which were *held* under the 52d section of the Poor-Law Amendment Act, 1845, to be vested in the parochial board. *Kirk-Session of Pencaitland v. Inspector of Poor of Pencaitland*, Dec. 7, 1893, p. 215.

Settlement—Rehabilitation—Poor-Law Amendment Act, 1845, sec. 76.

3. *Held* that a pauper who had been absent from a parish in which she had acquired a residential settlement for four years and a day before the commencement of a second period of chargeability, had lost her residential settlement there, notwithstanding the fact that during her absence she was for a time entitled to parochial relief, and obtained it from another parish. *Inspector of Poor of Inverkip v. Inspector of Poor of Greenock*, Nov. 14, 1893, p. 64.

Settlement—Imbecile pauper—Confinement in private lunatic asylum licensed by the Lunacy Board—Lunacy (Scotland) Act, 1857, secs. 75 and 95—Lunacy (Scotland) Act, 1862, sec. 7.

4. *Held* (1) that the Lunacy Act, 1857, fixes the permanent burden of a pauper lunatic's settlement in the parish of the lunatic's settlement at the date of seclusion in the district asylum, even in cases where the settlement is derivative ; and (2) that this liability is not avoided by reason of the lunatic being confined, with the sanction of the Lunacy Board, in a private asylum licensed by the board and not in the district asylum. *Inspector of Cupar-Angus v. Inspector of Murroes*, Feb. 23, 1894, p. 583.

POSSESSION. See *Fishing—Lease*, 1, 2, 4, 10, 16—*Property*, 1, 2—*Retention—Sale*, 6.

POST-MORTEM EXAMINATION. See *Insurance*, 5.

PRESCRIPTION. *Fishings—Trout-fishing—River navigable but non-tidal.*

1. In a question between a riparian proprietor and a member of the public *held* (1) that a right in the public of being at or on the non-tidal portion of a river for the purposes of navigation does not entitle them to fish for trout therein, and (2) that such a right of fishing cannot be acquired by prescriptive use. *Grant v. Henry*, Jan. 12, 1894, p. 358.

Fishing—Salmon-fishing.

2. *Opinion* that a right of salmon-fishing was an estate in land in the sense of the Conveyancing Act of 1874, and that possession of salmon-fishings for twenty years was prescriptive possession. *Ogston v. Stewart's Trustees*, Dec. 13, 1893, p. 282.

See *Caution*, 2—*Property*, 1, 2.

PRESUMPTION. See *Proof*, 1, 2—*Property*, 2—*Public Health*, 2.

PRINCIPAL AND AGENT. See *Agent and Principal*.

PROBABLE CAUSE, WANT OF. See *Reparation*, 27, 29.

PROCESS. *Summons—Competency—Two pursuers claiming separate damages.*

1. *Held* that it is competent for two persons alleging injury by one calumnious statement to claim damages in one action provided the damages due to each are separately concluded for. *Mitchell v. Grierson*, Jan. 13, 1894, p. 367.

Issue—Slander.

2. Where two persons claim damages for one calumnious statement each pursuer must take a separate issue. *Mitchell v. Grierson*, Jan. 13, 1894, p. 367.

Raising of action.

3. An action is raised when the summons is served. *Symington v. Campbell*, Jan. 30, 1894, p. 434.

PROCESS—Continued.

Action of damages for death of father at instance of widow and certain only of the children—Intimation to remaining children.

4. In an action at the instance of a widow and four children for damages on account of the death of their husband and father, the defenders lodged a minute in which they stated that since the record was closed they had ascertained that some of the children of the deceased had not been made parties to the action. The Court appointed intimation to be made "to the children of the deceased . . . other than those who are pursuers in the action, in order that they may crave themselves to be sisted in the action within eight days, if so advised." *Smith v. Wilsons and Clyde Coal Co., Limited*, Nov. 25, 1893, p. 162.

Record—Amendment—Court of Session Act, 1868, sec. 29.

5. An action concluded for declarator that the pursuer had a right of common property along with the defender in a loch and in the *solum* thereof and minerals thereunder. The pursuer moved for leave to amend the summons by substituting a conclusion for declarator that he had a right of common property along with the defender in the loch and the waters thereof, and an exclusive right of property in a specified portion of the *solum* of the loch and the minerals thereunder. *Held* that under section 29 of the Court of Session Act, 1868, the amendment was incompetent. *Leny v. Magistrates of Dunfermline*, March 20, 1894, p. 749.

Record—Dean of Guild.

6. In a petition in a Dean of Guild Court for a lining the burgh surveyor, who was called as a respondent, appeared in Court before the Dean of Guild and stated verbal objections to the granting of the petition, but without having lodged written answers. The Dean of Guild having refused the petition, and the petitioner having appealed, the Court *intimated* that the surveyor could not be heard unless he lodged written answers, and having, of consent of the petitioner, allowed the surveyor to put in objections, *remitted* the cause to the Dean of Guild to make up a record on the petition and answers. *Stewart v. Marshall*, July 20, 1894, p. 1117.

Reclaiming Note—Competency—Interlocutor ordering proof—Court of Session Act, 1868, sec. 28.

7. On 30th January a Lord Ordinary pronounced an interlocutor allowing a proof. The Court rose for recess on 3d February and met again on 13th February. The pursuer boxed a reclaiming note against the interlocutor on 12th February, being the earliest day after 3d February on which it was possible to box, but he did not, as he might have done, lodge a reclaiming note with the Clerk of Court within the six days allowed for reclaiming. *Held* that the reclaiming note had not been presented within six days from its date, and was therefore incompetent. *Mackenzie v. Lucas & Aird*, Feb. 15, 1894, p. 544.

Reclaiming Note—Competency—Interlocutory judgment—Court of Session Act, 1868, secs. 27, 28, and 54.

8. In an action of accounting the Lord Ordinary pronounced an interlocutor closing the record and allowing a proof. Thereafter an interlocutor was pronounced by the Lord Ordinary making a remit to a man of skill to report on certain objections to the account lodged by the defenders. *Held* that this interlocutor was not an interlocutor pronounced under sec. 27 of the Court of Session Act, 1868, and could not be reclaimed against without leave of the Lord Ordinary. *Edinburgh Northern Tramways Co. v. Mann*, June 28, 1894, p. 930.

Reclaiming Note—Competency—Expenses—Court of Session Act, 1868, sec. 53.

9. In an action for payment of legitim the Lord Ordinary on 22d June pronounced an interlocutor, which decerned against the defender for a certain sum in name of legitim, and found the pursuer entitled to expenses, "reserving till after taxation the question whether any, and if so what, modification should be allowed in respect of the ascertainment of the amount of

PROCESS—*Continued.*

the legitim fund ; allows an account," &c. No reclaiming note was presented against this interlocutor. On 14th July the Lord Ordinary pronounced this interlocutor:—"Approves of the Auditor's report on the pursuer's account of expenses, and having heard counsel on the question of modification modifies the same to the extent of . . . Decerns against the defender for payment to the pursuer" of the balance of the taxed amount. The defender having presented a reclaiming note against this interlocutor within twenty-one days, and the pursuer having objected to the competency of the reclaiming note, on the ground that the interlocutor of 22d June was the final interlocutor in the cause, and that of 14th July merely executorial, held by the Second Division, after consultation with the Judges of the First Division, that the reclaiming note was competent, and that it brought up all previous interlocutors. *Crallin's Trustees v. Muirhead's Judicial Factor*, Oct. 21, 1893, p. 21.

Reclaiming Note—Competency—Court of Session Act, 1868, sec. 52.

10. Held that it is incompetent to reclaim against an interlocutor, pronounced on the claimer's motion, with a view to submitting a prior interlocutor to review. *Watson v. Russell*, Jan. 30, 1894, p. 433.

Reclaiming Note—Title to reclaim—Concurring pursuer.

11. Held that a person who is a party to a cause only to the extent of giving his consent and concurrence thereto has no title to present a reclaiming note against an interlocutor pronounced in the cause. *Martin v. Lindsay*, May 16, 1894, p. 759.

Expenses—Time of lodging objections to the Auditor's report—A. S., Feb. 6, 1806.

12. Held that, as a general rule, objections must be lodged within forty-eight hours, and that the forty-eight hours run from the date of the Auditor's issuing his report, and not from the date when the report is lodged in process.

Circumstances in which objections were allowed to be lodged on the eighth day after the report was signed. *A B v. C D*, July 20, 1894, p. 1083.

Expenses—Taxation—A. S., July 15, 1876, General Regulation 5.

13. The defender of an action, who, besides denying the pursuer's averments on the merits, pleaded that the action was incompetent, did not reclaim against an interlocutor of the Lord Ordinary repelling the plea to competency and allowing a proof. The Lord Ordinary having heard the proof, gave judgment for the pursuer. At the hearing upon a reclaiming note against that judgment the defender insisted in his objection to the competency of the action, but admitted that his defences on the merits could not be entertained in the absence of a third party. The Court recalled the interlocutor of the Lord Ordinary, dismissed the action as incompetent, and found the defender entitled to expenses. The pursuer objected to the Auditor's report on the defender's account of expenses in respect that under the A. S., July 15, 1876, General Regulation 5, the Auditor ought to have taxed off the whole expenses of the proof. The Court repelled the objection, holding that the question raised was one which it was for the Court to decide when disposing of the motion for expenses, and not for the Auditor, and that the objection came too late, the Court having finally disposed of the motion for expenses. *Welsh v. Russell*, May 19, 1894, p. 769.

Loss of Process.

14. Where the whole process in a liquidation under the supervision of the Court had gone amissing, procedure for replacing the process. Liquidator of the Scottish Heritable Security Co., Limited, July 20, 1894, p. 1082.

Joint Minute.

15. Held that it was incompetent to prove by parole evidence an alleged verbal agreement to vary the terms on which an action had been compromised in a joint minute signed by counsel. *Hamilton & Baird v. Lewis*, Nov. 15, 1893, p. 120.

PROCESS—*Continued.**Diligence—Railway.*

16. In an action of damages brought against a railway company by the representatives of a wayman in their employment who had been run over by an accident train, the pursuers applied for a diligence to recover a great variety of writings. The Court, without determining whether the pursuers might not be entitled to recover some of the writings on a more limited application, *refused* the diligence asked for. *Silver v. Great North of Scotland Railway Co.*, Jan. 23, 1894, p. 416.

Proof or jury trial—"Special cause"—Evidence Act, 1866, sec. 4.

17. In an action of damages, *held* that the probability that only a trifling award of damages would be recovered was not a "special cause" which entitled the Court to refuse to send the case to a jury. *Rhind v. Kemp & Co.*, Dec. 13, 1893, p. 275.

See also *infra*, 32, 33, 34.

Jury trial—Verdict—Reparation.

18. In an action by a widow for damages on account of the death of her husband, which had been caused by a large gate belonging to the defenders falling on him, the defence was that the gate had been nailed up by order of the defenders, they not intending that it should thereafter be used as a gate, and that it had been opened without their knowledge and consent. The presiding Judge told the jury that even if they found that the gate when used as a gate was unsafe, the defenders would not be liable for the accident, if it was proved that it had been shut up by order of the defenders, and had not thereafter been used as a gate with their knowledge and consent. The jury returned an unanimous verdict for the defenders, but added this rider, as noted by the presiding Judge, "while accepting unanimously the law as laid down by your Lordship, we do not think that a due measure of supervision and care over the gate in question had been exercised by" the defenders. The verdict having been entered for the defenders, the pursuer moved for a rule to shew cause why a new trial should not be granted. The Court *refused* the motion, holding that the rider was not inconsistent with the verdict. *Burns v. Steel Co. of Scotland, Limited*, Nov. 7, 1893, p. 39.

Arrestment and furthcoming—Arrestment of joint property of tenant and landlord for landlord's debt—Competency.

19. Under the lease of a quarry the plant was declared to be the joint property of the landlord and of the tenant, the landlord being bound to pay one-half of the value thereof to the tenant at the ish of the lease. Certain creditors of the landlord, before the lease ended, used arrestments in the hands of the tenant. Thereafter they raised an action of furthcoming against the arrestee and the landlord's trustee, in which they alleged that the plant in the quarries had been attached, and concluded that the Court should ordain the arrestee to pay the whole debt due by the landlord or such part thereof as was represented by money arrested in his hands due by him to the landlord, and to pronounce such other orders as to the Court might "seem necessary for satisfying the said claim of the pursuers." The Court being of opinion that the summons contained no conclusions under which the arrestments, even if competently laid on, could be made available, allowed the pursuers an opportunity of amending the same. The pursuers, thereupon, amended their summons to the effect of concluding that the Court should ordain that the arrested plant should be sold, and the price thereof, so far as was necessary for the satisfaction of their debt, paid to them, or otherwise should pronounce a like order, upon the pursuers paying to the arrestee half the value of the plant as the same might be ascertained in terms of the lease. The Court *assolized* the defenders, on the ground that the conclusions were untenable, and that the interest of the landlord in the plant had not been validly arrested. *Lucas's Trustees v. Campbell and Scott*, July 20, 1894, p. 1096.

PROCESS—*Continued.**Declarator—Construction of statute.*

20. The magistrates of a police burgh having intimated that they claimed, under the Burgh Police (Scotland) Act, 1892, to be the licensing authority for the sale of exciseable liquors within the burgh, a publican holding a licence for premises in the burgh, which had been granted by the county Justices, brought an action for declarator that the licensing jurisdiction within the burgh had not been transferred from the county Justices to the burgh magistrates, and for interdict against the magistrates acting as the licensing authority. *Held* that the pursuer had a title to sue. *Tennent v. Magistrates of Partick*, March 20, 1894, p. 735.

Multiplepinding—Double distress—Fund in medio.

21. Where there were competing claimants to one half of a trust-estate, the right to the other half not being in dispute, one of the claimants raised an action of multiplepinding in name of the trustee, bringing the whole estate into Court as the fund *in medio*. *Held* that the action was incompetent. *Macnab v. Waddell*, May 30, 1894, p. 827.

Multiplepinding—Expenses.

22. *Observed* that it was the invariable rule that the expenses of bringing an action of multiplepinding fell to be paid out of the fund *in medio* when the multiplepinding was competently brought. *Hepburn's Trustee v. Rex*, July 17, 1894, p. 1024.

Multiplepinding—Trusts Act, 1867, sec. 16.

23. Settlement of a scheme under the Trusts Act, 1867, sec. 16, in a process of multiplepinding. *Old Monkland School Board v. Bargeddie Kirk-Session*, Nov. 15, 1893, p. 122.

Petition—Competency—Companies Act, 1862, sec. 35.

24. Shareholders of a company presented a petition under the 35th section of the Companies Act, 1862, for rectification of the register of the company by deletion therefrom of the names of certain shareholders, in respect that their shares had been illegally allotted to them as promotion money. The respondents lodged answers in which they denied the petitioners' allegations, stated facts and circumstances tending to shew that they had given good consideration for their shares, and pleaded that the petition was incompetent. The Court *held* that petition under the 35th section was an inappropriate and inconvenient way of dealing with the statements contained in the petition and answers, and *sisted* process in order to enable the petitioners to raise an action of reduction in ordinary form. *Blaikie v. Coats*, Nov. 21, 1893, p. 150.

Petition—Competency—Entail.

25. An heir of entail cannot by way of summary petition obtain the judgment of the Court on a question as to the extent to which the estate is burdened by a bond of annuity granted by a former heir to his widow. *Carter-Campbell v. Lamont-Campbell*, Feb. 27, 1894, p. 614.

Petition—Competency—Judicial Factor.

26. Petition for the appointment of a judicial factor *dismissed* in respect it was not clear what the rights of the petitioners under the deeds founded on by them were, and that the petition was an inappropriate process for determining their rights. *Dowie v. Hagart*, July 19, 1894, p. 1052.

Petition—Execution pending appeal—Prayer for further order.

27. It is incompetent in a petition for interim execution of a judgment pending an appeal to the House of Lords to add a prayer for any further or other order in the proceedings. *Stevenson v. Stevenson*, March 7, 1894, p. 617.

Petition—Custody of child—Bill-Chamber.

28. *Held* by Lord Kinnear that a petition by a father for the custody of his child was competently presented in vacation to the Lord Ordinary on the Bills, and order for delivery *granted*. *Edgar v. Fisher's Trustees*, Nov. 10, 1893, p. 59.

Reduction—Foreign—Bankruptcy—Sequestration.

29. *Opinions* that an action for reduction of a sequestration on the ground that

PROCESS—*Continued.*

the Court had no jurisdiction to award sequestration by reason of the existence of a liquidation in England of the debtor's estates was incompetent. *Gibson v. Munro*, June 5, 1894, p. 840.

Reduction—Reduction of interlocutor of Sheriff.

30. Reduction of an interlocutor of a Sheriff recalling an interlocutor of his substitute, and appointing the cause to be heard before himself, *dismissed* as incompetent. *County Council of Roxburgh v. Dalrymple's Trustees*, July 19, p. 1063.

See *Railway*, 6.

Suspension—Caution—Bill of Exchange.

31. A person who had been charged upon a bill bearing his name as acceptor presented a note of suspension of the charge on the ground that he had not adhibited or authorised the signature. *Circumstances in which the Court passed the note without caution.* *Kechans v. Barr*, Nov. 14, 1893, p. 75.

Appeal—Proof or jury trial—Judicature Act, 1825, sec. 40.

32. A steelmelter, who had been dismissed from his employment, brought an action in a Sheriff Court against his employers for £220, as the balance of the wages due to him on a yearly engagement, and £30 as the equivalent of a free house, alleging that he had been engaged at £5 a-week for a year, with a free house, and that he had been unjustifiably dismissed after eight weeks' service. The defenders averred that the engagement was a weekly one, and that the dismissal was justifiable. The pursuer having appealed for jury trial, the defenders moved that the case should be sent back to the Sheriff Court for a proof. The Court *remitted* the case to the Sheriff Court for a proof. *Cunningham v. Ayrshire Foundry Co., Limited*, Oct. 21, 1893, p. 19.
33. In an action in a Sheriff Court at the instance of a tenant of a farm against his landlord for £100 damages, on the ground that he had not had the use of certain buildings on the farm, which had become useless through decay, the Sheriff allowed a proof. The defender having appealed for jury trial, the pursuer moved the Court to remit the cause to the Sheriff on the ground that the sum at stake was trifling, and that the Sheriff was already acquainted with the case, as, in another action, he had already settled the question of the landlord's liability to repair the buildings. *Held* that the defender was entitled to have the case tried by jury, no special cause to the contrary having been shewn. *Johnstone v. Hughan*, May 22, 1894, p. 777.
34. In an action raised in the Sheriff Court by a parish minister against the heritors for manse rent in consequence of their failure to provide a habitable manse, the defenders appealed under the 40th section of the Judicature Act, 1825, and moved that the cause should be remitted to the Lord Ordinary on Teinds in respect there was already pending before him a cognate cause under the Ecclesiastical Buildings, &c. Act, 1868. The respondent moved that the cause should be remitted back to the Sheriff. The Court, in respect that neither party asked for jury trial, and that the question to be tried was peculiarly appropriate to a local tribunal, *remitted* to the Sheriff. *Bain v. Heritors of Duthil*, Feb. 13, 1894, p. 537.

Appeal—Competency—Crofters Holdings Act, 1886, sec. 16.

35. Question whether the decision of a Sheriff, finding that a person to whom a holding had been bequeathed was not one of the relatives to whom the deceased might legally bequeath his holding, was a final decision in the sense of the Crofters Holdings Act, 1886. *Mackenzie v. Cameron*, Jan. 25, 1894, p. 427.

Appeal—Competency—Statutory declaration of finality—Roads and Bridges Act, 1878, secs. 3, 42, and 43.

36. *Opinions* that notwithstanding the finality clause of the above Act, an appeal from the decision of a Sheriff would be competent where the question was whether the County Council had acted *ultra vires* in declaring

PROCESS—*Continued.*

that a road should cease to be a highway. County Council of Roxburgh v. Dalrymple's Trustees, July 19, 1894, p. 1063.

Appeal—Competency—Arbitration—Nomination of arbiter—Glasgow District Subway Act, 1890, sec. 56.

37. Under a private Act of Parliament all differences arising with regard to the carrying out of certain operations in a city were to be referred to an arbiter mutually agreed on by the promoters of the Act and the Corporation, and "failing such agreement" to an arbiter appointed "by the Sheriff of the county of Lanark." The Corporation presented a petition to the Sheriff, praying him to appoint an arbiter, which he did by an interlocutor in the ordinary form. *Held* that in doing so he was not acting in his judicial capacity, and that, therefore, an appeal to the Court of Session was incompetent. *Magistrates of Glasgow v. Glasgow District Subway Co.*, Nov. 8, 1893, p. 53.

Sheriff—Appeal—Competency—Railway Clauses Consolidation (Scotland) Act, 1845, sections 60, 61, and 150.

38. The Railway Clauses Consolidation Act, 1845, section 61, provides that "if any difference arise respecting the kind" or number of the accommodation works which a railway company is bound to make, or respecting their maintenance, "the same shall be determined by the Sheriff or two Justices." *Held* that no appeal lies to the Court of Session against a determination of a Sheriff-substitute under this section. *Main v. Lanarkshire and Dumbartonshire Railway Co.*, Dec. 19, 1893, p. 323.

Sheriff—Interlocutor—Findings in fact—Act of Sederunt, 15th February 1851.

39. An interlocutor of a Sheriff disposing of a case in which a proof had been led contained no findings in fact as required by the Act of Sederunt, 15th February 1851. The Court *remitted* to the Sheriff to recall the interlocutor, and pronounce one in the form prescribed by the Act of Sederunt. *Mackay v. Mackenzie*, June 12, 1894, p. 894.

PROOF. Onus—Ship—Bill of lading—Discrepancy between quantity stated in bill of lading and quantity delivered.

1. Where the quantity of goods delivered by a vessel at the port of discharge is less than that stated in the bill of lading the *onus* of proving that the quantity referred to in the bill of lading was not in fact shipped lies upon the owner of the vessel. *Horsley v. J. & A. D. Grimond*, Jan. 23, 1894, p. 410.

Onus.

2. A, a domestic servant, on the death of her mistress claimed certain pieces of furniture in the house as given to her by her mistress. In a reference made to an arbiter by A and by the judicial factor on the deceased's estate, the former produced a list of furniture in her mistress's handwriting in support of her claim. The arbiter having decided the case against A, the judicial factor refused to return to her the list of furniture. In an action brought by A in the Sheriff Court against the judicial factor for delivery of the writing the Sheriff *assolized* the defender.

In an appeal the Court *affirmed* the judgment, the Lord Justice-Clerk, Lord Young, and Lord Trayner holding that the pursuer had not proved her right to the document, Lord Rutherford Clark holding that the defender had proved that the document was his property. *Hallpenny v. Howden*, July 4, 1894, p. 945.

Oral modification of written contract—Compromise of action by joint minute.

3. *Held* that it was incompetent to prove by parole evidence an alleged verbal agreement to vary the terms on which an action had been compromised in a joint minute signed by counsel. *Hamilton & Baird v. Lewis*, Nov. 15, 1893, p. 120.

Necessity for writing.

4. Parole proof of evidence given at a former trial is competent in criminal trials. *M'Giveran v. Auld*, July 20, 1894, *Just. Cases*, p. 69.

PROOF—*Continued.**Hearsay—Fugitive.*

5. Of two persons charged with the crime of murder, one disappeared and was declared an outlaw. During the trial which proceeded against the other, the prosecutor stated that he had without success exhausted all possible resources for finding the fugitive, and he proposed to elicit from a witness who knew him a statement made by the fugitive to the witness shortly after the alleged murder. *Held* that the evidence was *incompetent*, in respect (1) that statements made in the panel's absence could not be evidence against him; and (2) that the failure to find a person did not make hearsay evidence as to statements made by him competent. *H. M. Advocate v. Monson*, Dec. 23, 1893, *Just. Cases*, p. 5.

Telephone.

6. *Held* that the evidence of a person who deposed that he had heard words through a telephone, and that he recognised the voice, was competent evidence as to the identity of the person speaking through the telephone. *M'Giveran v. Auld*, July 20, 1894, *Just. Cases*, p. 69.

See *Justiciary Cases*, 12—*Public Health*, 2—*Sale*, 12.

PROPERTY. *Superior and Vassal—Feu-charter—Construction—Servitude—Road.*

1. In 1806 a proprietor feued to A a piece of ground bounded on the south by a road, and on the west by another feu granted to B. At the northern extremity of A's feu, 140 feet from the road, was a well, and his charter contained this clause,—“But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disposed.” B had built a house fronting the road, with its eastern gable resting upon but not beyond the verge of his fen, with a boundary wall in continuation to the back, also just within his feu. A, in building his house, instead of building a western gable, made use of B's gable, leaving a passage below the house 6 feet wide close to B's gable. Behind the house a passage to the well 6 feet wide was left unbuilt on close to B's boundary. In 1866 B's successors made openings in their boundary wall, which were used as an access to the passage. In 1892 A's successor in his feu brought an action against B's successor for declarator that he was entitled to build a wall on the extreme west of his feu, the effect of building such a wall being that the passage would require to be moved eastward to an extent equal to the breadth of the proposed wall, and that B's successor would not have access to the passage through the doors in his wall. *Held* that, on a sound construction of his titles, the pursuer was entitled to decree. *Blair v. Strachan*, March 14, 1894, p. 661.

House—Gable—Boundary—Prescription—Possession—Presumption.

2. The titles of two adjoining properties in a burgh described the properties (in so far as coterminous) as being each bounded by the other. About the year 1770 there was erected on the westmost of these properties a house, the scarcement stones of whose east gable extended about nine inches beyond the line of the gable. Some years after the building of this house there was erected on the other property a building which came to be used as a byre. This byre had no west gable of its own, the east gable of the other house being used as its west gable, and the north and south walls of the byre rested upon the scarcement stones of the gable of the other house, and were built against that gable. In 1892 the proprietor of the house on the westmost property proposed to project the roof of his house (which was higher than the byre), about seven inches to the east of his east gable, and, in an action by the proprietor of the byre for interdict against this proposed projection, maintained that the boundary of his property was the east line of the scarcement stones and not the east line of the gable of his house, contending that the presumption was that his author had built his house entirely within his own property. A proof

PROPERTY—*Continued.*

shewed that the proprietor of the byre, and his authors, had, for more than the prescriptive period, possessed as belonging to the byre the entire area within the walls of the byre to the east of the defender's gable. *Held* that the pursuer's titles, coupled with the possession that had followed upon them, shewed that the boundary between the two properties was the east line of the gable and not the east line of the scarcement stones, and consequently that the pursuer was entitled to interdict against the defender projecting his roof as proposed. *Houston v. M'Laren*, June 22, 1894, p. 923.

Restrictions on building—Superior and Vassal—Feu-charter—Buildings similar in style and quality.

3. A feu-disposition contained a provision that the dwelling-houses to be erected on the feu by the feuar should be "similar in style and quality" to the tenements already erected by the superior in the same street in which the feu subjects were situated. The vassal erected a tenement containing dwelling-houses consisting of three or two rooms each. The tenements erected by the superior consisted of houses containing four or three rooms each. Externally the tenements were similar. *Held* that the tenement erected by the vassal was not in contravention of the stipulations of the feu-disposition. *Middleton v. Leslie*, May 23, 1894, p. 781.

Road—Obligation on disponent to maintain road—Conversion of road into a city street.

4. By disposition, dated in 1875, of a piece of ground in the burgh of Maryhill, near Glasgow, A, the disponent, became bound to construct a road and footpath through other lands belonging to him as an access to the ground disposed, and B, the disponent, became bound to pay a certain proportion "of the expense of maintaining the said road." In 1891 the burgh of Maryhill was included in the extended boundaries of the city of Glasgow, and the Glasgow Master of Works called on A to repair the road by putting in new water-channels of square dressed whinstone four feet broad, and covering the road with hand-broken whinstone metal. A having called on B to pay his proportion of the expense of such repair, and B having repudiated liability, A brought an action against B for declarator that the defender was bound to pay a proportion of the expense of the operations required by the Master of Works. B pleaded that as these operations were not of the character contemplated by the disposition, he was not liable. A proof shewed that the operations required by the Master of Works would greatly exceed in cost what would be necessary to restore the road to its original condition. *Held* that the pursuer was not entitled to decree of declarator as concluded for. *Campbell's Trustees v. Scottish Union and National Insurance Co.*, Nov. 28, 1893, p. 167.

Road—Burgh—Reparation.

5. *Held* that the proprietor of a house in a public street within burgh, whose titles include the *solum* of the pavement in front of the house, is not relieved from the duty of maintaining the pavement in a safe condition for foot-passengers by the mere fact that the street is under the control and management of a public body, and that he will be liable in damages to foot-passengers who are injured through his neglect to fulfil this duty. *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, p. 498.

Crofter—Nature of right in holding—March Fence—Crofters Holdings Act, 1886—Act 1661, c. 41.

6. *Held* that a crofter within the meaning of the Crofters Holdings Act, 1886, is the tenant, not the proprietor, of his holding, and that, therefore, he has no title to insist, under the Act 1661, c. 41, upon the proprietor of lands adjoining his croft paying half the cost of the march fence. *MacDonald v. Dalgleish*, June 12, 1894, p. 900.

See *Fishing*.

PROVIDENT SOCIETY. *Jurisdiction—Dispute between society and member—Reference clause—Industrial and Provident Societies Act, 1876.*

The rules of a provident society provided that in the event of any dispute between a member of the society, or any person claiming through a member, and the society, it must be referred to a committee of the society. In an action against the society at the instance of the executor-dative of a member to recover a sum alleged to be due by the society to the deceased, *held* that, as the defenders denied the pursuer's right to represent the deceased member, the question raised was not a dispute within the meaning of the rule, and that the jurisdiction of the Court was not ousted.

Held further, upon a construction of section 11, subsec. 6, of the above Act, that the society had acted *ultra vires* in paying to one only of the next of kin, he not being a person "entitled by law" to receive payment. *Symington's Executor v. Galashiels Co-operative Store Co., Limited*, Jan. 13, 1894, p. 371.

PUBLIC HEALTH. *Purveyor of milk—Ice-cream—Dairies, Cowsheds, and Milkshops Order of 1885.*

1. *Held* that a seller of ice-cream was not a purveyor of milk within the meaning of the Dairies, Cowsheds, and Milkshops Order of 1885, sec. 1, subsec. 1. *Lang v. Pianta*, Jan. 22, 1894, Just. Cases, p. 20.

Precautions to prevent infection—Public conveyance—Public Health (Scotland) Act, 1867, sec. 49.

2. *Held* (1) that no offence was committed under section 49 of the above Act, unless the patient was conveyed without proper precautions being taken against endangering the public safety by spreading infection; (2) that the *onus* lies upon the prosecutor to prove what precautions were necessary, and that they had not been used. *Malloch v. Hunter*, Jan. 22, 1894, Just. Cases, p. 22.

Sale of poisons by unqualified assistant—Pharmacy Act, 1868, sec. 15.

3. *Held* that upon a construction of the provisions of the Pharmacy Act, 1868, the penalty imposed by the 15th section is incurred by an unqualified assistant of a duly registered and qualified practitioner, where the assistant, in his master's absence and in his shop, sells any of the poisons scheduled in the Act for behoof of his master. *Bremridge v. Tomlinson*, June 1, 1894, Just. Cases, p. 46.

Appeal—Case stated—Criminal cause—Public Health Act, 1867—Housing of the Working-Classes Act, 1890—Summary Prosecutions Appeals (Scotland) Act, 1875.

4. Cause under the above Acts which was *held* not to be criminal, and therefore not to be appealable to the High Court on a case stated. *Suburban District Committee of County Council of Midlothian v. Maitland*, Jan. 19, 1894, Just. Cases, p. 11.

PUBLIC-HOUSE. *Breach of certificate—Master and Servant—Responsibility of master for servant—Public-Houses Acts Amendment Act, 1862.*

1. A barman, when in sole charge of licensed premises, before closing time sold a bottle of whisky to three of his friends, and after closing time (having shut up the shop) went into a room off the bar with his friends, where he and they consumed the whisky. *Held* that the servant in thus permitting drinking in the premises after closing time had not acted within the scope of his employment, and therefore that his master was not guilty of a breach of his certificate. *Patrick v. Kirkhope*, Jan. 23, 1894, Just. Cases, p. 27.

Travelling without a certificate—Relevancy—Ambiguous complaint—Public-Houses Acts Amendment (Scotland) Act, 1862, secs. 17 and 37.

2. A complaint charged the accused with an offence against the Public-Houses Acts, and particularly sec. 17 of the Public-Houses Acts Amendment Act, 1862, in so far as, upon a date and at a place specified, "he did, with William Galbraith and Frank Lambert, traffic in whisky, or other exciseable liquors," without having a certificate in that behalf. The accused having

PUBLIC-HOUSE—*Continued.*

been convicted, appealed. The Court *sustained* the appeal, on the ground that the complaint was irrelevant for ambiguity, in respect that it might mean either that the accused trafficked with the assistance of William Galbraith and Frank Lambert, or that he trafficked by selling to them.

Question whether a charge of "trafficking" in spirits without a certificate, without specification of the mode in which the offence was committed, was relevant. *Carr v. Neilson*, Jan. 23, 1894, Just. Cases, p. 29.

Public fair—Home Drummond Act, 1828, *sec. 8—Public-Houses Acts Amendment (Scotland) Act*, 1862, *sec. 6.*

3. *Held* that the holder of a certificate for the sale of exciseable liquors under the Public-Houses Acts Amendment Act, 1862, is entitled under section 8 of the Home Drummond Act to sell liquor at a public fair or market in the same parish with his licensed premises, or in any adjoining parish, without obtaining special permission to do so under section 6 of the Public-Houses Acts Amendment Act, 1862. *Lamb v. Brown*, March 5, 1894, Just. Cases, p. 35.

Club—Bona fides—Excise.

4. By one of the rules of admission to a working-men's club it was provided that intending members should only be admitted to the club by enrolment in a register (subject to the power of rejection by the committee), and upon payment of entry-money of 6d. and subscription of 3d. quarterly. This rule was habitually disregarded, and the barkeeper was authorised by the committee to admit any person whose appearance he considered respectable on payment of the club subscription of 3d. for three months without enrolment or payment of entry-money or consideration of the case by the committee. *Held* that whatever character the club might have possessed according to its written constitution, it was not, by reason of its permitting such a system of admission, a *bona fide* club, and that a sale of spirits to a member so admitted was a sale for which an Excise licence to retail spirits was required. *Madin v. M'Lean*, March 19, 1894, Just. Cases, p. 40.

Search warrant—Home Drummond Act, *sec. 9—Public-Houses Amendment (Scotland) Act*, 1862, *sec. 20.*

5. *Held* that notwithstanding the provision of the Home Drummond Act, *sec. 9*, a search warrant under *sec. 20* of the Public-Houses Amendment (Scotland) Act may competently be granted by a Justice of the Peace who is a licence-holder. *Costadasi v. Boyes*, July 20, 1894, Just. Cases, p. 75.

Summary Procedure—Complaint—Relevancy—"On Sunday or about that time"—Public-Houses Acts Amendment Act, 1862.

6. A person was convicted of a breach of his certificate upon a complaint which set forth that he did sell liquor "upon Sunday the 31st day of December 1893, or about that time." *Held* in an appeal by him upon a case stated under the Summary Prosecutions Appeals Act, 1875, that the complaint was irrelevant in respect that the words "or about that time" must be taken as including the days immediately before and after the Sunday specified, and therefore as including hours on Saturday and Monday when the sale would not have been an offence. *Macdonald v. Patterson*, March 5, 1894, Just. Cases, p. 38.

Title to sue—Declarator—Construction of statute.

7. The magistrates of a police burgh having intimated that they claimed, under the Burgh Police (Scotland) Act, 1892, to be the licensing authority for the sale of exciseable liquors within the burgh, a publican holding a licence for premises in the burgh, which had been granted by the county Justices, brought an action for declarator that the licensing jurisdiction within the burgh had not been transferred from the county Justices to the burgh magistrates, and for interdict against the magistrates acting as the licensing authority. *Held* that the pursuer had a title to sue. *Tennent v. Magistrates of Partick*, March 20, 1894, p. 735.

PUBLIC-HOUSE—*Continued.*

Burgh—Police—Certificate—Licensing authority—Burgh Police (Scotland) Act, 1892, sec. 38.

8. *Held* that the right of granting, refusing, renewing, and transferring certificates, under the Public-Houses Acts, for premises within police burghs has not been transferred under the Burgh Police (Scotland) Act, 1892, sec. 38, from the county Justices to the Magistrates of such burghs. *Tennent v. Magistrates of Partick*, March 20, 1894, p. 735.
See *Goodwill*, 2.

PUBLIC OFFICER. See *Notary-public—Poor*, 1.

QUORUM. See *Company*, 3.

RAILWAY. *Railways and Canals—“Company”—Valuation of Lands (Scotland) Act, 1854, secs. 20 and 21.*

1. *Held* that the words “canal company” in the section applied to a body of statutory commissioners who were charged with the administration of a canal when the Act was passed. *Commissioners of the Caledonian Canal v. County Councils of Inverness and Argyll*, July 18, 1894, p. 1045.

Compulsory powers—Omission to give notice to treat through mistake or inadvertency—Lands Clauses Consolidation Act, 1845, sec. 117.

2. *Held* that the above section did not apply to cases in which the promoters did not, prior to the expiry of the period allowed for compulsory purchase, intend to acquire the omitted estate, right, interest, or charge. *Davidson’s Trustees v. Caledonian Railway Co.*, July 19, 1894, p. 1960.

Compulsory powers—Lands Clauses Consolidation Act, 1845, sec. 84—Interest on purchase-money from date of entering on land.

3. *Held* (1) that when the owner of lands entered upon dispenses with the granting of the bond mentioned in the above section, he is nevertheless entitled to 5 per cent interest upon the compensation from the date of the promoters entering upon his land till the compensation is paid; and (2) that he is entitled to payment of such interest out of the sum deposited by the promoters. *West Highland Railway Co. v. Place*, Feb. 21, 1894, p. 576.

Compulsory powers—Accommodation works—Process—Sheriff—Appeal—Competency—Railway Clauses Consolidation (Scotland) Act, 1845, sec. 61.

4. *Held* that no appeal lies to the Court of Session against a determination of a Sheriff-substitute under this section. *Main v. Lanarkshire and Dumbartonshire Railway Co.*, Dec. 19, 1893, p. 323.

5. *Held* that sec. 61 applies not only to a difference between the company and the owner and occupier, but also to a difference between the owner and the occupier, and that each of these as well as the railway company should be before the Sheriff in order to the determination of any dispute relative to the accommodation works to be executed. *Lanarkshire and Dumbartonshire Railway Co. v. Main*, July 17, 1894, p. 1018.

6. The proprietor of lands intersected by a railway, who had agreed with the railway company as to the accommodation works to be provided, brought an action for reduction of a determination subsequently pronounced by the Sheriff as to the accommodation works on an application by the occupier of the lands under sec. 61 of the Railway Clauses (Scotland) Act, 1845. The pursuer averred that he was not called as a party to the application by the defender, and that it was only at the final stage, after he had become aware of the nature of the proceedings, that he sisted himself as a party and asked the Sheriff to be allowed to lodge written answers to the petition, or at least to have time given him to consider his position; that this had been refused, and that he had had no opportunity given him of stating his objections. *Held* that the pursuer’s averment that the Sheriff had not allowed him time to inform himself as to the proceedings was a relevant ground of reduction. *Lanarkshire and Dumbartonshire Railway Co. v. Main*, July 17, 1894, p. 1018.

RAILWAY—Continued.

Compulsory powers—Mines and Minerals—Freestone—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 70.

7. Held that the exception of "mines of coal, ironstone, slate, and other minerals," in the 70th section of the Railway Clauses Consolidation Act, 1845, from conveyances of land to railway companies covers freestone. Glasgow and South-Western Railway Co. v. Bain, Nov. 15, 1893, p. 134.

Compulsory powers—Mines and Minerals—Notice—Railway Clauses Consolidation (Scotland) Act, 1845, sec. 71.

8. A quarry-master having given notice to a railway company, under the 71st section of the Railway Clauses Consolidation Act, 1845, that he intended to work certain freestone belonging to him under the company's line, the company brought a note of suspension and interdict, averring, *inter alia*, that in the ordinary course of working the quarry the freestone in question would not be worked for many years, and that the notice had not been *bona fide* given, but was merely intended to raise up a fictitious claim against the company. Held that these averments were relevant, and a proof allowed. Glasgow and South-Western Railway Co. v. Bain, Nov. 15, 1893, p. 134.

Compulsory powers—Issue—Reparation.

9. Form of issue to try a question whether a railway company had exercised its statutory powers negligently to the damage of adjoining property. M'Bride v. Caledonian Railway Company, March 7, 1894, p. 620.

Running powers—Joint station—Statute—Construction—Caledonian and Scottish North-Eastern Railways Amalgamation Act, 1866.

10. Held (rev. the judgment of the First Division) that section 106 of the above Act giving the North British Railway Company the joint or separate use of the stations on the Scottish North-Eastern lines, "including, in so far as the [Caledonian] Company lawfully may, the station at Aberdeen," was to be read as giving the use of the Scottish North-Eastern stations, "including, in so far as the Caledonian Company lawfully may include, the station at Aberdeen"; (2) that the Caledonian Company had no right to give the use of the Aberdeen station without the consent of the Great North of Scotland Railway Company, the other joint proprietor thereof; and (3) that the pursuers, the Aberdeen Joint Station Committee and the Great North of Scotland Railway Company, were entitled to declarator that the North British Company were not entitled without the consent of the Great North of Scotland Company to use the joint passenger station for the purposes of their traffic. Aberdeen Joint Station Committee and Great North of Scotland Railway Co. v. North British Railway Co., Nov. 14, 1893, H. L., p. 48.

Statutory obligation to stop trains—"Ordinary trains."

11. A railway company was bound under its Act to stop "all ordinary trains" at a certain station. Trains which were held to be ordinary trains in the sense of the Act. Gilmour v. North British Railway Co., May 17, 1894, p. 765.

Bills posted up in stations by a railway company setting forth convictions for offences against company—Reparation—Slander.

12. A railway company is not liable in damages for slander by posting up in its stations bills announcing the names and addresses of persons who have been convicted of the offence of travelling without having previously paid the fare, and with intent to avoid payment thereof, or of other offences against the company's acts and bye-laws, together with the date and nature of the offence and the result of the conviction. Buchan v. North British Railway Co., Jan. 16, 1894, p. 379.

Bridge over railway—Public road—Water-pipe—Compulsory powers—Ultra vires—Statute—Construction—Water-Works Clauses Act, 1847, secs. 28 and 29.

13. Public water commissioners had statutory authority to lay a line of water-pipes along a road which passed over two girder bridges belonging to a

RAILWAY—*Continued.*

railway company. *Held*, upon a construction of secs. 28 and 29 of the Water-Works Clauses Act, 1847, that it was *ultra vires* of the commissioners to carry the pipes through the stone abutments of the bridges and to sling them from the girders. *Glasgow and South-Western Railway Co. v. Magistrates of Glasgow*, July 17, 1894, p. 1033.

RECOMPENSE. See *Succession*, 27.

RECONVENTION. See *Jurisdiction*, 6.

REDUCTION. See *Bankruptcy*, 1, 2—*Fraud—Railway*, 6—*Process*, 30—*Sale*, 14—*Trust*, 16.

REPARATION. *Title to sue—Injury to property—Evidence that a disposition ex facie absolute was really in security.*

1. In 1880 A, the owner of house property, granted for onerous causes and considerations an *ex facie* absolute disposition thereof to a bank to which he owed £2500. The bank was infert. In 1893 A raised an action against a railway company for damage done to the property in 1890. *Held* that it had been proved that A's disposition in 1880 was in security merely, and that as he had not been divested of the radical right to the subjects he had a good title to sue. *M'Bride v. Caledonian Railway Co.*, March 7, 1894, p. 620.

Title to sue—Acquisition of right and title after action raised.

2. A, the purchaser of a vessel from B, brought an action of damages in his own name and as an assignee of B against C for injuries which had been done to the vessel prior to the date of the purchase. The summons was served on the 28th June 1893. On the 29th June the seller of the ship assigned to A all claims competent to him against C. *Held* (1) that at the date of the action A had no right to damages for injury done to the vessel prior to his purchase, and had no title to sue; and (2) that the subsequent assignation did not remedy the defect. *Symington v. Campbell*, Jan. 30, 1894, p. 434.

Persons liable—County Council—Road.

3. *Held* that a claim of damages is competent against a county council for injuries arising from their neglect of duty in failing to keep a road sufficiently fenced. *Strachan v. Aberdeen District Committee of the County Council of Aberdeenshire*, June 19, 1894, p. 915.

Persons liable—Right in security—Mails and duties.

4. *Held* that the creditor under a bond and disposition in security entering into possession of the security subjects under a decree of mails and duties and conducting himself as owner thereof, to the exclusion of the true owner, incurs the liabilities of an owner in questions with the public. *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, p. 498.

Persons liable—Road—Burgh.

5. *Held* that the proprietor of a house in a public street within burgh, whose titles include the *solum* of the pavement in front of the house, is not relieved from the duty of maintaining the pavement in a safe condition for foot-passengers by the mere fact that the street is under the control and management of a public body, and that he will be liable in damages to foot-passengers who are injured through his neglect to fulfil this duty. *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, p. 498.

Persons liable—Road—Burgh—Glasgow Police Act, 1866, sec. 326.

6. *Held* that the owner of the *solum* of a pavement adjoining his house in a public street is liable in damages for an accident caused to a member of the public by the defective state of the pavement, unless the pavement had been taken over by the board of police in terms of sec. 326 of the above Act. *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, p. 498.

Contribution between wrongdoers—Assignation to one of two wrongdoers of joint and several decree against both.

7. *The widow of a man who had been killed by the breaking down of the tackle*

REPARATION—Continued.

used in discharging a ship's cargo raised an action against the shipowner and the stevedore who was using the tackle at the time of the accident for damages, the fault alleged against the former being that his tackle was unfit for the work, and that alleged against the latter being that he had recklessly overloaded the tackle. The pursuer obtained decree against both the shipowner and the stevedore, jointly and severally, for a sum of damages and expenses. Thereafter she gave the shipowner a charge for payment of the whole sum. He paid it and obtained from her an assignation to the sum of damages and expenses, and to the decree. He then raised an action against the stevedore for half that sum. The stevedore pleaded in defence that the action was incompetent and irrelevant, in respect that there is no contribution between wrongdoers. Held (aff. judgment of the Second Division) that the shipowner was entitled to recover half of the damages and expenses from the stevedore, because he was in right of the decree against the latter; and that the rule that there is no contribution between wrongdoers was inapplicable. Palmer v. Wick and Pulteneytown Steam Shipping Co., Limited, June 5, 1894, H. L., p. 39.

Police—Abortive assessment—Action of damages against collector—General Police and Improvement (Scotland) Act, 1862, sec. 106.

8. An action by the Police Commissioners of a burgh against a ratepayer of the burgh for recovery of a private improvement assessment imposed by them was dismissed on the ground that the ratepayer had not received notice of the imposition of the assessment at least two weeks before the day fixed for the hearing of appeals, as required by section 106 of the General Police and Improvement Act, 1862. The Commissioners then raised an action against their collector for payment of the amount of the assessment, averring that their failure to recover the assessment had occurred through his neglect to send the notice within the statutory time. The Court *dismissed* the action, holding that the pursuers had not proved loss through the defender's fault, in respect that it had not been determined whether the sum sued for might not still be recovered from the ratepayer by re-imposing the assessment and giving him timeous notice under the statute. Glasgow Police Commissioners v. Donald, June 12, 1894, p. 895.

Railway—Statutory powers—Negligence—Issue.

9. Form of issue to try a question whether a railway company had exercised its statutory powers negligently to the damage of adjoining property. M'Bride v. Caledonian Railway Co., March 7, 1894, p. 620.

Road—Burgh—Regulation of traffic.

10. In order to ease the traffic passing up a steep street in Glasgow, there was laid down a stone track which led up on the right hand side of the street for a considerable distance, and then passed diagonally across it. At one point the track was only 18 inches from the pavement, between which and it there was a rough gutter 6 inches below the kerbstone of the pavement, and sloping gently upward to the track, which was about a foot above the gutter. The rule of the road was, according to these arrangements, reversed for traffic going up and down the street. A child of five years old while playing at the point referred to tripped in the gutter, and falling on to the track was run over by a cart and killed. The track had been for a long time in the same condition without accident. In an action of damages by the child's father against the Police Commissioners founded upon the position of the track and condition of the gutter, *held* that no fault was attributable to the defenders. Scott v. Glasgow Police Commissioners, Jan. 31, 1894, p. 466.

Ship—Danger to ship at quay—Obstruction by vessel lying outside and parallel—Right to cut mooring ropes of outside vessel to escape danger.

11. While the s.s. "Dunlossit" was lying at a quay the s.s. "Easdale" came in, in the evening, took up her position outside and close to the "Dunlossit," and moored herself to the shore by ropes crossing the stem and

REPARATION—*Continued.*

stern of the "Dunlossit." A gale rose during the night, and the position of both vessels became perilous. During the night the master of the "Dunlossit" repeatedly asked the master of the "Easdale" to move, so that the "Dunlossit" might escape, but the master of the "Easdale" did not do so. In the morning the master of the "Dunlossit," after giving warning of his intention, cut the mooring ropes of the "Easdale" and steamed away. The "Easdale" was then driven ashore by the wind and damaged. In an action of damages at the instance of the owner of the "Easdale" against the owners of the "Dunlossit," *held* that the cutting of the ropes was *prima facie* an illegal act, and that the defenders had failed to justify it, and were therefore liable in damages for the consequences of the act. *Currie v. Allan*, July 17, 1894, p. 1004.

Personal injury—Process—Jury trial—Verdict.

12. In an action by a widow for damages on account of the death of her husband, which had been caused by a large gate belonging to the defenders falling on him, the defence was that the gate had been nailed up by order of the defenders, they not intending that it should thereafter be used as a gate, and that it had been opened without their knowledge and consent. The presiding Judge told the jury that even if they found that the gate when used as a gate was unsafe, the defenders would not be liable for the accident, if it was proved that it had been shut up by order of the defenders, and had not thereafter been used as a gate with their knowledge and consent. The jury returned an unanimous verdict for the defenders, but added this rider, as noted by the presiding Judge, "while accepting unanimously the law as laid down by your Lordship, we do not think that a due measure of supervision and care over the gate in question had been exercised by" the defenders. The verdict having been entered for the defenders, the pursuer moved for a rule to shew cause why a new trial should not be granted. The Court *refused* the motion, holding that the rider was not inconsistent with the verdict. *Burns v. Steel Co. of Scotland, Limited*, Nov. 7, 1893, p. 39.

Personal injury—Hired vehicle—Responsibility of hirer for fault of owner.

13. The hirer of a driver and vehicle is not responsible for an accident occasioned by the fault of the driver. *Anderson v. Glasgow Tramway and Omnibus Co., Limited*, Dec. 19, 1893, p. 318.

Personal injury—Road—Horse frightened by manure piled on ground adjoining road—Occupation of ground by trespasser.

14. In an action of damages for personal injury the pursuer averred that the defender was the proprietor of a farm of which the pursuer was tenant, and from which he was to remove at Whitsunday; that before the term of removal the defender entered on a field on the farm and placed thereon a heap of bags of manure covered with a tarpaulin, which flapped in the wind, close to the private road leading to the farm-house; that on 12th May, while the pursuer was driving along the road his horse shied at the manure bags, and overturned the conveyance, whereby the pursuer was seriously injured. He further averred that the defender in placing the bags where he did was a trespasser on the ground in the pursuer's occupation. *Held* (1) that the pursuer's averments, apart from the statement as to trespass, were not relevant to support an issue of fault on the part of the defender in placing the manure near the road; but (2) that he was entitled to an issue whether the defender wrongfully placed the bags of manure upon a field in the occupation of the pursuer, and whether the pursuer was injured by his horse taking fright thereat. *Gibson v. Stewart*, Jan. 30, 1894, p. 437.

Personal injury—Relevancy—Specification of fault.

15. In an action of damages for personal injuries the defenders maintained that the action was not relevant, as no specific fault on their part had been set forth. *Held* that the action was relevant. *Olipphant v. Johnstone & Macleod*, Feb. 3, 1894, p. 531.

REPARATION—*Continued.**Master and Servant—Contract—Notice—Employers Liability Act, 1880—Insurance.*

16. In defence to an action by a workman against his employers for damages for personal injury, at common law and under the Employers Liability Act, 1880, the defenders proved that they had posted at various places in their works, including the pay-box, notices to the effect that from the weekly wages paid to the workmen certain sums would be deducted, to secure certain insurance benefits in case of accident, and that any workman accepting such benefits would be held to have discharged all claims against his employers. It was further proved that the notice was well known to the defenders' workmen generally, and that the pursuer had taken benefit of the insurance. The Court *assolized* the defenders, holding (1) that the conditions founded on were lawful conditions of the contract of employment; and (2) that on the evidence the pursuer must be held to have known of and assented to the conditions. *Wright v. Howard, Baker, & Co.*, Oct. 26, 1893, p. 25.

Master and Servant—Personal injury—Liability at common law.

17. Action at common law for damages for personal injury by a workman against his employers *dismissed* as irrelevant, on the ground that, on the pursuer's own shewing, the proximate cause of the accident was due to the fault of one or other of his fellow-workmen. *Baxter v. Abernethy & Co.*, Nov. 25, 1893, p. 159.

Master and Servant—Factory—Mill-gearing—Fencing—Factory and Workshop Act, 1878, sec. 5, subsec. 3, sec. 96, and sec. 9—Factory and Workshop Act, 1891, sec. 6, subsec. 2—Contributory negligence.

18. When a worker in a factory is injured by an accident which would not have happened if the mill-gearing had been properly fenced in terms of the statute, the employer will not be liberated from liability by the fact that the accident was partly due to a mistake on the part of the worker. *Pringle v. Grosvenor*, Feb. 3, 1894, p. 532.

Slander—Issue—Two pursuers claiming separate damages in one action.

19. *Held* (1) that it is competent for two persons alleging injury by one calumnious statement to claim damages in one action provided the damages due to each are separately concluded for; and (2) that in such an action each pursuer must take a separate issue. *Mitchell v. Grierson*, Jan. 13, 1894, p. 367.

Slander—Statements in reply to previous attack—Innuendo—Counter issue.

20. M. wrote a letter to a newspaper in which, after charging various tradesmen, who had been the contractors for the supply of provisions to a school in Rothesay of which M. was governor with having supplied inferior goods, he stated that he had detected W., who had contracted to supply groceries, in trying to send a different, and, he believed, a cheaper brand of coffee than that contracted for. W. replied by a letter to a newspaper in which he made the following remarks upon M.'s letter:—"Every sentence of this contribution mirrors with startling significance the man M. Meant to be an exposure of a number of Rothesay gentlemen, every line exposes the true nature of the man who wrote it. Perhaps none will feel the sting of the letter so much as those whom he so gushingly thanks in the same breath as he levels his vile statements against so many of our prominent townsmen. . . . If I am able to shew that the statement made as regards myself is a consummate lie, the other statements in M.'s letter may be put down in the same category. I hereby charge this man with a deliberate and wilful untruth contained in what he says with reference to my supplying the school with goods." In an action of damages for slander by M. against W., and also against the publisher of the letter, the pursuer averred that by the letter the defender had represented that the pursuer "had no regard for truth and was a liar." The Court *held* (1) that the letter as innuendoed was more than a reply to the pursuer's charge, and that the pursuer was entitled to an issue whether the statement in the defender's letter represented that the pursuer had no regard for truth

REPARATION—*Continued.*

and was a liar; (2) that the defender was not entitled to a counter issue, whether the pursuer's statement regarding the coffee contract was a lie, as not fully meeting the pursuer's issue. *Milne v. Walker*, Nov. 24, 1893, p. 155.

Slander—Verbal injury—Innuendo—Issue.

21. A newspaper, commenting on the manner in which a contract for printing a register of voters had been secured, said—"This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract." The successful offerer brought an action against the printer and publisher of the newspaper, in which he innuendosed the statement to mean that he had obtained the contract by dishonest and improper means. He also averred that the statement had been made with the design and the result of injuring him. The Court *held* that the statement would bear the innuendo put upon it, and allowed the pursuer an issue of slander, but that the pursuer was not entitled to an issue of verbal injury.

Paterson v. Welch, May 31, 1893, 20 R. 744, *commented on*. *Waddell v. Roxburgh*, June 9, 1894, p. 883.

Slander—Slanderous attributing of letter—Innuendo—Issue.

22. Terms of letter on which it was *held* (1) that the words could be innuendosed as an incitement to riot and bloodshed, and (2) that it was slanderous to attribute to the pursuer the authorship of the letter. Terms of the issue *adjusted* to try the cause. *Waugh v. Ayrshire Post, Limited*, Dec. 22, 1893, p. 326.

Slander—Accusation of drunkenness—Master and Servant.

23. The head cook in a hotel raised an action of damages against her master, alleging that, being in a violent temper with her for asking for additional assistants in the kitchen, he had called out to her in a loud voice several times in a public part of the hotel, and in presence of several of her fellow-servants, "You are drunk and must go at once"; and further averring that these statements were false, malicious, and without probable cause, were injurious to the character of the pursuer, and hurtful to her feelings, and were made by the defender without taking the trouble to ascertain whether they were true or not and "simply to browbeat" the pursuer. *Held* that the action was irrelevant. *Macdonald v. Rupprecht*, Jan. 19, 1894, p. 389.

Slander—Bills posted up in stations by railway company setting forth convictions for offences against company.

24. A railway company is not liable in damages for slander by posting up in its stations bills announcing the names and addresses of persons who have been convicted of the offence of travelling without having previously paid the fare, and with intent to avoid payment thereof, or of other offences against the company's Acts and bye-laws, together with the date and nature of the offence and the result of the conviction. *Buchan v. North British Railway Co.*, Jan. 16, 1894, p. 379.

Slander—Issue—Counter Issue—Veritas.

25. In an action of damages for slander brought by an elder against a parish minister, the pursuer obtained an issue whether certain statements made by the defender on 16th July 1893 falsely and calumniously represented "that the pursuer was addicted to taking strong drink to excess, and that this was notorious to the parishioners. . . ." The defender who pleaded *veritas*, and set forth on record a number of occasions, giving dates and places, from 1887 onwards, on which he alleged that the pursuer had been intoxicated, proposed a counter issue in general terms. The Court, having regard to the specific averments on record to which the proof would be limited, *allowed* the counter issue. *Hunter v. MacNaughton*, June 5, 1894, p. 850.

Wrongous apprehension—Apprehension without a warrant.

26. In an action of damages for illegal apprehension brought by a seaman

REPARATION—*Continued.*

against a sergeant of police, the pursuer averred that while he was engaged in regular employment on board a trading steamer he had been arrested by the defender, without a warrant, on a charge of having received 10s. 7d. six months previously by false representations; and that the defender, having handcuffed the pursuer, took him from Leith (where he had been arrested) to Edinburgh and thence to Falkirk, where he was tried and acquitted. *Held* that the action was relevant. *Leask v. Burt*, Oct. 28, 1893, p. 32.

Wrongous apprehension—Liability of master for act of servant—Issue—Malice and want of probable cause—Merchant Shipping Act Amendment Act, 1862, secs. 35 and 37.

27. In an action of damages brought by a passenger against the owner of a passenger steamer, the pursuer averred that he had been wrongously apprehended by a purser in the employment of the defender, on the ground that he had refused to pay his fare. *Held* that the action was relevant, in respect (1) that the defender had a statutory power to arrest on the ground alleged, and (2) that, on the averments of the pursuer, the purser had acted within the scope of his employment as a servant of the defender, and an issue whether the defender had "wrongfully and illegally" caused the apprehension *approved*. *Lundie v. Macbrayne*, July 20, 1894, p. 1085.

Wrongous prosecution—Limitation of action—Summary Procedure Act, 1864, sec. 35.

28. *Held* that although a complaint bearing to be under the above Act had been quashed on account of defective instance, it was not the less a proceeding under the Act, and consequently that an action of damages for wrongous prosecution raised more than two months after the date of the complaint was barred by section 35. *Lundie v. Macbrayne*, July 20, 1894, p. 1085.

Taking decree in absence for debt paid after action raised—Agent and principal—Malice—Want of probable cause—Issue.

29. In an action for damages brought by B against X, a debt collector, the pursuer averred that the defender had been employed by A to recover a claim against the pursuer, and that the defender had raised an action in A's name in the Debts Recovery Court against him; that two hours before the diet of appearance X had received notice from A that the debt and expenses had been paid, and instructions to stop proceedings, but that notwithstanding he had maliciously caused decree in absence to be taken against B. Form of issue adjusted, in which "malice," but not "want of probable cause," was inserted. *Rhind v. Kemp & Co.*, Dec. 13, 1893, p. 275.

Wrongous use of diligence—Bank—Cheque.

30. Young, a writer in Glasgow, who had been instructed by a client to recover the sum due by Macdougall under a decree on which a charge expired on 29th December, on that day wrote to Macdougall, who lived in Dunoon, that unless the debt was paid next day a poiding would be executed, and payment not having been made, he, on 31st December, instructed a sheriff-officer to execute a poiding of Macdougall's furniture in Dunoon. On 3d January Young received from Macdougall a cheque for the amount due, but on presenting it at the bank he was informed that there were no funds to meet the cheque. He accordingly returned it to Macdougall. Macdougall returned the cheque to Young next day, 4th January, with a letter intimating that there were now funds in the bank. The cheque reached Macdougall's office about two o'clock on the 4th January, when he was absent on business, but his clerk ascertained from the bank that there were funds to meet the cheque, and Young was informed of this on his return to his office after bank hours that day. Next day, at about eleven o'clock, he presented the cheque (which was crossed) at his own bank with instructions to have it specially presented at Macdougall's bank. This was done, and Young was informed about two o'clock that day that the cheque

REPARATION—*Continued.*

had been paid. He then wrote to the sheriff-officer countermanding the pouncing. It had, however, been executed about one o'clock that day. Founding on these circumstances, Macdougall brought an action of damages for illegal pouncing against Young and his client. *Held* that Young's retention of the cheque on 4th January imported merely the duty of duly presenting it for payment, and, if paid, of duly countermanding the pouncing, that he had in fact so presented the cheque and countermanded the pouncing, and therefore that the defenders fell to be assoilzied. *Macdougall v. M'Nab*, Nov. 21, 1893, p. 144.

Breach of contract.

31. Agent and Client—Completion of title. *Auchincloss v. Duncan*, July 20, 1894, p. 1091.
32. Lease—Personal exception—Mora. *Emslie v. Young's Trustees*, March 16, 1894, p. 710; *Hughan v. Johnston*, May 22, 1894, p. 777; *Elliott's Trustees v. Elliott*, June 21, 1894, p. 858.
33. Lease—Excessive stock of game. *Elliott's Trustees v. Elliott*, June 21, 1894, p. 858.
34. Master and Servant—Assignment of contract of service by master. *Ross v. M'Farlane*, Jan. 19, 1894, p. 396.
35. Sale—Disconformity to contract—Consequential damages. *Wilson v. Carmichael & Sons*, March 20, 1894, p. 732.

Breach of contract—Measure of damages.

36. Interest—Rate of interest. *Dunn & Co. v. Anderston Foundry Co., Limited*, June 8, 1894, p. 880.
37. Contract to deliver in "about equal monthly quantities." *Ireland & Son v. Merryton Coal Co.*, July 13, 1894, p. 989.

Curator ad litem.

38. Entail—Disentail—Liability of curator *ad litem* to next heir for insufficient security. *Maxwell Heron v. Dunlop*, Dec. 8, 1893, p. 230.

RETENTION. *General lien—Fraud—Lessee holding himself out as true owner—Rollers for calico printing—Custom of trade.*

W. M. let out on hire to M. J. & Co., calico printers, certain copper rollers, on an agreement that the rollers should be marked with his name, and that in the event of M. J. & Co. parting with the custody of the rollers to any third person they should be delivered under a receipt bearing that they were "received from W. M." M. J. & Co., who had no printing works of their own, in accordance with a custom in the trade, sent their cloth with the rollers to be printed by H. & Sons, to whom they falsely represented that the rollers were their own property. M. J. & Co. having become insolvent, H. & Sons refused to deliver the rollers to W. M., on the ground that by an admitted custom of trade calico printers employed to print for others had a general lien over the cloth and rollers sent to them. *Held* that as M. J. & Co. had no power to subject W. M.'s rollers to the lien of H. & Sons, and as W. M. had done nothing to mislead H. & Sons into the belief that the rollers were the property of M. J. & Co., he was entitled to recover them. *Mitchell v. Heys & Sons*, Feb. 27, 1894, p. 600.

See *Company*, 12—*Lease*, 4.

REVENUE. *Income-tax—Investment Trust Company—Profits or gains—Property and Income-Tax Act, 1842, Schedule D—First case.*

1. The memorandum of association of a company stated that its objects were to raise money by share capital and invest the same in stocks and shares, to vary "the investments of the company, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company." *Held* that gains made by the company by realising investments at larger prices than those paid for them were to be reckoned as "profits and gains" of the company, in the sense of the Property and Income-Tax Act, 1842, Schedule D. *Scottish Investment Trust Co. Limited, v. Inland Revenue*, Dec. 12, 1893, p. 262.

REVENUE—Continued.

Income-tax—Deductions for wear and tear—Obsolete type of ship—Income-Tax Act, 1842, sec. 100, Schedule D, Case I. Rule iii.—Customs and Inland Revenue Act, 1878, sec. 12.

2. *Held* that the owners of a ship engaged in trade were not entitled under section 12 of the Act of 1878 to a deduction for depreciation in the value of their ship caused by ships of a better construction being built. *Burnley Steamship Co., Limited, v. Surveyor of Taxes*, July 10, 1894, p. 965.

Income-tax—Abatement—"Income"—Official residence—Manse—Income-Tax Act, 1842, sec. 167, Schedules A and E—Customs and Inland Revenue Act, 1876, sec. 8.

3. The Customs and Inland Revenue Act, 1876, sec. 8, allows an abatement from income-tax to a person assessed when "his total income from all sources" is less than £400. *Held* that the annual value of a manse occupied rent free by the minister of a congregation of the Free Church of Scotland, the feudal title to which was in trustees for behoof of the congregation, did not fall to be reckoned as "income" of the minister in the sense of the above section. *Inland Revenue v. Sutherland*, March 20, 1894, p. 753.

Inhabited house duty—Exemption—Business premises—Messengers—Customs and Inland Revenue Act, 1878, sec. 13, subsec. 2—Customs and Inland Revenue Act, 1881, sec. 24.

4. *Held* (1) that the words "for the protection thereof" in sec. 13, subsec. 2, of the Act of 1878 applied to "servant" as well as to "other person"; (2) that this construction was not modified by sec. 24 of the Act of 1881; and (3) that an insurance company were not within the exemption, in respect that two messengers who occupied the premises at night did not reside in the premises solely for the protection thereof. *Inland Revenue v. Standard Life Assurance Co.*, May 29, 1894, p. 820.

Inventory-duty—Stamp-duty on accounts—Voluntary settlement—Reservation of interest in property settled—Customs and Inland Revenue Act, 1881, sec. 38, subsec. 2 (c)—Customs and Inland Revenue Act, 1889, sec. 11, subsec. 1.

5. In 1887 W transferred to three of his sons, who formed a copartnership, the whole stock in trade and goodwill of his business. No cash was paid down by his sons, but they undertook, both as individuals and as a firm, to grant a bond of annuity in favour of their father, and after his death of their mother, equivalent to 5 per cent on the value of the stock in trade. The bond was in no way secured on the business. The sons further, in consideration of their father entering into the arrangement, discharged all claims competent to them on his death to any share of his estate. W died in 1893. In an action at the instance of the Inland Revenue to recover duty on the property so acquired by his sons, *held* that the transfer of the business was a voluntary settlement within the meaning of the Customs and Inland Revenue Act, 1881, sec. 38, subsec. 2, and that the annuity was an interest in the business reserved by implication to the settlor, and therefore that duty was payable. *Lord Advocate v. Wilson*, July 17, 1894, p. 997.

Inventory and legacy-duties—Double duties—Legatees identified by reference to will of another testator—Power of disposal—Stamp-Duties, &c., Act, 1845, sec. 4—Stamp-Duties Act, 1860, sec. 4.

6. A bequeathed one-third of the residue of her estate to B, and failing him to his executors and representatives. B predeceased A, leaving a will, under which he appointed executors. In addition to the inventory and legacy-duties payable by A's executors the Crown claimed inventory and legacy-duties from B's executors on one-third of A's residue on the ground that it had been disposed of by B's will. *Held* (aff. judgment of First Division) that B's executors were not liable for the duties claimed, as B had no power to dispose of, and had not disposed of, any part of A's estate. *Lord Advocate v. Bogie*, March 6, 1894, H. L., p. 6.

REVENUE—Continued.

Legacy-duty—Legacy compounded for less than the amount thereof—Act 36 Geo. III. cap. 52, secs. 23 and 37.

7. A competition between a person claiming a bequest on behalf of a class of beneficiaries under a will and the next of kin (a niece) of the testator, who maintained that the bequest was void from uncertainty, was terminated by joint minute under which each party received one-half of the subject of the bequest. The Court interposed authority to the minute, and in terms thereof ranked and preferred each claimant to one-half of the fund. The Crown then claimed legacy-duty at the rate of 10 per cent on the whole fund, on the ground that as the bequest had not been set aside the rate of duty for the whole was that payable by strangers in blood to the testator. The testator's next of kin maintained that the rate of duty on the half payable to her under the arrangement ought to be 3 per cent only. *Held* that, under section 23 of the Act, the bequest having been released for payment of one-half of its amount, duty at the rate of 10 per cent was payable on that half only, and that the half payable to the next of kin was liable to 3 per cent duty. *Lord Advocate v. Freckleton's Judicial Factor*, May 20, 1894, p. 743.

Legacy-duty—Entail—Money directed to be invested in land to be entailed—“Estate of inheritance”—36 Geo. III. cap. 52, secs. 12 and 19.

8. *Testamentary trustees were directed, during the period of six years next after the testator's death, to realise the residue of the trust-estate, and to purchase land to be entailed on A and a series of heirs. At the end of the six years A, whose right then vested, presented a petition for disentail, and having by private arrangement obtained the consents of the next three heirs on payment of compensation for their respective interests, as ascertained by an extra-judicial valuation, he obtained a decree ordaining the trustees to convey to him in fee-simple the lands and the moneys held by them for investment in land. The Crown thereupon claimed from the trustees legacy-duty upon the capital of the whole residue of the moveable estate, under the 19th section of the Act 36 Geo. III. c. 52. Held (in aff. judgment of First Division) (1) that the words “shall become entitled to an estate of inheritance in possession in real estate” fell to be construed as meaning shall become entitled, if real estate is purchased, to an estate of inheritance in possession; (2) that under the entail directed to be executed A, as institute, would have had an estate of inheritance in possession; and therefore (3) that under the will, and apart from the disentail proceedings, A was liable in duty on the whole residue in terms of the proviso in section 19 of the Act.*

Opinions that if A had been originally liable to duty on his life interest only, he would have become liable under sec. 12, to duty on the whole residue on his acquiring an absolute interest by the disentail proceedings.

Held further (aff. judgment of First Division) that money expended in building a mansion-house was not money expended in the purchase of real estate. Macfarlane v. Lord Advocate, June 1, 1894, H. L., p. 28.

9. With reference to the same succession held also (by the First Division) that a sum expended in the purchase of land prior to the lapse of the six years was exempt from legacy-duty. *Lord Advocate v. Dunlop's Trustees*, Jan. 12, 1894, p. 348.

RIGHT IN SECURITY. *Bond and disposition in security—Mails and duties—Reparation.*

1. *Held* that the creditor under a bond and disposition in security entering into possession of the security subjects under a decree of mails and duties and conducting himself as owner thereof, to the exclusion of the true owner, incurs the liabilities of an owner in questions with the public. *Baillie v. Shearer's Judicial Factor*, Feb. 1, 1894, p. 498.

Bond and disposition in security—Debtor's right to assignation of bond on payment.

2. Where the debtor under a bond and disposition in security has sold the security subjects under burden of the bond, he is entitled, on being called

RIGHT IN SECURITY—*Continued.*

on to make payment of the bond under his personal obligation, to require the creditor, as a condition of payment, to assign the bond to him. *North Albion Property Investment Co., Limited, v. MacBean's Curator Bonis*, Nov. 14, 1893, p. 90.

Bond and disposition in security—Assignment—Unconditional offer and acceptance—Implement—Defect in bond.

3. The holders of a bond and disposition in security having advertised the security subjects for sale, the firm of A & B, who had a reversionary interest in the subjects, in consideration of the bondholders having agreed to withdraw the subjects from sale, bound themselves, by letter, personally to take an assignment of the bond and to pay the amount therein with interest. This was agreed to by letter, and the subjects were withdrawn from sale. Thereafter A & B refused to implement the contract, on the ground that they had discovered that the bond was not a valid security over the subjects *quoad* the interest, and that its validity in this respect was an implied condition of their obligation. In an action at the instance of the holders of the bond against A & B for implement of the contract, *held* that A & B were bound to take over the bond whether it was defective or not. *Forbes v. Welsh & Forbes*, March 8, 1894, p. 630.

Bond and disposition in security—Bond for indefinite sum—Rate of interest not specified.

4. *Held* by Lord Low (Ordinary) that a heritable bond for a principal sum "with interest," the rate not being specified, did not constitute a valid security *quoad* the interest, as bearing to impose a burden of indefinite amount. *Opinions in the Inner-House reserved.* *Forbes v. Welsh & Forbes*, March 8, 1894, p. 630.

Ex facie absolute disposition—Evidence that a disposition ex facie absolute was really in security—Title to sue.

5. In 1880 A, the owner of house property, granted for onerous causes and considerations an *ex facie* absolute disposition thereof to a bank to which he owed £2500. The bank was infest. In 1893 A raised an action against the railway company for the damage done to the property in 1890. *Held* that it had been proved that A's disposition in 1880 was in security merely, and that as he had not been divested of the radical right to the subjects he had a good title to sue. *M'Bride v. Caledonian Railway Co.*, March 7, 1894, p. 620.

Ex facie absolute disposition and recorded back-letter—Sale by creditor—Sale by private bargain.

6. B was infest in heritable subjects on an *ex facie* absolute disposition granted by A. Subsequently a minute of agreement between A and B was recorded, which provided that on repayment of an advance made by B to A, the former should be bound to reconvey the subjects to A, but that in the meanwhile B's right to sell the subjects should "remain as entire as if this minute of agreement had not been entered into and as if the absolute right of proprietorship and beneficial interest of the said B had been in no way qualified by this minute of agreement; and further, that in the event of the creditor selling the said subjects, or any part or portion thereof, which he is specially authorised to do as aforesaid, and that at any time or times, by public roup or private bargain," he should be bound to account to the debtor for any balance in his hands after repayment of his advances. The creditor sold the subjects by private bargain and tendered a conveyance granted by himself alone. The buyer objected to the title offered. In an action by the seller for implement of the contract of sale, *held* that the conveyance offered was sufficient, the seller being entitled to sell by private bargain. *Duncan v. Mitchell & Co.*, Nov. 3, 1893, p. 37.

Lease—Trade fixtures.

7. A tenant assigned to his landlord certain trade fixtures on the subjects let, in security of advances. In a question between the landlord and the tenant's creditors, *held* that the fixtures being *partes soli* were the property of the

RIGHT IN SECURITY—*Continued.*

landlord, and that the tenant's assignation operated as a valid renunciation of his right to remove them so long as the debt was not paid. *Miller v. Muirhead*, March 10, 1894, p. 658.

Pledge—Bill of lading.

8. Bill of lading handed over in security of loan—Handing of bill of lading to borrowers, as agents for lenders, to obtain delivery of the goods, and to sell for behoof of lenders. *Held* that by handing over bill of lading the lenders had lost their real security. *North-Western Bank, Limited, v. Poynter, Son, & Macdonald*, Feb. 2, 1894, p. 513.

See *Entail*, 1—*Sale*, 6.

RIVER. *River navigable but non-tidal—Fishings—Trout-fishing.*

In a question between a riparian proprietor and a member of the public, *held* (1) that a right in the public of being at or on the non-tidal portion of a river for the purposes of navigation does not entitle them to fish for trout therein, and (2) that such a right of fishing cannot be acquired by prescriptive use. *Grant v. Henry*, Jan. 12, 1894, p. 358.

ROAD. *Public Road—Water-pipe—Compulsory Powers—Ultra vires—Railway—Statute—Construction—Water-Works Clauses Act, 1847, secs. 28 and 29.*

1. Public water commissioners had statutory authority to lay a line of water-pipes along a road which passed over two girder bridges belonging to a railway company. *Held*, upon a construction of secs. 28 and 29 of the Water-Works Clauses Act, 1847, that it was *ultra vires* of the commissioners to carry the pipes through the stone abutments of the bridges and to sling them from the girders. *Glasgow and South-Western Railway Co. v. Magistrates of Glasgow*, July 17, 1894, p. 1033.

Public right of way for foot-passengers over road suited for carriage traffic—Right of proprietor to erect gates to prevent carriage traffic.

2. *Held (diss. Lord Rutherford Clark)* that the proprietor of a road, which was suited for carriage traffic, and of the whole of which the public had been found entitled to "the free use," for foot-passengers only, was entitled to erect, and to keep locked, gates at each end of the road, across the carriage-way, for the purpose of preventing any public traffic along the road other than that of foot-passengers, swing-gates being left unlocked at each end sufficient to permit the entrance and egress of foot-passengers. *Lord Donington v. Mair*, May 31, 1894, p. 829.

Declaration by County Council that road should cease to be highway—Sheriff—Finality of Sheriff's judgment—Roads and Bridges Act, 1878, secs. 3, 42, and 43.

3. A County Council having determined that a particular road should cease to be a highway, three ratepayers appealed to the Sheriff, pleading (1) that it was incompetent for the County Council to declare that the road should cease to be a highway in respect that it was part of a road which extended beyond the confines of the county; and (2) that if competent, the determination of the County Council was, in the circumstances, an injudicious exercise of their powers and one which would cause public inconvenience. A record having been made up, the Sheriff-substitute appointed parties to debate on the "preliminary pleas," and thereafter pronounced an interlocutor repelling the pleas in law for the pursuers and "dismissing" the action. The pursuers appealed to the Sheriff, who recalled the foregoing interlocutor and appointed the case to be heard by himself. The County Council then brought a reduction of the Sheriff's interlocutor. The Court *dismissed* the action as incompetent, holding further that notwithstanding sec. 43 of the above Act, the Sheriff had acted within his powers in recalling the Sheriff-substitute's interlocutor and appointing the cause to be heard before himself, in respect that the Sheriff-substitute had not disposed of the merits of the appeal from the determination of the County Council, and that the question of competency was in any event subject to appeal.

—Continued.

County Council of Roxburgh v. Dalrymple's Trustees, July, 19, 1894, p. 1063.

Police, 5 to 13—*Property*, 1—*Reparation*, 3, 14.

Sale of heritage—Warrandice.

The purchaser of a heritable subject, holding a disposition containing a clause of absolute warrandice, has no remedy under the warrandice clause other than a claim for indemnity for loss sustained through eviction. *Welsh v. Russell*, May 19, 1894, p. 769.

Defect in title—Right to cancel—Tender of valid title after action raised for implement.

A purchaser of heritage objected to the title tendered by the seller on the ground that it was defective. The seller having written a letter refusing to give any other title, the purchaser repudiated the contract. In the course of an action brought by the seller against the purchaser for implement, the pursuer admitted that the title previously tendered was defective, but tendered a valid title. *Held* that the purchaser had been justified in rescinding from the contract, and was entitled to absolvitor. *Gillfillan v. Cadell & Grant*, Dec. 12, 1893, p. 269.

Lease—Farm—Right to take peats from another part of estate—Sale of farm and of peat moss to different persons—Rent—Abatement—Retention—Act, 1449, cap. 18.

In 1880 the tenant of a farm renewed his lease of the farm, "all as possessed by him." For many years he and his predecessors in the farm had been in use to take peats from a moss on another part of the landlord's estate, a particular lair being appropriated to the farm. In 1887 the proprietor sold the moss, and subsequently sold the farm. *Held* in a question between the tenant and the purchaser of the farm that the tenant had under his lease a right to take peats from the moss, and that he was entitled to an abatement from his rent corresponding to the value of the right to take peats of which he had been deprived.

Opinion (per Lord Young) that the tenant's right to take peats from the moss was not protected by the Act 1449, cap. 18, so as to be good against singular successors in the ownership of the peat moss. *Duncan v. Brooks*, May 17, 1894, p. 760.

Assignment to bond and disposition in security—Unconditional offer and acceptance—Implement—Defect in bond.

The holders of a bond and disposition in security having advertised the security subjects for sale, the firm of A & B, who had a reversionary interest in the subjects, in consideration of the bondholders having agreed to withdraw the subjects from sale, bound themselves, by letter, personally to take an assignment of the bond and to pay the amount therein with interest. This was agreed to by letter, and the subjects were withdrawn from sale. Thereafter A & B refused to implement the contract, on the ground that they had discovered that the bond was not a valid security over the subjects *quoad* the interest, and that its validity in this respect was an implied condition of their obligation. In an action at the instance of the holders of the bond against A & B for implement of the contract, *held* that A & B were bound to take over the bond whether it was defective or not. *Forbes v. Welsh & Forbes*, March 8, 1894, p. 630.

Sale of moveables—Principal and Agent—Title to sue.

On 31st March Stewart, Brown, & Company sent the following sale-note to Biggart & Fulton:—"We have this day sold to you, on account of Stevenson & Company, Manila, 100 tons of sugar at £10, 17s. 3d. c. i. f. Liverpool . . . we to accept shippers' drafts at 3 m/s." Biggart & Fulton authorised Stewart, Brown, & Company to take delivery of and sell the sugar on arrival in Liverpool and to credit themselves with the proceeds against the price, and their outlay in taking delivery of the sugar and selling it. The proceeds of the sale in Liverpool were insufficient to meet the price, &c., and Stewart, Brown, & Company (together with

SALE—Continued.

Stevenson & Company) sued Biggart & Fulton for the difference. In defence Biggart & Fulton pleaded no title to sue, in respect that Stewart, Brown, & Company, as agents for a disclosed principal, had no title, and that Stevenson & Company had no title, as they had made no contract with Biggart & Fulton. On a proof it appeared that Stevenson & Company were in the custom of sending cargoes of sugar to this country for sale, but instead of breaking the cargoes into quantities to suit purchasers they disposed of them entire to brokers upon contracts which bore that the broker was "buyer" of the cargo at a certain sum per ton. The broker then disposed of the sugar in lots to the buyers whom he had secured at a somewhat increased rate per ton, he receiving the difference. Stewart, Brown, & Company held the cargo, of which the 100 tons in question was a part, on a contract in these terms, and disposed of it in this way to different purchasers. *Held* that Stewart, Brown, & Company, as agents for Biggart & Fulton in paying the price, taking delivery of the sugar, and reselling it at Liverpool, were entitled to recover the sum sued for.

Question, whether the pursuers had a title to sue upon the sale-note of 31st March. *Stewart, Brown, & Co. v. Biggart & Fulton*, Dec. 13, 1893, p. 293.

Sale of moveables—Delivery—Possession—Marriage-contract—Conveyance to marriage-contract trustees retenta possessione.

6. In December 1883 M's estates were sequestrated, but before a trustee had been appointed a deed of arrangement was executed between M and his creditors and B. By this deed M assigned his furniture to B in consideration of payment of a sum exceeding its value by way of composition to the creditors. B thereafter assigned the furniture to the trustees under M's antenuptial marriage-contract for behoof of M's wife in liferent, and of the children of the marriage in fee, M's *jus mariti* being excluded. The furniture was allowed to remain in the house then occupied by M and his wife, which belonged to the trustees, and on the spouses removing to another house in 1884 the furniture was taken with them. In 1890 M sold the furniture to G, and G let the furniture on hire to M. The furniture remained with M and his wife. In an action by the marriage-contract trustees to have G interdicted from removing the furniture, *held* that the right to the furniture was in the trustees, in respect that since the date of the assignation in their favour M's wife had been in actual possession of it as liferentrix, and that the trustees had accordingly been in civil possession through her, and that G therefore had no title to it, and interdict *granted*. *Mitchell's Trustees v. Gladstone*, Feb. 27, 1894, p. 586.

Sale of moveables—Subsale—Factors Act, 1889, sec. 9—Factors (Scotland) Act, 1890.

7. Ainslie & Company sold certain casks of whisky in their bonded warehouse to Davis & Company, and gave them a delivery-order for the whisky on Anderson, the keeper of Ainslie & Company's bonded warehouse. *Question* whether Davis & Company were "mercantile agents in possession" of a document of title in the sense of the 9th section of the Factors Act, 1889. *Browne & Co. v. Ainslie & Co.*, Nov. 28, 1893, p. 173.

Sale of moveables—Disconformity to contract—Timeous inspection by buyer—Loss of profit—Consequential damages.

8. In June 1891, W, a market gardener, ordered from a firm of seed-merchants 30 lbs of "Enfield market cabbage" seed, an early variety of cabbage. The invoice and the packet in which the seed was sent bore that the seed was of the variety ordered. W sowed the seed in his own garden, and retailed the plants to customers who ordered early cabbage plants, some in September 1891, but the bulk in March, April, and May 1892. In May 1892, when most of the plants were sold, W discovered that the crop was of a late variety, and ploughed down the remaining plants. In an action for damages against the seed-merchants it was proved that a skilled gardener could have discovered in September 1891 that the

SALE—*Continued.*

plants were disconform to contract. *Held* (1) that W was entitled to damages in respect that, owing to the defenders' breach of contract, his ground had been for a considerable time occupied with an unremunerative crop; but (2) that inasmuch as he had failed to discover, as he would have done had he made an inspection, the mistake in the variety of plant in September 1891, he was not entitled to damages on the grounds that claims of damages had been made against him by the buyers of the plants, and that he had lost business owing to the disappointment of his customers. *Wilson v. Carmichael & Sons*, March 20, 1894, p. 732.

Sale of moveables—Pactum illicitum—Weights and Measures Act, 1878, sec. 14, 19.

9. *Held* that a bargain to deliver 600 stones of hay, each stone to weigh 24 imperial pounds, was not void under the provisions of the Weights and Measures Act, the transaction being a sale by an imperial weight, namely, the pound. *Lang v. Cameron*, Jan. 10, 1894, p. 337.

Sale of moveables—Offer and acceptance—"This for reply by" a day named—Time.

10. An offer to buy certain goods bore, "This for reply by Monday, 6th inst." A letter accepting the offer was posted on the evening of Monday, the 6th, and did not reach the offerer until the next day. *Held* that the offer had been timeously accepted. *Jacobsen, Sons, & Co. v. Underwood & Son, Limited*, March 10, 1894, p. 654.

Sale of moveables—"Equal monthly quantities of 300 tons maximum."

11. On 5th March 1891 Waldie, a coalmaster, by sale-note contracted with Barr to sell 2500 tons of coal "in equal monthly quantities in lots of 300 tons maximum." A letter accompanying the sale-note stated "that if necessary you"—Barr—"are to extend the period of delivery somewhat." *Held* that the contract imported that the deliveries of coal were to be in monthly quantities as nearly as might be of 300 tons each, but never more. *Barr v. Waldie*, Dec. 8, 1893, p. 224.

Sale of moveables—Subsale—Intimation—Arrestment—Mercantile Law Amendment Act, 1856, sec. 3.

12. In January 1891 Ainslie & Company, of Leith, sold to Davis & Company, of London, twenty hogsheads of whisky, which were lying in Ainslie & Company's bonded warehouse at Leith, and gave Davis & Company a delivery-order for the whisky on Anderson, their warehouse-keeper, and Davis & Company sent this delivery-order to Anderson, intimating that they would grant delivery-orders on him for the whisky. Davis & Company paid the price of the whisky to Ainslie & Company. In April 1892 Ainslie & Company arrested the whisky, which had been sold to Browne & Company, but was still in Ainslie & Company's bonded warehouse, for a debt due to them by Davis & Company. In an action by Browne & Company against Ainslie & Company for delivery of the whisky, Ainslie & Company pleaded that they were entitled to arrest in virtue of the Mercantile Law Amendment Act, 1856, sec. 3, the subsales not having been intimated to them within the meaning of the Act. A proof shewed that Browne & Company had neither intimated nor authorised anyone to intimate the subsale to Ainslie & Company, but Ainslie & Company knew that the subsale had taken place. *Held* that the arrestments were ineffectual in competition with Browne & Company. *Browne & Co. v. Ainslie & Co.*, Nov. 28, 1893, p. 173.

Sale of ship—Title to sue—Acquisition of right and title after action raised.

13. A, the purchaser of a vessel from B, brought an action of damages in his own name and as assignee of B against C for injuries which had been done to the vessel prior to the date of the purchase. The summons was served on the 28th June 1893. On the 29th June the seller of the ship assigned to A all claims competent to him against C. *Held* (1) that at the date of the action A had no right to damages for injury done to the vessel prior to

SALE—Continued.

his purchase, and had no title to sue; and (2) that the subsequent assignation did not remedy the defect. *Symington v. Campbell*, Jan. 30, 1894, p. 434.

Sale of business—Resale for enhanced price—Subvendee—Reduction—Title to sue reduction of original contract.

14. An arrangement was made for the sale of a brewery by A to B at a price of £20,500 fixed on the basis of profits for the last two years as shewn by the books. The books were examined by an accountant employed by B, and the sale was completed. B sold the brewery to C for £28,500, which was fixed without reference to profits, and A, at B's request, conveyed the brewery to C. It was afterwards discovered that A's books contained false entries largely increasing the apparent profits, which had been made by his clerk without his knowledge. C in his own name and as B's assignee, and B, raised an action against A for reduction of the contract between A and B, and of the conveyance by A to C, C offering restitution in integrum. Held in aff. judgment of the First Division which assolizied A (1) that as C was not privy to the contract between A and B, he had no title to reduce it; (2) that as B had no interest in the subjects after the conveyance by A to C, he had no title to reduce the said contract. *Edinburgh United Breweries, Limited, v. Molleson*, March 9, 1894, H. L., p. 10.

Sale of business—Agreement to sell business on condition of buyer being satisfied as to profits after examination of the books.

15. An agreement for the sale of a brewery business at a certain price set out that the arrangement proceeded upon the basis that the profits during the two preceding years amounted to a certain sum upon an average, and that "in the event of it being ascertained that this is not the fact the arrangement shall be at an end"; and further bore, that B, the purchaser, "with the view of verifying the amount of the profits for the said two years, shall immediately, upon delivery hereof, be entitled to have the books," &c., connected with the business, examined by an accountant. The balance-sheets and books were examined by accountants employed by the buyer, and thereafter the contract of sale was completed. The buyer thereafter agreed to assign his rights as purchaser to a company, and at his request the original seller conveyed the brewery to the company. In an action brought by the company as B's assignee, and with his concurrence, against the original seller for reduction of the sale to B, on the ground that it had been ascertained that the amount of the profits set forth as the basis of the price was not the true amount of profits, and that in terms of the contract the sale fell to be reduced, held that the condition as to the amount of profits lapsed on the completion of the sale. *Edinburgh United Breweries, Limited, v. Molleson*, March 9, 1894, H. L., p. 10.

Sale of moveables—Construction.

16. Sale of 3000 tons of coal to be delivered "over next four months" in "average" or "about equal" monthly quantities. *Ireland v. Merryton Coal Co.*, July 13, 1894, p. 989.

See *Judicial Factor*, 5—*Railway*, 2 to 9—*Right in security*, 2, 6—*Tramway—Trust*, 4.

SCHOOL. *Emoluments of teacher appointed prior to Act—Government grant—Education (Scotland) Act, 1872.*

1. Action dismissed as irrelevant, in respect that the pursuer had no right to the Government grant in virtue of his office as an "old" teacher, and had stated no relevant case of a specific contract with the school board giving him a right thereto. *M'Vicar v. School Board of Kiltarn*, Jan. 31, 1894, p. 459.
- Trust—Scheme—Nobile officium—Multiplepoinding—Trusts (Scotland) Act, 1867, sec. 16—Education (Scotland) Act, 1872, sec. 38.*
2. Multiplepoinding in which the Court approved of a scheme for the allocation of the price obtained by the compulsory sale of a school-house which had been built by the kirk-session of a parish. *Old Monkland School Board v. Bargeddie Kirk-Session*, Nov. 15, 1893, p. 122.

SECRETARY FOR SCOTLAND. See *Police*, 14.

SERVITUDE. See *Fishing*, 1—*Property*, 1.

SEXENNIAL LIMITATION. See *Bill of Exchange*.

SHERIFF. *Jurisdiction—Judicial factor*.

1. *Question*, whether it is competent to sue in the Sheriff Court a judicial factor appointed by the Court of Session. *Hallpenny v. Howden*, July 4, 1894, p. 945.

Jurisdiction—Bankruptcy—Sequestration—Bankruptcy (Scotland) Act, 1856, *secs.* 26 and 30.

2. *Held* that it is *ultra vires* of a Sheriff to consider the question of jurisdiction in a petition for sequestration until the diet to which the debtor is cited, under *sec.* 26 of the Bankruptcy Act, 1856, to shew cause why sequestration should not be awarded. *Hope v. Macdougall*, Nov. 7, 1893, p. 49.

Criminal jurisdiction—Burgh Police (Scotland) Act, 1892, *secs.* 447, 454, 508, and 509.

3. The Burgh Police (Scotland) Act, 1892, does not deprive the Sheriff of a county of jurisdiction to try persons for offences committed within a burgh in the county. *Cameron v. Macniven*, Jan. 23, 1894, *Just. Cases*, p. 31.

Interlocutor—Findings in fact—Act of Sederunt, 15th February 1851.

4. An interlocutor of a Sheriff disposing of a case in which a proof had been led contained no findings in fact as required by the Act of Sederunt, 15th February 1851. The Court *remitted* to the Sheriff to recall the interlocutor, and pronounce one in the form prescribed by the Act of Sederunt. *Mackay v. Mackenzie*, June 12, 1894, p. 894.

Appeal—Competency—Statutory declaration of finality—Competency of appeal from Sheriff-substitute to Sheriff—Reduction of Sheriff's interlocutor—Road—County Council—Roads and Bridges (Scotland) Act, 1878, *secs.* 3, 42, and 43.

5. A County Council having determined that a particular road should cease to be a highway, three ratepayers appealed to the Sheriff, pleading (1) that it was incompetent for the County Council to declare that the road should cease to be a highway in respect that it was part of a road which extended beyond the confines of the county; and (2) that if competent, the determination of the County Council was, in the circumstances, an injudicious exercise of their powers and one which would cause public inconvenience. A record having been made up, the Sheriff-substitute appointed parties to debate on the "preliminary pleas," and thereafter pronounced an interlocutor repelling the pleas in law for the pursuers and "dismissing" the action. The pursuers appealed to the Sheriff, who recalled the foregoing interlocutor and appointed the case to be heard by himself. The County Council then brought a reduction of the Sheriff's interlocutor. The Court *dismissed* the action as incompetent, holding further that notwithstanding *sec.* 43 of the above Act the Sheriff had acted within his powers in recalling the Sheriff-substitute's interlocutor and appointing the cause to be heard before himself, the Sheriff-substitute not having disposed of the merits of the appeal from the determination of the County Council, and that the question of competency was in any event subject to appeal. *County Council of Roxburgh v. Dalrymple's Trustees*, July 19, 1894, p. 1063.

Appeal—Competency—Railway Clauses Consolidation (Scotland) Act, 1845, *sec.* 61.

6. *Held* that no appeal lies to the Court of Session against a determination of a Sheriff-substitute under the above section. *Main v. Lanarkshire and Dumbartonshire Railway Co.*, Dec. 19, 1893, p. 323.

Appeal—Competency—Arbitration—Glasgow District Subway Act, 1890, *sec.* 56.

7. Under a private Act of Parliament all differences were to be referred to an arbiter appointed "by the Sheriff of the county of Lanark." *Held* that in

SHERIFF—Continued.

appointing an arbiter under this enactment the Sheriff was not acting in his judicial capacity, and that, therefore, an appeal to the Court of Session against his appointment was incompetent. *Magistrates of Glasgow v. Glasgow District Subway Co.*, Nov. 8, 1893, p. 52.

See *Railway*, 6.

SHIPPING LAW. Bill of lading—Proof—Onus.

1. Where the quantity of goods delivered by a vessel at the port of discharge is less than that stated in the bill of lading the *onus* of proving that the quantity referred to in the bill of lading was not in fact shipped lies upon the owner of the vessel. *Horsley v. J. & A. D. Grimond*, Jan. 23, 1894, p. 410.

Bill of lading—Right in security.

2. Bill of lading handed over in security of loan—Handing of bill of lading to borrowers as agents for lenders to obtain delivery of goods and to sell for behoof of lenders. *Held* that by handing over the bill of lading the lenders had lost their real security. *North-Western Bank, Limited, v. Poynter, Son, & Macdonald*, Feb. 2, 1894, p. 513.

Charter-party—Charterer's right to freight earned for deck cargo.

3. Where a charter-party binds the shipowners to carry a full and complete cargo for a lump sum, the charterer is not entitled to any freight which the ship may earn by goods stored on deck. *Wills & Co. v. Burrell & Son*, Feb. 2, 1894, p. 527.

Shipbroker—Agent and Principal—Commission.

4. Circumstances in which it was *held* that a shipbroker who had first introduced to a firm of shipbuilders the name of a person who afterwards bought a ship from them was not entitled to any commission, the introduction having in no way contributed to bring about the sale. *Jacobs & Co. v. McMillan & Son, Limited*, March 8, 1894, p. 623.

Collision—Regulations for preventing collisions at sea under Order of Council, 11th August 1884, articles 15, 18, 19, and 21.

5. The steamships "*Thorsa*" and "*Otto*" were approaching each other end-on, or nearly so, in daylight in the Sound. When they were a mile apart the "*Thorsa*" signalled in manner provided by the 19th article of the Regulations for preventing collisions at sea of 1884, that she was (in terms of article 15 of these Regulations) about to alter her course to starboard to pass the "*Otto*" on the port side, and at the same time she put her helm to port, and brought her head a point, or nearly a point, to starboard. The "*Otto*" heard, but disregarded the signal, and kept her course. When the ships were within half a mile, the "*Thorsa*" repeated the signal, and again ported her helm. The "*Otto*" immediately thereafter starboarded her helm, bringing her head to port, and shaped a course across the bows of the "*Thorsa*." The "*Thorsa*" immediately stopped and reversed her engines, but a collision took place, and the "*Otto*" sank. In cross actions by the owners of the vessels the owners of the "*Otto*," while admitting that their vessel had been in fault, maintained that the "*Thorsa*" had also been in fault, in respect that she did not stop and reverse her engines when the risk of collision first became apparent. *Held* (aff. judgment of Second Division) that no fault was attributable to the "*Thorsa*," in respect (1) that it was proved that at her second porting the "*Thorsa*" had done enough to determine the risk of collision if the "*Otto*" had kept her course; and (2) that she had complied with article 18, as she had stopped and reversed as soon as it became apparent that it was "necessary" so to do, i.e., when the "*Otto*" changed her course so as to cross the bows of the "*Thorsa*." *Wilson, Sons, & Co. v. Currie*, March 13, 1894, H. L., p. 17.

Reparation—Title to sue—Acquisition of right and title after action raised.

6. A, the purchaser of a vessel from B, brought an action of damages in his own name and as assignee of B against C for injuries which had been done to the vessel prior to the date of the purchase. The summons was served on the 28th June 1893. On the 29th June the seller of the ship assigned

SHIPPING LAW—*Continued.*

to A all claims competent to him against C. *Held* (1) that at the date of the action A had no right to damages for injury done to the vessel prior to his purchase, and had no title to sue; and (2) that the subsequent assignation did not remedy the defect. *Symington v. Campbell*, Jan. 30, 1894, p. 434.

Reparation—Danger to ship at quay—Obstruction by vessel lying outside and parallel—Right to cut mooring ropes of outside vessel to escape danger.

7. While the s.s. "Dunlossit" was lying at a quay the s.s. "Easdale" came in, in the evening, took up her position outside and close to the "Dunlossit," and moored herself to the shore by ropes crossing the stem and stern of the "Dunlossit." A gale rose during the night, and the position of both vessels became perilous. During the night the master of the "Dunlossit" repeatedly asked the master of the "Easdale" to move, so that the "Dunlossit" might escape, but the master of the "Easdale" did not do so. In the morning the master of the "Dunlossit," after giving warning of his intention, cut the mooring ropes of the "Easdale" and steamed away. The "Easdale" was then driven ashore by the wind and damaged. In an action of damages at the instance of the owner of the "Easdale" against the owners of the "Dunlossit," *held* that the cutting of the ropes was *prima facie* an illegal act, and that the defenders had failed to justify it, and were therefore liable in damages for the consequences of the act. *Currie v. Allan*, July 17, 1894, p. 1004.

See *Company*, 13—*Justiciary Cases*, 16—*Reparation*, 7, 27, 28—*Revenue*, 2.

STATUTE. *Private Act—Railway.*

1. Observations on the construction of private Acts of Parliament amalgamating railway companies, as affecting the rights of companies not parties to the Act. *Aberdeen Joint Station Committee v. Great North of Scotland Railway Company*, Nov. 14, 1894, H. L., p. 48.

Construction of statute—Title to sue—Declarator.

2. The magistrates of a police burgh having intimated that they claimed, under the Burgh Police (Scotland) Act, 1892, to be the licensing authority for the sale of excisable liquors within the burgh, a publican holding a licence for premises in the burgh, which had been granted by the county Justices, brought an action for declarator that the licensing jurisdiction within the burgh had not been transferred from the county Justices to the burgh magistrates, and for interdict against the magistrates acting as the licensing authority. *Held* that the pursuer had a title to sue. *Tennent v. Magistrates of Partick*, March 20, 1894, p. 735.

Rules made in virtue of statute—Patents, Designs, and Trade-Marks Acts, 1883 and 1888.

3. Opinion that rules made by the Board of Trade bearing to be made in virtue of the above Act were *intra vires* of the Board, and that it was not competent for a Court of law to entertain any question as to the validity of these rules. *Institute of Patent-Agents v. Lockwood*, June 11, 1894, H. L., p. 61.

See *Police*, 4, 14, 15—*Public-House*, 3, 5, 8—*Road*, 1, 3—*Sheriff*, 3, 6, 7.

STATUTES.

1449, cap. 18. See *Lease*, 4.

1695, cap. 5 (*Septennial Limitation Act*). See *Caution*, 2.

36 Geo. III. cap. 52. See *Revenue*, 7, 8.

5 Geo. IV. cap. 87 (*Aberdeen Act*). See *Entail*, 2.

6 Geo. IV. cap. 120 (*Judicature Act, 1825*). See *Process*, 32, 33, 34.

9 Geo. IV. cap. 58 (*Home Drummond Act*). See *Public-House*, 3, 5.

1 and 2 Will. IV. (*General Turnpike Act, 1831*). See *Police*, 6.

2 and 3 Will. IV. cap. 68 (*Day Trespass Act*). See *Justiciary Cases*, 19.

5 and 6 Vict. cap. 35 (*Property and Income-Tax Act, 1842*). See *Revenue*, 1, 2, 3.

STATUTES—Continued.

- 8 and 9 Vict. cap. 19 (*Lands Clauses Consolidation Act*, 1845). See *Railway*, 2, 3.
- 8 and 9 Vict. cap. 33 (*Railways Clauses Consolidation Act*, 1845). See *Railway*, 4, 5, 6, 7, 8.
- 8 and 9 Vict. cap. 76 (*Stamp-Duties, &c., Act*, 1845). See *Revenue*, 6.
- 8 and 9 Vict. cap. 83 (*Poor-Law Amendment Act*, 1845). See *Poor*, 2, 3.
- 10 and 11 Vict. cap. 17 (*Water-Works Clauses Act*, 1847). See *Road*, 1.
- 17 and 18 Vict. cap. 91 (*Valuation of Lands Act*, 1854). See *Valuation Acts*.
- 17 and 18 Vict. cap. 104 (*Merchant Shipping Act*, 1854). See *Justiciary Cases*, 16.
- 19 and 20 Vict. cap. 58 (*Burgh Voters Act*, 1856). See *Election Law*, 1.
- 19 and 20 Vict. cap. 60 (*Mercantile Law Amendment Act*, 1856). See *Sale*, 12.
- 19 and 20 Vict. cap. 79 (*Bankruptcy Act*, 1856). See *Bankruptcy*.
- 20 and 21 Vict. cap. 71 (*Lunacy Act*, 1857). See *Poor*, 4.
- 23 Vict. cap. 15 (*Stamp-Duties Act*, 1860). See *Revenue*, 6.
- 25 and 26 Vict. cap. 35 (*Public-Houses Acts Amendment Act*, 1862). See *Public-House*, 1, 2, 3, 5, 6.
- 25 and 26 Vict. cap. 54 (*Lunacy Act*, 1862). See *Poor*, 4.
- 25 and 26 Vict. cap. 63 (*Merchant Shipping Act Amendment Act*, 1862). See *Reparation*, 27.
- 25 and 26 Vict. cap. 89 (*Companies Act*, 1862). See *Company*.
- 25 and 26 Vict. cap. 101 (*General Police and Improvement Act*, 1862). See *Police*, 1, 2, 5.
- 27 and 28 Vict. cap. 53 (*Summary Procedure Act*, 1864). See *Justiciary Cases*, 16, 17, 19, 20—*Reparation*, 28.
- 29 and 30 Vict. cap. 112 (*Evidence Act*, 1866). See *Process*, 17.
- 29 and 30 Vict. cap. cclxxiii. (*Glasgow Police Act*, 1866). See *Reparation*, 6.
- 29 and 30 Vict. cap. ccl. (*The Caledonian and Scottish North-Eastern Railways Amalgamation Act*, 1866). See *Railway*, 10.
- 30 and 31 Vict. cap. 97 (*Trusts Act*, 1867). See *Trust*, 4, 8, 9, 14.
- 30 and 31 Vict. cap. 101 (*Public Health Act*, 1867). See *Justiciary Cases*, 15—*Public Health*, 2.
- 30 and 31 Vict. cap. 131 (*Companies Act*, 1867). See *Company*, 8, 10, 11.
- 31 and 32 Vict. cap. 48 (*Representation of the People Act*, 1868). See *Election Law*, 2.
- 31 and 32 Vict. cap. 100 (*Court of Session Act*, 1868). See *Process*, 5, 7 to 10.
- 31 and 32 Vict. cap. 121 (*Pharmacy Act*, 1868). See *Public Health*, 3.
- 33 and 34 Vict. cap. 78 (*Tramways Act*, 1870). See *Tramway*.
- 34 and 35 Vict. cap. 112 (*Prevention of Crimes Act*, 1871). See *Justiciary Cases*, 2.
- 35 and 36 Vict. cap. 62 (*Education Act*, 1872). See *School*, 1, 2.
- 37 and 38 Vict. cap. 94 (*Conveyancing Act*, 1874). See *Superior and Vassal*, 1.
- 38 and 39 Vict. cap. 62 (*Summary Prosecutions Appeals Act*, 1875). See *Justiciary Cases*, 15.
- 39 and 40 Vict. cap. 16 (*Customs and Inland Revenue Act*, 1876). See *Revenue*, 3.
- 39 and 40 Vict. cap. 45 (*Industrial and Provident Societies Act*, 1876). See *Provident Society*.
- 39 and 40 Vict. cap. 49 (*Burgh Gas Supply Act*, 1876). See *Police*, 3.
- 40 and 41 Vict. cap. 26 (*Companies Act*, 1877). See *Company*, 10, 11.
- 40 and 41 Vict. cap. cxxiii. (*Greenock Police Act*, 1877). See *Police*, 13.
- 41 Vict. cap. 15 (*Customs and Inland Revenue Act*, 1878). See *Revenue*, 2, 4.
- 41 Vict. cap. 16 (*Factory and Workshop Act*, 1878). See *Reparation*, 18.
- 41 and 42 Vict. cap. 49 (*Weights and Measures Act*, 1878). See *Sale*, 9.
- 41 and 42 Vict. cap. 51 (*Roads and Bridges Act*, 1878). See *Sheriff*, 5.
- 42 and 43 Vict. cap. 42 (*Valuation of Lands Amendment Act*, 1879). See *Valuation Acts*, 8.

STATUTES—Continued.

- 43 and 44 Vict. cap. 42 (*Employers Liability Act*, 1880). See *Contract*, 6.
- 44 Vict. cap. 12 (*Customs and Inland Revenue Act*, 1881). See *Revenue*, 4, 5.
- 44 and 45 Vict. cap. 21 (*Married Women's Property Act*, 1881). See *Husband and Wife*, 6, 7—*Marriage-contract*, 3.
- 44 and 45 Vict. cap. 33 (*Summary Jurisdiction Act*, 1881). See *Justiciary Cases*, 19.
- 44 and 45 Vict. cap. 34 (*Debtors Scotland Act*, 1881). See *Bankruptcy*, 9.
- 45 and 46 Vict. cap. 53 (*Entail Act*, 1882). See *Entail*, 1.
- 46 and 47 Vict. cap. 57 (*Patents, Designs, and Trade-Marks Act*, 1883). See *Statute*, 3.
- 46 and 47 Vict. cap. 62 (*Agricultural Holdings Act*, 1883). See *Lease*, 11.
- 48 Vict. cap. 3 (*Representation of the People Act*, 1884). See *Election Law*.
- 49 and 50 Vict. cap. 27 (*Guardianship of Infants Act*, 1886). See *Parent and Child*, 4.
- 49 and 50 Vict. cap. 29 (*Crofters Holdings Act*, 1886). See *Lease*, 17, 18.
- 50 and 51 Vict. cap. 58 (*Coal Mines Regulation Act*, 1887). See *Justiciary Cases*, 3, 4.
- 51 and 52 Vict. cap. 50 (*Patents, Designs, and Trade-Marks Act*, 1888). See *Statute*, 3.
- 52 Vict. cap. 7 (*Customs and Inland Revenue Act*, 1889). See *Revenue*, 5.
- 52 and 53 Vict. cap. 39 (*Judicial Factors Act*, 1889). See *Judicial Factor*, 7.
- 52 and 53 Vict. cap. 44 (*Prevention of Cruelty to Children Act*, 1889). See *Justiciary Cases*, 17.
- 52 and 53 Vict. cap. 45 (*Factors Act*, 1889). See *Sale*, 7.
- 52 and 53 Vict. cap. 50 (*Local Government Act*, 1889). See *County Council*, 1, 3—*Poor*, 1.
- 53 and 54 Vict. cap. 40 (*Factors Act*, 1890). See *Sale*, 7.
- 53 and 54 Vict. cap. 62 (*Companies Memorandum of Association Act*, 1890). See *Company*, 5.
- 53 and 54 Vict. cap. 70 (*Housing of Working Classes Act*, 1890). See *Justiciary Cases*, 15.
- 53 and 54 Vict. cap. clxii. (*Glasgow District Subway Act*, 1890). See *Sheriff*, 7.
- 54 Vict. cap. 3 (*Custody of Children Act*, 1891). See *Parent and Child*, 6.
- 54 and 55 Vict. cap. 75 (*Factory and Workshop Act*, 1891). See *Reparation*, 18.
- 54 and 55 Vict. cap. cxxxvi. (*Edinburgh Municipal and Police (Amendment) Act*, 1891). See *Police*, 7.
- 55 and 56 Vict. cap. 55 (*Burgh Police Act*, 1892). See *Police*, 8—*Public House*, 9.

STREET. See *Police*, 5 to 13.

SUCCESSION. "Next of kin."

1. Advertisement in newspaper that £100 would in the event of the death through accident of subscriber to paper, be paid to the person whom the proprietors of the paper "may decide to be the next of kin" of such subscriber. *Law v. George Newnes, Limited*, July 17, 1894, p. 1027.
2. Payment of interest of deceased member of provident society to the persons who appear to a majority of the committee of the society to be entitled by law to receive the same. *Symington's Executor v. Galashiels Co-operative Store Co., Limited*, Jan. 13, 1894, p. 371.
3. Vesting in next of kin taking *ab intestato*. *Ross' Trustees*, July 14, 1894, p. 995.

Aliment—Maintenance of lunatic widow.

4. A husband died intestate and childless, survived by his widow, who was of unsound mind, and was confined in a lunatic asylum. She had no means

SUCCESSION—*Continued.*

of subsistence other than her right to a half of her husband's estate, which amounted to £200. In a special case between her curator bonis and the deceased's next of kin, *held* that the maintenance of the widow was not a burden on the husband's estate, and that the next of kin were entitled to immediate payment of one-half thereof. *Howard's Executor v. Howard's Curator Bonis*, May 25, 1894, p. 787.

Crofter—Succession—Crofters Holdings Act, 1886, sec. 16.

5. *Held* that, under the 16th section of the Crofters Act, 1886, a crofter is not entitled to bequeath his right to his croft to the son of his mother's sister. *Mackenzie v. Cameron*, Jan. 25, 1894, p. 427.

Jus mariti—Marriage-contract.

6. By antenuptial marriage-contract executed in 1855 a wife conveyed the whole funds payable to her under her father's settlement to trustees for the purpose, *inter alia*, that the revenue of £5000 (being the portion of the funds available at the date of the contract) should be paid to herself exclusive of the *jus mariti* and right of administration of her husband, the clear revenue of the remainder to be held for the joint behoof of the spouses and paid to them on their joint receipt. The husband expressly renounced his *jus mariti* and right of administration, in so far as the capital of the whole funds and the revenue of the £5000 were concerned, but the deed was silent as to the husband's rights with respect to the revenue of the remainder of the funds. *Held* that the husband's *jus mariti* and right of administration did not affect funds conveyed to the trustees by the antenuptial contract of marriage or the revenue thereof. *Bruce's Trustees v. Bruce's Trustee*, Feb. 27, 1894, p. 593.

Jus relictæ—Marriage-contract—Married Women's Property (Scotland) Act, 1881, secs. 6 and 8.

7. Claim by surviving husband to one-half of his wife's moveable estate *repelled* on the ground that it was inconsistent with the provisions of the marriage-contract between him and his wife. *Buntine v. Buntine's Trustees*, March 16, 1894, p. 714.

Legitim.

8. Amount of legitim fund—Father twice married—Whether legitim of children of first marriage diminished by provisions to children under antenuptial contract of second marriage. *Bishop's Trustees v. Bishop*, March 17, 1894, p. 728.

Legitim—Interest.

9. *Held* that interest at the rate of 5 per cent per annum was due upon a child's legitim from the date of the father's death, although the funds in the hands of the father's testamentary trustees had been earning only about 2 per cent. *Bishop's Trustees v. Bishop*, March 17, 1894, p. 728.

Testament—Writ—Unsubscribed holograph writing underneath subscribed holograph settlement.

10. A holograph writing, occurring below the subscription to a holograph trust-settlement, and containing bequests of specific articles, *held* to be effectual, as part of the trust-settlement, although not itself subscribed. *Burnie's Trustee v. Lawrie*, July 17, 1894, p. 1015.

Testament—Construction—Revocation—Marriage-contract—Alimentary life-rent—Power of spouses jointly to recall alimentary life-rent to widow—Trust—Denuding.

11. By antenuptial contract of marriage the husband on his part conveyed his whole means and estate to trustees for payment to himself during his life, and after his death to his wife, should she survive him, of the free annual income thereof, "for the life-rent and alimentary use alienably of them and the survivor of them, declaring that the same shall not be affectable by the debts or deeds of either of them, or the diligence of their creditors." Then followed provisions to the effect that in the event of there being no children of the marriage the fee of the husband's estate should be reconveyed

SUCCESSION—*Continued.*

to him, or made over to his heirs and assignees on the death of the wife. The marriage was dissolved, without issue, by the death of the husband, who left a will, by which he bequeathed "all my real and personal estate, including any property over which I have power of appointment, to my dear wife absolutely," appointed her his sole executor, and revoked "all former wills and testamentary dispositions." The widow having called on the trustee under the marriage-contract trust to denude of the trust-estate in her favour, *held* that, on a sound construction of the husband's will, it was not his intention to discharge his estate of the alimentary liferent in his widow's favour, and consequently that the trustee was not entitled to denude of the trust-estate.

Question, whether it was in the power of the husband, with the consent of his wife, to revoke the alimentary liferent. *Elliott's Trustee v. Elliott*, July 13, 1894, p. 975.

Testament—Construction—Accretion of liferent.

12. In her trust-settlement a testator appointed her trustees to pay over the yearly interest of the residue of her estate to her three brothers, Charles, George, and Stuart, equally among them, and to the survivors and survivor of them, and at the death of the survivor to divide the residue among three of her nieces. In a codicil, upon the narrative that George, one of the brothers, had died since the date of the settlement, she provided,— "I hereby recall the bequest made by me therein to George of a share of the residue of my estate, being one-third thereof, and ordain my trustees to pay over the said share which would have fallen to him had he not so predeceased me to his widow." The testatrix died in 1890, and her brother Stuart died in 1893. In an action raised by George's widow against the trustees, *held* (assuming that by share of residue the testator meant share of income of residue) that the pursuer was entitled not only to the third share of income, but also to one half of Stuart's share to which under the settlement her husband would have been entitled. *Burnett v. Burnett's Trustees*, July 18, 1894, p. 1040.

Testament—Construction—"Residue."

13. The presumption is that the word "residue" occurring in a testamentary writing carries the residue of the testator's whole estates and not merely the balance of a particular fund. *Millar v. Morrison*, June 21, 1894, p. 921.

Testament—Construction—"Survivor."

14. "Survivor" *held* to be equivalent to "other." *Paterson's Trustees v. Brand*, Dec. 9, 1893, p. 253.

15. *Held contra.* *Monteith v. Belfrage*, March 7, 1894, p. 615.

Testament—Construction—Rent of lands to "form part of" annuity—Additional or in security merely.

16. A testator by his trust-disposition and settlement directed his trustees to pay an annuity of £500 to his widow, with power to her to bequeath the amount of the annuity to any one or more of the children she might choose, and failing her exercising this power, the sum retained to meet the annuity was to be divided among the children equally. The estate beyond what was retained to meet the annuity was to be realised and divided among the children equally. By holograph codicil the testator directed that the free rental of certain heritage should "form part of the annuity bequeathed to my wife during her life . . . after the death of my wife the free rental to be divided equally among my children." *Held* that the rental of the heritage was not intended to be given in addition to the £500 annuity already bequeathed, but merely that the heritage was to be part of the estate retained to meet the annuity. *Chivas' Trustees v. Chivas*, Oct. 17, 1893, p. 1.

Testament—Construction—Implication—Resignation of trustees—Trusts (Scotland) Act, 1867.

17. A trust-disposition and settlement, which conferred no express power on

SUCCESSION—*Continued.*

the trustees to resign, contained a clause, declaring that upon any of the trustees resigning office and accounting for their intrusions, the remaining trustees should be bound to discharge them of their office. *Held* that the trustees had power to resign under the deed, and a petition for authority to resign refused as unnecessary. *Bunten v. Muir*, Jan. 13, 1894, p. 370.

Faculties and powers—Power to appoint “under conditions”—Appointment in part ultra vires.

18. By antenuptial marriage-contract trustees were directed after the death of the survivor of the spouses “to pay over or assign” certain funds to the child or children of the marriage “in such proportions and at such times and under such conditions” as the survivor of the spouses should appoint. The spouses were survived by three children of the marriage. The surviving spouse in his trust-disposition and settlement, professing to exercise the power of appointment, directed his trustees to “lay out and invest the third part or share falling to his daughter F.” in their own names, and to pay over the annual proceeds to F. during her life, and “in the event of her being married, and her husband surviving her,” to pay the annual proceeds to him, and upon the death of the longest liver of F. and her husband, then to hold the funds for behoof of F.’s children. Failing children of F., the trustees were directed at the death of the survivor of F. and her husband to pay the funds “to such persons and in such manner” as F. should direct. In a question between the trustees and F. (who was seventy-five years of age and unmarried), F. contended that the power had been invalidly exercised. *Held* (1) that the appointment was not invalid because it restricted F.’s right to a *liferent*, with a power to test; and (2) that although the provisions in favour of F.’s husband and children were *ultra vires* and ineffectual, their invalidity did not affect the gift of the power of disposal in the event of F. having no children. *Wright’s Trustees v. Wright*, Feb. 20, 1894, p. 568.

Faculties and powers—Liferent with power of testing—Exercise of power.

19. A son who was entitled under his father’s settlement to the fee of part of his father’s estate and to the *liferent* of another part with a power of testing thereon, left a will in which, after bequeathing certain legacies, he left the residue of his real and personal estate to his brothers. *Held* that the will was to be construed as embracing the share of his father’s estate of which he had power to dispose by will. *Clark’s Trustees v. Clark’s Executors*, Feb. 16, 1894, p. 546.

Power of appointment—Exercise of—Marriage-contract—Construction.

20. Terms of trust-settlement which were held to be an effectual exercise of a power of appointment in an antenuptial marriage-contract. *Donaldson’s Trustee v. Donaldson*, July 17, 1894, p. 1025.

Liferent or fee—Intestacy.

21. A testator by his settlement “willed and disposed of” his whole property in favour of his two surviving daughters *nominatim* “during their lifetime, share and share alike,” and appointed two persons to be trustees “to see the provisions of this my will carried into effect.” The settlement did not dispose of the fee of his estate *per expressum*. The testator was survived by the two daughters named in the will, and by a grandchild, the daughter of a deceased daughter. His wife predeceased him. In a competition between (1) the two surviving daughters, and (2) the grandchild, *held* that the settlement conferred a *liferent* only of one-half the estate on each of the surviving daughters, and that as each *liferent* terminated, the half of the fee *liferented* fell to be disposed of as intestate succession of the testator. *Spink’s Executors v. Simpson*, Feb. 16, 1894, p. 551.

Trust—Charitable trust—Uncertainty.

22. *Held* that a direction to trustees to pay and apply the residue of the testator’s estate “to such useful, benevolent, and charitable institutions” as the

SUCCESSION—Continued.

trustees in their discretion might think proper, was not void from uncertainty. *Cobb v. Cobb's Trustees*, March 9, 1894, p. 638.

Precatory bequests—Bequest to A "for the benefit of herself and of B."

23. Held that under a bequest "to A for the benefit of herself and of her sister B," each sister had a vested beneficial right in fee to one-half of the bequest, but that A was bound to retain B's share during their joint lives as trustee for her. *Macpherson v. Macpherson's Curator Bonis*, Jan. 17, 1894, p. 386.

Conditio si institutus sine liberis decesserit.

24. A mother in her settlement bequeathed one-third of her silver-plate to her daughter M, and small keepsakes to M's daughters, and by a subsequent clause bequeathed to each of her children an equal share of residue. By a codicil the testator, on the narrative of M's death, revoked the bequest of silver-plate, and directed it to be divided among the testator's family. In a question between M's children and the testator's heirs *in mobilibus*, held that the *conditio si sine liberis* was to be implied in the settlement with regard to the bequest of residue, and was not displaced by the codicil. *Forrester's Trustees v. Forrester*, July 12, 1894, p. 971.

Conditio si testator sine liberis decesserit.

25. The presumption is that a settlement which makes no provision for children *nascituri* is revoked on the birth of a child to the testator after the date of the settlement, although he had children at its date. *Elder's Trustees v. Elder*, March 16, 1894, p. 704.

Heritable and Moveable—Conversion.

26. Held (1) that the exercise of a power to sell the heritage was indispensable to the due execution of the trust, and therefore (2) that the whole of the share of a beneficiary who had not received it was moveable *quoad* her succession, and fell to her heirs *in mobilibus*. *Playfair's Trustees v. Playfair*, June 1, 1894, p. 836.

Option to take over heritable subjects at specified price—Enhancement of value after date of settlement—Recompense—Mora.

27. Circumstances in which it was held (1) that three sons who under their father's settlement had the option of taking over certain business premises had not lost their right to exercise the option by delay, and (2) that they were entitled to have the subjects conveyed to them on the conditions set forth in the settlement, without compensating the general estate for the sums expended on them since the testator's death. *Fraser's Trustees v. Fraser*, May 25, 1894, p. 790.

Trust—Testamentary annuity to widow less Government annuity and increase in latter after death of testator—Bona fide percepta et consumpta.

28. A husband who predeceased his wife, by a trust-disposition and settlement, *inter alia*, directed his trustees to pay to his widow an annuity of £300 "in addition to what she is entitled to under" the contract of marriage, "my intention being that the said" widow "shall have a free annuity of £600 under the said marriage-contract and these presents, any annuity she may receive from the Bombay Civil Fund being imputed to account thereof"; under the declaration that in the event of his widow "from any cause losing or not receiving from the Bombay Civil Fund the usual annuity of Indian civil servants, she shall only be entitled to a free annuity of £500 from my own proper funds, to which sum her annuity under said marriage-contract and these presents shall in that event be restricted." The amount of the annuity payable from the Bombay Civil Fund to the widow at her husband's death in 1876 was £300, and she accordingly received £300 a-year more from her husband's testamentary trustees. In 1882 the Bombay Civil Fund annuity was by Act of Parliament increased by a pension of £60 a-year. The husband's representatives continued to pay to the widow an additional £300 a-year until 1894, when the question arose whether the additional sum ought to be £240 a-year only in respect that she was receiving the additional pension of £60 a-year. A special

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case was presented by the widow and her husband's representatives, in which it was admitted that they had paid and she had received the full £300 a-year from her husband's estates in *bona fide* ignorance of any doubt as to her right to do so. *Held* (1) that from the time the widow became entitled to the additional annuity of £60 she was only entitled to receive an annuity of £240 from her husband's estate, but (2) that she was not bound to repay the over-payments. *Hunter's Trustees v. Hunter*, July 6, 1894, p. 949.

Satisfaction of legacy by advances—Interest.

29. A trustor bequeathed a share of residue to his daughters in *liferent* only and their children in fee, but declaring "that all advances which I have made, or may hereafter make, to my respective sons-in-law, shall be deducted from the respective shares" *liferented* by his daughters. The trustor acceded to a trust-deed for creditors granted by one of his sons-in-law, to whom he had made advances, took payment of dividends, and granted receipts therefor, which bore that he accepted the dividends in terms of the trust-disposition, and discharged his son-in-law. In a special case *held* that the balance of the father's advances, which had not been repaid to him, but without interest, fell, as at the date of the father's death, to be imputed as a payment to account of the share of residue falling to the daughter's children. *Smith's Trustees v. Sellar*, March 9, 1894, p. 633.

Vesting—Direction to trustees to retain—Repugnancy—Revocation.

30. Terms of trust-disposition and codicil upon a construction of which *held* (1) that as under the trust-disposition by itself the provisions to the daughters vested *a morte testatoris*, the codicil was not to be construed as altering the period of vesting, and (2) that the daughters were entitled to immediate payment of their provisions, directions to the trustees to retain, in the codicil, being void from repugnancy. *Wilkie's Trustees v. Wight's Trustees*, Nov. 30, 1893, p. 199.

Vesting—Express clause of vesting—Testament—Construction—Repugnancy.

31. A testator, by his trust-disposition and settlement, directed his trustees, after the death of the survivor of himself and his wife, to "set apart as a debt the sum which they shall judge necessary" for the maintenance and education of such of his children as should then be in minority until they should reach majority, "and the trustees shall pay over and divide the free proceeds of my moveable or personal estate and arrears or accumulations, if any, of the whole income of the trust-estate, to and among, and shall dispose, assign, and convey my whole heritable and real estate to and in favour of" his children, "equally share and share alike, and the survivors and survivor equally, and that at the term of Whitsunday or Martinmas immediately following the death of the survivor of my said wife and me, or the majority of my youngest child, whichever of these events shall last happen, on the following conditions: the share of the premises of each child shall be a vested right at majority, though not payable till the youngest child reach majority; if any of my said children die before the said period of division leaving lawful issue, the latter shall succeed equally to the share of their parent." In a competition between the trustee of the testator's eldest son, who survived his father and attained majority, but predeceased his mother, and the only child of the eldest son, *held* that on a sound construction of the trust-disposition and settlement, the shares of the testator's children vested in them as they respectively attained majority, although their mother might then be alive. *Carruthers's Trustee v. Eeles*, Feb. 1, 1894, p. 492.

Vesting—Repugnancy.

32. A testator directed his trustees, after payment of an alimentary *liferent* of the residue of his estate to his brother, Joseph Ritchie, to "hold and apply" one-half of the residue "for the uses and behoof of Alexander Ritchie, son of Joseph Ritchie, and of any other child or children that may yet be procreated of his marriage, equally among them if more than

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one, and if only one child should be left, then for the sole use and behoof of such child, and that in such sums, at such times, and in such manner as my trustees shall think best, and of which they shall be the sole judges." Joseph Ritchie survived his brother, the testator, and as one of his brother's two next of kin was entitled to one-half of such part of his brother's estate as might be undisposed of. Joseph Ritchie died leaving a will by which he bequeathed the fee of his whole estates to his only son Alexander. Alexander having called on his grandfather's trustees to denude of one-half of the trust-estates in his favour, *held* that the fee of one-half of the residue of his grandfather's estate having vested in Alexander Ritchie either under his grandfather's will or *ab intestato*, the trustees were bound to denude in his favour. *Ritchie's Trustees v. Ritchie*, March 16, 1894, p. 679.

Vesting—Effect of widow's repudiation of testamentary annuity.

33. *Held* (*dub.* Lord Young) that a widow's repudiation of her husband's settlement did not accelerate the period of vesting of the residue, and consequently that the trustees were not entitled under the residue clause to pay over either the capital or the income until the death or the second marriage of the widow. *Ross's Trustees v. Ross*, June 28, 1894, p. 927.

Vesting—No gift except in direction to convey.

34. A testator by trust-disposition and settlement directed his trustees to give to his wife the liferent of his whole estates, and then directed them, as soon as convenient after her death, to convey a specific heritable property to his daughter M, "but in the event of her marrying and having no issue alive at the time of her death, the same shall revert to and belong to my surviving children, share and share alike." The truster was survived by his wife, by his daughter M, and by other children. *Held* that no fee vested in M at the testator's death. *Groat v. Stewart's Trustees*, July 7, 1894, p. 961.

Vesting—Substitution.

35. A testator by holograph settlement left the liferent of his whole estates, heritable and moveable, to his widow. He then disposed of the fee of his estates, and, *inter alia*, provided, "I leave to my nephew J. F. W. my estate of B, but I wish it expressly understood that in the event of my said nephew dying without leaving any lawful heir-male of his body, then and in that event my said lands of B are to revert back to my nephew J. H." J. F. W. survived the testator, but predeceased the testator's widow unmarried, and was survived by J. H. J. F. W. left a general trust-disposition and settlement of his whole estates, heritable and moveable. In a question between J. F. W.'s trustees and J. H., *held* (*aff. judgment of Second Division*) that the fee of the lands of B vested in J. F. W. at the testator's death, subject to a simple substitution in favour of J. H., in the event of J. F. W. dying without leaving an heir-male of his body, and that the substitution had been evacuated by J. F. W.'s general disposition. *Hamilton v. Ritchie*, June 4, 1894, H. L., p. 35.

Vesting—Conditional institution—Destination over—Heritage—Substitution.

36. By general disposition and settlement A disposed a share of her heritable and moveable estate to B in liferent *allennarly*, and to the heirs of B's body in fee, whom failing, to C, and the heirs of his body in fee. C survived the testator, and was survived by B, the liferentrix, who died unmarried. C left an heir of his body who survived the liferentrix. *Held* that no fee had vested in C, as the heir of his body was a conditional institute. *Turner v. Gaw*, Feb. 20, 1894, p. 563.

Vesting—Payment postponed till death of liferenter without children.

37. A truster by his trust-disposition and settlement directed his trustees to hold a fund for behoof of his daughter F., and of any husband she might marry who should survive her in liferent, and on the death of the survivor, for behoof of their children. Failing children of F., then the trustees were directed at the death of F., or of her husband, if he survived her, to pay

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the fund to the children of the truster's son W. if any then existing, and failing such children, to pay one half of the fund to W. himself or his next of kin. W. survived the truster, and died unmarried. At the date of his death F. was his sole next of kin. In a question between F. (who was unmarried, and seventy-five years of age) and the trustees, F. contended that one half of the fund had vested in her subject to defeasance in the event of her having children. *Held* that vesting was postponed until the death of F. *Wright's Trustees v. Wright*, Feb. 20, 1894, p. 568.

See *Fraud—Goodwill—Marriage-contract—Revenue, 6—Trust.*

SUPERIOR AND VASSAL. *Composition—Relief—Implied entry—Entail—Conveyancing (Scotland) Act, 1874, sec. 4.*

1. An institute under a deed of entail obtained an implied entry with the superior by the Conveyancing Act, 1874, and not being an heir *aliouqui successurus* became liable in composition. The superior discharged his claim on payment of relief-duty. On the next heir of entail—who was not heir of line—obtaining an implied entry the superior claimed composition. *Held* that the vassal being the heir of investiture was only liable in relief-duty. *Lord Advocate v. Moray*, Feb. 16, 1894, p. 553.

Feu-charter—Construction—Servitude—Road.

2. In 1806 a proprietor feued to A a piece of ground bounded on the south by a road, and on the west by another feu granted to B. At the northern extremity of A's feu, 140 feet from the road, was a well, and his charter contained this clause,—“But reserving always to our said feuars and their tenants and servants free entry and issue to and from the said well by a road or passage of 6 feet wide and at least 8 feet high, to be left out upon the west end of the piece of ground hereby disposed.” B had built a house fronting the road, with its eastern gable resting upon but not beyond the verge of his feu, with a boundary wall in continuation to the back, also just within his feu. A, in building his house, instead of building a western gable, made use of B's gable, leaving a passage below the house 6 feet wide close to B's gable. Behind the house a passage to the well 6 feet wide was left unbuilt on close to B's boundary. In 1866 B's successors made openings in their boundary wall, which were used as an access to the passage. In 1892 A's successor in his feu brought an action against B's successor for declarator that he was entitled to build a wall on the extreme west of his feu, the effect of building such a wall being that the passage would require to be moved eastward to an extent equal to the breadth of the proposed wall, and that B's successor would not have access to the passage through the doors in his wall. *Held* that, on a sound construction of his titles, the pursuer was entitled to decree. *Blair v. Strachan*, March 14, 1894, p. 661.

Restrictions on building—Feu-charter—Buildings similar in style and quality.

3. A feu-disposition contained a provision that the dwelling-houses to be erected on the feu by the feuar should be “similar in style and quality” to the tenements already erected by the superior in the same street in which the feu subjects were situated. The vassal erected a tenement containing dwelling-houses consisting of three or two rooms each. The tenements erected by the superior consisted of houses containing four or three rooms each. Externally the tenements were similar. *Held* that the tenement erected by the vassal was not in contravention of the stipulations of the feu-disposition. *Middleton v. Leslie*, May 23, 1894, p. 781.

SUSPENSION. See *Bill of Exchange.*TEINDS. *Bona fide perception and consumption—Belief that teinds exhausted.*

In an action at the instance of a proprietor of teinds against the proprietor of the lands for arrears of surplus teinds, the defender admitted that the pursuer was the proprietor of the teinds, but pleaded *bona fide* consumption, averring that he had regularly paid his proportion of the minister's

TEINDS—*Continued.*

stipend in the belief that the teind was thereby exhausted. *Held* that the defenders' statements were not relevant to support the plea of *bona fide* consumption. *Macrae v. Assets Co., Limited*, July 20, 1894, p. 1080.

TIME. See *Justiciary Cases*, 17, 18—*Reparation*, 28—*Sale*, 10.

TITLE TO SUE. *Lease—Heir—Executor—Rent legally due prior to heir's succession, but conventionally payable thereafter—Removing.*

1. Where a tenant is bound to pay rent at a certain term, the landlord then in possession is entitled to enforce the obligation, notwithstanding that he may be liable to account for the rent recovered to the representatives of his predecessor. *Lennox v. Reid*, Nov. 14, 1893, p. 77.

Right in security—Reparation—Injury to property—Evidence that a disposition ex facie absolute was really in security.

2. *Held* that it had been proved that a disposition *ex facie* absolute was in security merely, and that as the disponees had not been divested of the radical right to the subjects he had a good title to sue an action for damages for injury to the subjects. *M'Bride v. Caledonian Railway Co.*, March 7, 1894, p. 620.

Acquisition of right and title after action raised.

3. A, the purchaser of a vessel from B, brought an action of damages in his own name and as assignee of B against C for injuries which had been done to the vessel prior to the date of the purchase. The summons was served on 28th June 1893. On the 29th June the seller of the ship assigned to A all claims competent to him against C. *Held* (1) that at the date of the action A had no right to damages for injury done to the vessel prior to his purchase, and had no title to sue; and (2) that the subsequent assignation did not remedy the defect. *Symington v. Campbell*, Jan. 30, 1894, p. 434.

Company—Agent and Principal—Contract by agent for intended company.

4. In an action of damages at the instance of a limited company, registered on 29th July 1890, the pursuers averred that, on 11th July 1890, D, as agent for the company, entered into a contract with the defenders for the supply by the latter of certain pieces of machinery, and that the machinery supplied was defective, and had caused great loss to the company. *Held* that the company had not set forth a title to sue, as D could not have acted as its agent before it was in existence. *Tinnevelley Sugar Refining Co., Limited, v. Mirrlees, Watson, & Yaryan Co., Limited*, July 17, 1894, p. 1009.

Declarator—Construction of statute.

5. The magistrates of a police burgh having intimated that they claimed, under the Burgh Police (Scotland) Act, 1892, to be the licensing authority for the sale of exciseable liquors within the burgh, a publican holding a licence for premises in the burgh, which had been granted by the county Justices, brought an action for declarator that the licensing jurisdiction within the burgh had not been transferred from the county Justices to the burgh magistrates, and for interdict against the magistrates acting as the licensing authority. *Held* that the pursuer had a title to sue. *Tennent v. Magistrates of Partick*, March 20, 1894, p. 735.

Sale—Resale for enhanced price—Subvendee—Reduction—Title to sue reduction of original contract.

6. C in his own name and as B's assignee, and B, raised an action against A for reduction of contract between A and B, and of a conveyance following thereon by A to C, C offering restitution in integrum.

Held, in aff. judgment of the First Division which assailed A, (1) that as C was not privy to the contract between A and B, he had no title to reduce it; (2) that as B had no interest in the subjects after the conveyance by A to C, he had no title to reduce the said contract. *Edinburgh United Breweries, Limited, v. Molleson*, March 9, 1894, H. L., p. 10.

See *Contract*, 1—*Fishing*, 2—*Sale*, 5—*Statute*, 2.

TRADE INCORPORATION. See *Trust*, 15, 16.

TRAMWAY. *Sale to Local Authority—Undertaking—Price—Rental value—Tramways Act, 1870, sec. 43.*

In an action for the reduction of an award by a referee under this provision, held (aff. judgment of the First Division) that having regard to the fact that the tramway company could not assign the right to use the tramways, the "then value" of the tramway meant the then value of the tramway lines, and that in ascertaining the value the basis of the calculation should be the sum which would be required to construct the lines less a sum for depreciation. Edinburgh Street Tramways Co. v. Magistrates of Edinburgh, July 30, 1894, H. L., p. 78.

TRANSACTION. *Church—Churchyard—Heritors—Ultra vires.*

1. *Held that it is within the powers of the heritors of a parish to compromise questions regarding the extent of the churchyard, arising with a contentious proprietor, subject to the control of the Court at the instance of anyone having a legitimate interest. Fraser v. Turner, Dec. 13, 1893, p. 278.*
Compromise of action by joint minute—Proof—Oral modification of written contract.

2. *Held that it was incompetent to prove by parole evidence an alleged verbal agreement to vary the terms on which an action had been compromised in a joint minute signed by counsel. Hamilton & Baird v. Lewis, Nov. 15, 1893, p. 120.*

TRESPASS. See *Justiciary Cases*, 19—*Reparation*, 14.

TRUST. *Constitution of trust—Provision for wife or wife trustee for husband.*

1. *By antenuptial bond of annuity A provided to his wife an annuity of £1000 per annum, "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life, . . . moreover, I do hereby renounce and discharge my *jus mariti* and right of administration of and in relation to" his wife's estate, "including the foresaid annuity payable to her during my lifetime, declaring that the same shall be and remain a separate estate in her person, free of any right or claim on my part whatsoever." Some years after the marriage A executed a trust-disposition of his whole estate for behoof of creditors. Held that the annuity fell to be applied by the wife for her husband's behoof, and that therefore the bond was ineffectual in a question with his creditors. Elliott v. Elliott's Trustee, July 7, 1894, p. 955.*

Whether trust one for behoof of creditors—Jus quesitum tertio—Personal liability of trustee.

2. *By trust-disposition A, a married woman, conveyed to B, as trustee, all her interest under the will of her deceased father, for the purposes (1) of realising the same and converting it into cash; (2) of paying all debts due by her at the date of the deed; and (3) of thereafter paying over the balance to her. In an action by C against A and B, in which it was established that a claim which C had intimated to B was due by A, held that B having represented that the trust in his person was a trust for creditors, and C having intimated her claim to him, he was not entitled to pay over the balance of the trust funds to A without satisfying C's claim, and consequently that he was personally liable to C. Cruickshank v. Thomas, Dec. 9, 1893, p. 257.*

Liability of trustees—Goodwill of business carried on by trustee.

3. *An engineer who had been many years in India, on his return to this country, continued to supply native and other traders in India with cotton presses, which he bought from makers in this country. At the time of his death his average income from this source was about £300 per annum. In an action of accounting brought some years after his death by the beneficiaries under his settlement against his trustees, after a proof, held that the goodwill was an asset of the deceased's estate which should have been sold by the trustees, and that they fell to be debited with £300 as the value thereof. Donald v. Hodgart's Trustees, Dec. 8, 1893, p. 246.*

TRUST—*Continued.*

Sale of heritage by trustee without authority of the Court—Confirmation of sale—Nobile Officium—Trusts (Scotland) Act, 1867, sec. 3.

4. A trustee acting under a trust-disposition and settlement which contained no power to sell heritage sold a part of the trust-estate without having first obtained the authority of the Court. The purchaser having objected to the title offered by the trustee, the latter presented a petition craving the Court "to approve, ratify, and confirm" the sale. The Court *refused* the petition. Clyne, June 5, 1894, p. 849.

Bona fide percepta et consumpta.

5. Testamentary annuity to widow less Government annuity and increase in latter after death of testator. *Hunter's Trustees v. Hunter*, July 6, 1894, p. 949.

Sale—Delivery—Possession—Marriage-contract—Conveyance to marriage-contract trustees retenta possessione.

6. In December 1883 M's estates were sequestrated, but before a trustee had been appointed a deed of arrangement was executed between M and his creditors and B. By this deed M assigned his furniture to B in consideration of payment of a sum exceeding its value by way of composition to the creditors. B thereafter assigned the furniture to the trustees under M's antenuptial marriage-contract for behoof of M's wife in liferent, and of the children of the marriage in fee, M's *jus mariti* being excluded. The furniture was allowed to remain in the house then occupied by M and his wife, which belonged to the trustees, and on the spouses removing to another house in 1884 the furniture was taken with them. In 1890 M sold the furniture to G, and G let the furniture on hire to M. The furniture remained with M and his wife. In an action by the marriage-contract trustees to have G interdicted from removing the furniture, *held* that the right to the furniture was in the trustees, in respect that since the date of the assignation in their favour M's wife had been in actual possession of it as liferentrix, and that the trustees had accordingly been in civil possession through her, and that G therefore had no title to it, and interdict *granted*. *Mitchell's Trustees v. Gladstone*, Feb. 27, 1894, p. 586.

Nobile Officium—Advances out of income directed to be accumulated.

7. In a petition for advances to be made for the maintenance and education of the minor children of a truster out of income directed by him to be accumulated, the Court, in respect that the main purpose of the truster had been effected by the accumulation of a sum of £10,000, and that advances were desirable in the interests of the children, *granted* the petition, and authorised the trustees to advance £200 a-year for each of the petitioners. Colquhoun, March 15, 1894, p. 671.

Advances out of income for maintenance of beneficiaries—Trusts (Scotland) Act, 1867, sec. 7.

8. Testamentary trustees held the residue of a trust-estate for behoof of the testator's children, who were all minors, subject to a direction to divide it among the children or the survivors, when the youngest child should reach twenty-one years of age. The settlement contained a declaration that the provisions to the children should not become vested interests in them until the period of division, and there was no direction as to the application of the accruing income. There was no destination over in the event of the children all dying before the date of division. A petition was presented by the trustees for authority to apply the whole of the income, or such part thereof as they should think proper, for behoof of the children, on the ground that this was necessary for their maintenance and education. *Held* that the petition might be granted under sec. 7 of the Trusts Act, 1867, in respect (1) that the unappropriated income formed part of the capital; (2) that although the interest of each child was contingent, and had not vested, the children as a class had a vested interest in the sense of the statute; (3) that no persons had an interest in the residue other than the children and their heirs or representatives, as in the event of all the children

TRUST—*Continued.*

dying before the provisions vested, the residue would fall to be dealt with as intestate succession of the testator, and would be payable to the representatives of the children, his next of kin. *Ross's Trustees*, July 14, 1894, p. 995.

Resignation of trustees—Implied power to resign in trust-deed—Trusts (Scotland) Act, 1867.

9. A trust-disposition and settlement, which conferred no express power on the trustees to resign, contained a clause, declaring that upon any of the trustees resigning office and accounting for their intromissions, the remaining trustees should be bound to discharge them of their office. *Held* that the trustees had power to resign under the deed, and a petition for authority to resign refused as unnecessary. *Bunten v. Muir*, Jan. 13, 1894, p. 370.

Removal of Trustee—Judicial Factor.

10. In a petition for removal of a trustee, and appointment of a judicial factor on the trust-estate, the petitioner averred that the trustee had paid out of the trust funds a claim on the trust-estate, without satisfying himself that it was properly vouched. It was not averred that in doing so he had acted in bad faith. The Court *refused* the prayer of the petition, on the ground that no malversation of office had been averred. *Harris v. Howie's Trustee*, Oct. 20, 1893, p. 16.

Process—Multiplepoinding—Double distress—Fund in medio.

11. Where there were competing claimants to one half of a trust-estate, the right to the other half not being in dispute, one of the claimants raised an action of multiplepoinding in name of the trustee, bringing the whole estate into Court as the fund *in medio*. *Held* that the action was incompetent. *Macnab v. Waddell*, May 30, 1894, p. 827.

Precatory bequests—Bequest to A "for the benefit of herself and of B."

12. *Held* that under a bequest "to A for the benefit of herself and of her sister B," each sister had a vested beneficial right in fee to one-half of the bequest, but that A was bound to retain B's share during their joint lives as trustee for her. *Macpherson v. Macpherson's Curator Bonis*, Jan. 17, 1894, p. 386.

Charitable trust—Uncertainty.

13. *Held* that a direction to trustees to pay and apply the residue of the testator's estate "to such useful, benevolent, and charitable institutions" as the trustees in their discretion might think proper, was not void from uncertainty. *Cobb v. Cobb's Trustees*, March 9, 1894, p. 638.

Charitable trust.

14. Settlement of scheme—Nobile officium—Process—Multiplepoinding—Trusts (Scotland) Act, 1867, sec. 16—Education (Scotland) Act, 1872, sec. 38. *Old Monkland School Board v. Bargeddie Kirk-Session*, Nov. 15, 1893, p. 122.

Charitable trust—Trade incorporation—Widows' fund—Illegal resolution—Exclusion of new members.

15. *Held* (1) that the power possessed by a trade incorporation prior to the passing of the Act 9 and 10 Vict. cap. 17, of admitting persons to the privilege of trading were held by them in trust for public purposes, and that the incorporation could not have refused admission to the trade of persons properly qualified; (2) that a relative benefit scheme was a similar trust, and that the incorporation were not entitled, for the purpose of enlarging the benefits of present members, to impose restrictions on the entry of new members; and (3) that a resolution passed for that purpose was illegal. *Sadler v. Webster*; *Webster v. Incorporation of Tailors of Ayr*, Nov. 14, 1893, p. 107.

Charitable trust—Trade incorporation—Illegal resolution.

16. A trade incorporation holding funds in trust for the benefit of existing and future members passed a resolution illegally restricting the admission of future members to persons under thirty years of age instead of under forty

TRUST—*Continued.*

as formerly. *Held* that the incorporation were entitled to disregard the illegal resolution without formally recalling it. *Sadler v. Webster*; *Webster v. Incorporation of Tailors of Ayr*, Nov. 14, 1893, p. 107.

See *Cautioner*, 1—*Church*, 1—*Judicial Factor*, 4—*Marriage-contract*, 2, 6, 8—*Succession*, 26, 30, 32, 33.

ULTRA VIRES. See *Arbitration*, 5—*Bankruptcy*, 1—*Church*, 2—*Judicial Factor*, 5—*Lease*, 1, 2—*Police*, 2, 14, 15—*Poor*, 1—*Provident Society—Statute*, 3—*Trust*, 4, 15, 16.

UNDERTAKING. See *Tramway*.

UNDUE INFLUENCE. See *Fraud—Judicial Factor*, 3.

VALUATION ACTS. *Railways and Canals—Whether “company” includes commissioners—Valuation of Lands (Scotland) Act*, 1854, *sec.* 21.

1. *Held* that the words “canal company” in the above section applied to a body of statutory commissioners who were charged with the administration of a canal when the Act was passed. *Commissioners of the Caledonian Canal v. County Councils of Inverness and Argyll*, July 18, 1894, p. 1045.

Principle of Valuation—Paper mill—Valuation by floor area.

2. An assessor valued the buildings of a paper mill at a uniform rate per square yard of floor space. *Held* in an appeal by the proprietor, that, as he did not propose to give information as to the profits of his business, but merely stated the alternative of valuation by cost of construction, the Assessor's valuation was *right*. *Cowan & Sons, Limited, v. Assessor for Midlothian*, May 25, 1894, p. 812.

Harbour—Apportionment of value between two parishes—Quayage.

3. In apportioning the *cumulo* valuation of a harbour between two parishes within which it was situated, the Assessor did so according to the lengths of quayage in the two parishes respectively. One of the parishes maintained that it should be first credited with revenue derived from certain fixed machinery locally situated within its bounds, and that only the revenue should be apportioned according to the quayage. *Held* that the harbour fell to be regarded as a *unum quid*, and that the allocation by quayage was *right*. *Ayr Harbour Trustees v. Assessor for Ayr*, May 25, 1894, p. 807.

Deductions—Harbour—Tenants' profits.

4. The trustees of Ayr Harbour were by statute empowered to administer the harbour, and to levy rates upon vessels and cargoes using the harbour, and were bound to apply the revenue derived from the rates, 1st, in payment of costs of management and maintenance, 2d, in payment of interest on borrowed money, 3d, in prescribed payments to a sinking fund, 4th, the surplus, if any, in paying off borrowed money, or in improving or otherwise for the benefit of the undertaking. The Assessor, in estimating the annual value of the harbour for the Valuation-roll, deducted from the gross revenue derived from the harbour-rates the charges and expenses necessary to earn that revenue, including interest on moveable plant and floating capital, together with the expenses of collection and management. The trustees maintained that they were entitled to a further deduction in name of tenants' profits. *Held* that as the whole surplus revenue was devoted by statute to other purposes, there could be no tenants' profits. *Ayr Harbour Trustees v. Assessor for Ayr*, May 25, 1894, p. 807.

Mansion-house and garden—Rent—Deductions—Services.

5. In a lease of a mansion-house, garden, and grounds to a yearly tenant at a *cumulo* rent, it was provided that the tenant should have the use of the furniture in the house and the garden produce, but the wages of the gardeners and the expense of keeping up the garden were to be paid by the proprietor. The Assessor having entered the subjects at the value at which they had stood in the Valuation-roll for fifteen years, while unlet and in the occupation of the proprietor, the proprietor appealed and main-

VALUATION ACTS—*Continued.*

tained that the house, garden, &c., having been actually let, the rent ought to be taken as the basis of valuation, under deduction of the annual cost of the services provided by him. The Valuation Committee sustained the Assessor's valuation. In an appeal *held* that it was admitted that the services of the gardeners supplied by the proprietor were required for other parts of the estate as well as for the garden and grounds let to the tenant, and as it was impossible to ascertain precisely to what extent they were given to the let and to the unlet parts of the estate, the Valuation Committee were justified in the circumstances in adhering to the former valuation, and the Assessor's valuation *affirmed*. *Colville's Trustees v. Assessor for Fife*, May 25, 1894, p. 799.

Consideration other than rent—Minerals—Sum paid for right to bring down surface.

6. The proprietor of a colliery who had acquired from the proprietor of the surface the right to bring down the surface in consideration of an annual payment on the output, assigned this right to the tenant of the mine, who undertook in future to relieve him of the payment. *Held* that the annual payment thus made by the tenant constituted a consideration other than rent, and fell to be added to the lordships received by the proprietor from the tenant in estimating the annual value to be entered in the Valuation-roll, and there being nothing to shew how much of the payment represented surface damages, for which the tenant would have been liable, no deduction could be made on that account. *Harvie v. Assessor for Upper Ward of Lanarkshire*, May 25, 1894, p. 803.

Subjects of valuation—Steam-engine—Fixtures—Valuation of Lands (Scotland) Act, 1854, sec. 42.

7. Steam-engines which were *held* to be heritable fixtures in the sense of the Act of 1854, falling to be valued as part of the lands and heritages. *Cowan & Sons, Limited, v. Assessor for Midlothian*, May 25, 1894, p. 812.

Remit to obtain further information—Valuation of Lands (Scotland) Amendment Act, 1879, sec. 9.

8. Circumstances in which in a valuation appeal the Court, on the motion of the appellant, in terms of the 9th section of the Valuation Act, 1879, *remitted* the case to the Valuation Committee to take further evidence, although the appellant had declined to avail himself of an opportunity of leading the evidence when the case was before the Commissioners. *Ramsden v. Assessor for Inverness*, May 25, 1894, p. 797.

WARRANTICE. See *Sale*, 1.

WARRANT. See *Reparation*, 26.

WATER-WORKS. See *Road*, 1.

WRIT. *Succession—Testament—Unsubscribed holograph writing underneath subscribed holograph settlement.*

1. A holograph writing, occurring below the subscription to a holograph trust-settlement, and containing bequests of specific articles, *held* to be effectual, as part of the trust-settlement, although not itself subscribed. *Burnie's Trustee v. Lawrie*, July 17, 1894, p. 1015.

Bill of Exchange—Denial of Signature—Suspension—Caution.

2. A person who had been charged upon a bill bearing his name as acceptor presented a note of suspension of the charge on the ground that he had not adhibited or authorised the signature. *Circumstances* in which the Court passed the note without caution. *Kechans v. Barr*, Nov. 14, 1893, p. 75.

See *Election Law*, 1.

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